



Neutral Citation Number: [2017] EWHC 2541 (IPEC)

Case No: IP-2017-000045

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT
ON APPEAL FROM
INTELLECTUAL PROPERTY ENTERPRISE COURT SMALL CLAIMS TRACK
DEPUTY DISTRICT JUDGE VARY

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/10/2017

Before :

HIS HONOUR JUDGE HACON

Between :

PABLO STAR MEDIA LIMITED

Claimant

- and -

RICHARD BOWEN

Defendant

Haydn Price, director and sole shareholder of the Claimant, appeared on behalf of **the Claimant**

The Defendant appeared as a litigant in person

Hearing date: 5 October 2017

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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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. This is an appeal against the Order of Deputy District Judge Vary dated 13 December 2016. The appellant (“Media”) was represented by Haydn Price who is the director and sole shareholder of the company. The respondent (“Mr Bowen”) represented himself.

Background

2. Dylan Thomas was introduced to Caitlin Macnamara by Augustus John in a pub in Fitzrovia, London, in 1936. Mr Thomas is said to have drunkenly proposed to Miss Macnamara there and then. The couple married on 11 July 1937 in Penzance. Shortly after their wedding this photograph of them was taken by Vernon Watkins (“the Photograph”):



3. Ownership of copyright in the Photograph passed from Mr Watkins to his widow, Gwendoline, on his death 1967. By a written agreement dated 21 August 2011 it was assigned by Mrs Watkins to Pablo Star Limited (“Pablo Star”), along with the copyright in a similar photograph. Pablo Star paid £350 for both copyrights.
4. In February 2013 Mr Price, in his capacity as director of Pablo Star, applied to have it struck off the Register of Companies. The company was dissolved on 18 February 2014. On 21 May 2014 there was a purported assignment of the copyright in the Photograph from Pablo Star to Media. The latter assignment has been the subject of controversy to which I will return.
5. The copyright had expired at the end of 1987 but for present purposes is assumed to have been revived on 1 January 1996 pursuant to the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297), enacted pursuant to Council Directive 93/98 of 29 October 1993 (“the Copyright Term Directive”).

6. In August 2016 Media brought an action against Mr Bowen for infringement of the copyright. A cropped version, showing only Dylan Thomas's head, had been used by Mr Bowen on a website used to advertise holiday cottages in Wales. Mr Bowen had copied the photograph from the website VisitWales.com, which is operated by a branch of the Welsh government. There was debate about the degree of Mr Bowen's involvement in the holiday cottages business, which he said is owned by his parents. It makes no difference. Mr Bowen is a geophysicist by profession but he claimed full responsibility for the contents of the holiday website.

The Judgment

7. Media obtained judgment in default in September 2016 – whether in default of filing an acknowledgment of service or a defence is not clear, but it doesn't matter. The trial before the District Judge and his judgment, from which this is the appeal, concerned only damages. He awarded Media £250 in damages plus £3 interest, applying the 'user principle'. He declined to award additional damages pursuant to s.97(2)(b) of the Copyright, Designs and Patents Act 1988. The District Judge also declined to award Media any sum in costs. In fact he took the view that Mr Price's conduct on behalf of Media had been in breach of the overriding objective and so ordered that Media should pay a proportion of Mr Bowen's costs, namely his travelling costs incurred attending the trial, £164.10. Mr Bowen was ordered to pay the balance of £88.90 to Media.
8. The District Judge's finding in relation to the overriding objective arose from Media having brought proceedings in Ireland for the infringement of copyright in the Photograph in that country and from having threatened, in the District Judge's view, to bring proceedings in the United States. He said that this appeared to be deliberately intended to maximise cost and pressure on Mr Bowen to settle. This was therefore

“...one of the rare cases where the court should mark its disapproval of the litigation conduct of a successful party by ordering that he pay a portion of his opponent's costs”

Grounds for appeal

9. I can summarise the grounds advanced by Mr Price in support of Media's appeal as follows:

Damages

- (1) The approach to damages on the 'user principle' was unreasonable and failed to take into account the multiple acts of infringement by Mr Bowen.

Flagrancy

- (2) The conclusion that the infringement was not flagrant was contrary to the authorities on this aspect of the law.

- (3) The award was not dissuasive, as required by art. 3(2) of Directive 2004/48/EC (“the Enforcement Directive”).

Costs

- (4) Bringing proceedings in other jurisdictions was Media's right, particularly under EU law, and should have had no bearing on costs. The overriding objective was therefore wrongly applied to the order on costs.
- (5) The District Judge wrongly took into account an offer of settlement of £250 by Mr Bowen.
- (6) The District Judge asked the parties about Part 36 Offers and without prejudice offers before giving his judgment.

Approach to the appeal

10. The approach that an appellate court should take in assessing whether to overrule the decision of a lower court is nuanced and governed by a number of factors. In *REEF Trade Mark* [2000] EWCA Civ 763; [2003] R.P.C. 5 the Court of Appeal considered how a High Court Judge should approach an appeal from a hearing officer in the Trade Marks Registry. It was a trade mark case and therefore within the expertise of the Hearing Officer. Robert Walker LJ (with whom Buxton and Clarke LJJ agreed) reviewed several authorities including *Re Grayan Building Services Ltd* [1995] Ch. 241 and *Biogen Inc v Medeva plc* [1997] R.P.C.1. He said this:

“[26] How reluctant should an appellate court be to interfere with the trial judge's evaluation of, and conclusion on, the primary facts? As Hoffmann L.J. made clear in *Grayan* there is no single standard which is appropriate to every case. The most important variables include the nature of the evaluation required, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence.

[27] It is worth noting that *Biogen* was a case very close to the top end of the scale. It involved very complex biotechnology which was the subject of a lot of expert evidence given at a lengthy trial before a very experienced judge of the Patents Court. In the circumstances Lord Hoffmann's memorable reference to Renan was not (if I may respectfully say so) out of place. There are far fewer nuances to be picked up from a bundle of statutory declarations which contain a good deal of irrelevant or tendentious material and on which there is no cross-examination.

[28] In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion and the outcome of a notional passing-off claim. It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer's specialised experience. (It is interesting to compare the observations made by Lord Radcliffe in *Edwards v Bairstow* [1956] A.C. 14 at pp.38-39, about the general commissioners, a tribunal with a specialised function but often little specialised training.) On the other hand, the hearing officer did not hear any oral evidence. In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle.

[29] The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed. The duty to give reasons must not be turned into an intolerable burden: see the recent judgment of this court in *English v Emery Reimbold & Strick Ltd* (and two other appeals heard with it) [2002] EWCA Civ 605, April 30, 2002, para.19:

“... the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision.”

11. Shortly after the judgment in *REEF* the Court of Appeal returned to the question of the correct approach to an appeal in *Bud and Budweiser Budbräu Trade Marks* [2002] EWCA Civ 1534; [2003] R.P.C. 25, again an appeal from a judgment of the High Court which was itself an appeal from a decision of a hearing officer in the Trade Marks Registry. The hearing officer, Mr Salthouse, had been required in particular to assess the distinctive character of a trade mark in issue. Sir Martin Nourse referred to *REEF* and then said (at [12]):

“Moreover, I am unable to hold that Mr Salthouse was not entitled to take the view that he did. It is true that another hearing officer might, as indeed did the judge, have taken a different view. But it cannot be said that Mr Salthouse's view was one to which no reasonable hearing officer could have come.”

12. Lord Walker added this:

“[52] Ultimately the issue on the first appeal is whether the deputy judge was right to discern two errors of principle in the hearing officer's approach, so opening the way for the deputy judge to substitute his own view. For the reasons which I have explained, I do not think that the hearing officer did make any significant error of principle which appears from his written decision. I do find his conclusion surprising and if this court had a free choice between the hearing officer's decision and that of the deputy judge I would unhesitatingly choose the latter.

[53] However this court does not have a free choice, as Sir Martin Nourse has explained in his judgment. As Buxton L.J. said in *Norowzian v Arks Ltd (No.2)* [2000] F.S.R. 363 at 370:

“... where it is not suggested that the judge has made an error of principle a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this court, or at least by two of them, will be different from that of the trial judge.”

The same principle applies to an appeal from a hearing officer to a judge of the Chancery Division. Although the hearing officer's decision is one which I find surprising, I do not consider that it can be described as clearly wrong.”

13. I draw from these judgments the following:
- (1) An appellate court must decide whether the court or tribunal below has made a distinct and material error of principle. If so, the decision will be overturned and the relevant point of dispute between the parties reconsidered.
 - (2) The appellate court should not treat a judgment or decision as containing an error of principle simply because it could have been better expressed.
 - (3) The judgment or decision below must have identified and recorded those matters which were critical to its conclusion. By implication a failure to do this can amount to an error of principle.
 - (4) Absent an error of principle, there is no single standard to be applied in assessing whether the appellate court should interfere with the decision below. It is a multi-factorial assessment with the following being of particular relevance: (i) the nature of the evaluation required, (ii) the standing and experience of the fact-finding judge or tribunal and (iii) the extent to which the judge or tribunal had to assess oral evidence.
 - (5) In making this assessment the appellate court should not interfere solely because it finds that a conclusion reached below is surprising or is one which the appellate court would not have reached. Neither such finding necessarily means that the court or tribunal below has made a material error of principle.
 - (6) In the case of an appeal from a decision given by specialised hearing officer following a hearing without oral evidence, the appellate court should show a real reluctance, but not the very highest degree of reluctance, to interfere with the decision (absent an error of principle).

Compensatory damages

14. In relation to the calculation of compensatory damages, Mr Price argued that the District Judge had failed to take into account the different acts of infringement committed by Mr Bowen, each of which should have given rise to compensation. He referred to copying by downloading, storing, cropping the Photograph, uploading and displaying it to the public. I reject this criticism. While it is true to say that there were several acts of infringement, these did not require separate calculations of damage, to be totalled the end. The question at issue was the damage suffered by Media from all the acts of infringement taken together with a substantial overlap in damage on the present facts.
15. The District Judge awarded damages on the ‘user principle’. This is an investigation into what the parties would have agreed by way of payment for the use made of the copyright work in issue in a hypothetical negotiation immediately before infringement. The claimant is assumed to have been a reasonable and willing licensor and the infringer a willing and reasonable licensee. The District Judge had available

to him several alternative comparable rates for the use of photographs of Dylan Thomas. He selected three, which he regarded as the closest, and reduced the fees charged in relation to those by reference to the period during which the Photograph was appeared on the website for holiday cottages.

16. There seems to have been some confusion about that period. The judgment states (at paragraph 10) that it appeared on the website from about 18 September 2014 until 3 January 2015, a period of a little over 15 weeks. Elsewhere, it is said that infringement was for a duration of 17 days (paragraph 27). In the Grounds of Appeal drafted by Mr Price he said that the photograph was on the website from 18 December 2014 and that Mr Bowen copied the photograph before July 2015.
17. I will take Mr Price's date of 18 December 2014 for first use of the Photograph on the website to be correct. It was not in doubt that Mr Bowen removed the Photograph promptly from the website as soon as he received Mr Price's complaint. Mr Price did not dispute 3 January 2015 as the date on which this happened – which makes the relevant period 17 days – and this period was not challenged by Mr Price at the hearing of the appeal.
18. The District Judge seems to have assumed that the parties would have negotiated payment by reference to the time during which the Photograph appeared on the website. I see no reference to anything that would contradict such an assumption. It is supported by the fact that Mr Price was keen to have the Photograph removed from the website when he made his initial complaint. Mr Bowen may or may not have retained a copy of the Photograph away from public display and if so, this does not seem to be Media's primary concern.
19. In my view the District Judge correctly applied the law by reference to comparables and arrived at a figure for damages without any error of principle.

Additional damages

20. The District Judge rejected an award of additional damages because Mr Bowen had not been sure whether copyright subsisted in the Photograph. The District Judge felt that doubt was reasonable bearing in mind that the Photograph was taken in 1937, copyright had expired, but had revived on 1 January 1996. Even then, the District Judge pointed out, it had required evidence from an expert on the law of copyright in Spain to establish that copyright subsisted in the Photograph in that country in 1995, which meant that Media was entitled to claim the revival of copyright in the UK pursuant to the Copyright Term Directive. Flagrant infringement had not been established. Nor had much benefit accrued to Mr Bowen because of the infringement. Only 10 people visited his website while Photograph appeared on it and there was no evidence that these 10 visits had led to an increased profit because of the Photograph. The District Judge accordingly found that no damages should be awarded under s.97(2)(b).
21. I am not sure whether doubt about the subsistence of copyright was an argument actively advanced by Mr Bowen before the District Judge. I had the impression that the reasons given by the District Judge for Mr Bowen's entertaining such doubt implied a sophistication in the understanding of copyright law which Mr Bowen did not at the time possess.

22. At any rate, this was not Mr Bowen's argument before me. He did not dispute that the VisitWales website makes it clear that VisitWales owns the copyright in the images appearing on that site (or claims to) and that it also clearly states that permission must be obtained before any use is made of those images. In other words, Mr Bowen accepted that he knew he could not use the Photograph without obtaining permission and he accepted that he had not done so.
23. Mr Bowen told me that he had frequently used the VisitWales.com website as a source of images for his website – over the years he had used over 100 of them taken. He said that he had always informed VisitWales of his wish to use an image and explained why, and had always been told that he could do so without charge. On this occasion he had downloaded the Photograph, intending to inform VisitWales. But 9 months elapsed before the Photograph was put on to the live website and he forgot to go through the usual procedure.
24. Mr Price said that this was a wholly new story unsupported by any documents, despite the very large number that had been generated in the proceedings. He invited me to disbelieve Mr Bowen. Mr Bowen, he argued, had demonstrated a 'couldn't care less' attitude (see *Nottingham Healthcare NHS Trust v News Group Newspapers Ltd* [2002] R.P.C. 49) and there had been a deliberate and calculated infringement (see *Ravenscroft v Herbert* [1980] R.P.C. 193).
25. I find it hard to be sure whether or not Mr Bowen's new version of events is accurate. However, s.97(2)(b) of the Act requires me to take into account *all* the circumstances, not just flagrancy (if there was any). Mr Bowen only used the Photograph for 17 days, removed it from the website as soon as he received notice from Mr Price and almost certainly gained no benefit from the infringement. Subject to one further point, on those facts I do not believe that an award of additional damages would be appropriate.
26. Mr Price submitted that the low award of damages did not provide for the dissuasive element required by the Enforcement Directive. I think there is no prospect of Mr Bowen infringing the copyright in any of Media's photographs in the future. Nor do I believe that there are out there third parties in need of dissuasion from carrying out minor infringements equivalent to this one by an award of additional damages.
27. I have come to the view, for different reasons to those given by the District Judge, that he was right to decline to award additional damages.

The law on costs

28. Costs in the IPEC small claims track are, as for other small claims tracks, governed principally by CPR 27.14. So far as is relevant, it provides:
 - (1) *This rule applies to any case which has been allocated to the small claims track.*
 - (2) *The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –*

- (a) *the fixed costs attributable to issuing the claim which –*
- (i) *are payable under Part 45; or*
- (ii) *would be payable under Part 45 if that Part applied to the claim;*
- (b) *in proceedings which included a claim for an injunction or an order for specific performance a sum not exceeding the amount specified in Practice Direction 27 for legal advice and assistance relating to that claim;*
- (c) *any court fees paid by that other party;*
- (d) *expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;*
- (e) *a sum not exceeding the amount specified in Practice Direction 27 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing;*
- (f) *a sum not exceeding the amount specified in Practice Direction 27 for an expert's fees;*
- (g) *such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably;*
- ...
- (3) *A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test.*

29. Section 51(1) of the Senior Courts Act applies to costs in the small claims track as much as any other, so the basic rule is that the costs of and incidental to proceedings are in the discretion of the court. The general rules about costs contained in CPR 44 are not disapplied in relation to small claims, although where there is an inconsistency with CPR 27.14 the general provisions of CPR 44 must yield to the specific provisions of CPR 27.14 in compliance with the usual rules of construction, see *Solomon v Cromwell Group plc* [2012] 1 W.L.R. 1048.
30. As can be seen from CPR 27.14, the starting point is different from that which generally applies in the High Court: rather than beginning with the initial presumption that the loser pays the winner's costs, the basic rule is that neither party will pay the other's costs, save as provided by the stated exceptions.

Costs and the overriding objective

31. I turn now to the argument that by far occupied the greater part of Mr Price's complaint and accordingly Mr Bowen's response. Both gentlemen filed a very large number of authorities, English cases and judgments of the Court of Justice of the European Union, particularly in relation to Regulation (EU) 1245/2012 as amended by Regulation (EU) 542/2014 (the recast Brussels I Regulation) and its predecessors, Regulation 44/2001 and the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The main argument advanced by Mr Price and disputed by Mr Bowen was this: the District Judge's award in costs was inconsistent with Media's absolute right to bring proceedings wherever it pleased and, particularly by reference to the Irish proceedings, was in breach European Union law.
32. I do not believe that it is necessary for me to consider any of the authorities cited. I do not doubt that Media was entitled to sue in Ireland, the United States and anywhere else. I can say nothing about the merits of any such overseas litigation. The point is whether by choosing to conduct itself in the way it did Media imposed unfair financial pressure on Mr Bowen; further, whether in bringing such pressure (if it did) Media was in breach of the overriding objective thus entitling the District Judge to visit a sanction in costs on Media. Given the time spent by both sides on this topic, I will deal with it in a little detail.
33. The District Judge criticised Media's parallel litigation in Ireland and threatened proceedings in the United States in this way:

“[53] I also note that Mr Price has elected through his companies to sue Mr Bowen in Ireland as well as the UK, and has threatened litigation in the United States also. Both parties are UK domiciled. Mr Bowen's website is clearly targeted at the UK. This court would have jurisdiction to deal with the entire claim.

[54] Whilst I mean no disrespect to the general courts of Ireland or the United States, it would have been more efficient if the entire claim had been resolved in this court. Neither party needs expensive legal representation because they can be heard in person. Specialist intellectual property judges sit in a specialised court, capable of dealing with questions of intellectual property law without the assistance of learned counsel. Proceedings are quick and cheap.

[55] Mr Price's tactics of suing in several courts appear to be deliberately intended to maximise cost and pressure on Mr Bowen to settle.”

34. The District Judge then quoted the overriding objective contained in the Civil Procedure Rules. He said:

“[58] I am concerned that Mr Price's approach to this claim has little regard to the overriding objective, in particular [CPR Part 1, rule 1.1] (2)(b), (c), (d) and (e). I am sufficiently concerned that this seems to me to be one of the rare cases where the court should mark its disapproval of the litigation conduct of a successful party by ordering that he pay a portion of his opponent's costs.

[59] In the circumstances I order that Pablo Star Media Limited reimburse Mr Bowen his costs of attending this hearing today, which amounts to

£164.10, and which may be deducted from the damages and interest awarded above.”

35. Mr Price denied that Media had threatened to sue Mr Bowen in the United States and argued that anyway to do so would also be an exercise of Media’s entitlement in law and there should have been no penalty in costs in England even if Media had made the threat alleged.
36. During the hearing of the appeal Mr Bowen found on his laptop an email to him from Mr Price dated 9 January 2015, part of a chain. Mr Price did not dispute that he had sent the email. It included this:

“6. You talk about the US Library of Congress Copyright Register as being irrelevant. However in the U.S. your infringement would be deemed ‘wilful’ and statutory damages of up to \$150,000 can be awarded plus costs. We have not gone there at present but could. I will save you the legal explanation for now but it is real.”
37. I take the view that any reasonable reader of this email would understand that Media, in the person of Mr Price, was at the least serious in reserving the right to bring proceedings in the United States and claiming up to \$150,000 in damages for Mr Bowen’s alleged infringement of copyright there.
38. Turning to the Irish litigation, at the hearing of the appeal Mr Price told me that he had instigated Media’s action in Ireland against Mr Bowen because that is where he lives and because court fees are lower in Ireland. He said that in about December 2016 or January 2017 the proceedings were stayed by the Irish judge pending resolution of the question of whether Media owns the copyright in the Photograph, to be decided in England. I asked for copies of the relevant orders and/or judgments in Ireland. Mr Price said that none existed. He told me that he had become frustrated by the delays and lack of progress in Ireland, so he started fresh proceedings against Mr Bowen here in the IPEC Small Claims Track. He disclaimed any intention thereby to bring financial pressure on Mr Bowen.
39. There are no proceedings in this jurisdiction in which, specifically, the question of ownership of the copyright of the Photograph will be determined. On the other hand there has been litigation in the English courts about whether Mr Price is entitled to restore Pablo Star, the assignee of the copyright from Gwendoline Watkins and dissolved in February 2014, to the Register of Companies solely for the purpose of pursuing an action for infringement of the copyright. Since the hearing of the appeal I have read the judgment of Behrens J in this matter, *In re Pablo Star Ltd, Price v Registrar of Companies* [2016] EWHC 2640 (Ch); [2017] 1 W.L.R. 299. Behrens J allowed an appeal from Registrar Barber and permitted the restoration of Pablo Star to the Register. According to the Civil Appeals case tracker, an appeal from that judgment is due to be heard on 17 October 2017.
40. It may well be that the Irish litigation is stayed pending the final outcome of those proceedings. Bearing in mind the information that I have now obtained from reading the judgment of Behrens J, it may also be the case that Media did not have a cause of action against Mr Bowen for infringement of copyright in the first place. Be that as it may, I do not take it into account. This is because the present appeal progresses from

a judgment properly granted in default and anyway Mr Price has not had the opportunity to say anything about it.

41. So far as the Irish proceedings are concerned, I will assume in Mr Price's favour that his bringing those proceedings against Mr Bowen first, followed by the present litigation in England, did not of itself constitute an oppressive campaign. I do not think that the same can be said of Mr Price's indication that if Mr Bowen did not meet his demands Media may sue in the United States and seek payment of \$150,000.
42. There is a further matter I should mention. Mr Price told me, almost in passing, that he had started about 10 actions in Ireland and proceedings elsewhere relating to the copyright in the Photograph. He said that these had resulted in different and inconsistent results, although I was provided with no documents from the Irish courts to back this up. Mr Bowen seems to have been the defendant in only one set of Irish proceedings. I indicated earlier that Mr Bowen had obtained his copy of the Photograph from VisitWales.com. This is the trading name of an administrative division of the Welsh government that promotes tourism in Wales. It is not a legal entity. The legal persons constituting the division are apparently the Welsh Ministers. The Welsh Ministers have been sued several times in relation to the Photograph by Media in New York, the Netherlands and for the most part Ireland, sometimes along with local newspapers.
43. Mr Price appears to be an enthusiastic litigator. I take the view that Mr Price not only indicated that Media could bring litigation in the United States absent a deal on terms satisfactory to Mr Price – he may well have made good on his indication but for the judgment from the District Judge and the present appeal. I think he did intend to put pressure on Mr Bowen and a reasonable person in Mr Bowen's shoes would have known it.
44. The District Judge believed that this, taken together with the Irish proceedings, constituted a breach of the overriding objective, specifically CPR 1.1(2)(b),(c),(d) and (e). I think it would be more accurate to characterise the District Judge's point as being that if the court did not sanction Media in costs, the court would be in breach of the overriding objective:

“The overriding objective

1.1

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) *saving expense; and*

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

45. I have assumed in Mr Price's favour that bringing the Irish proceedings did not constitute oppressive behaviour. Does that make the difference?
46. I think on balance that there was no clear error of principle. First, the discretion of the court on costs is wide save in so far as it is not specifically limited by the rules. Secondly, CPR 44.4(3)(a)(i) requires the court to have regard to the conduct of the parties before as well as during the proceedings. This implies that the court can, and sometimes should, take into account conduct which has a bearing on the proceedings even though it takes place outside the four corners of the action before the court. That could include the threat of overseas litigation to attempt to pressurise a party with limited financial resources into an unfair settlement. It does include the suggested litigation against Mr Bowen in the United States.
47. I am not entirely sure that I would have made the same order as the District Judge, but I do not believe that I should interfere with the decision that Media should pay Mr Bowen's travelling costs of £164.10.

The relevance of Mr Bowen's offer

48. Mr Price criticised the District Judge for being influenced by Mr Bowen's offer to pay £250 for the use of the Photograph within days of the complaint raised on behalf of Media. Mr Price argued that this offer was for use throughout the world and £250 was very modest when compared to the sum that the parties would have agreed for worldwide use.
49. I agree that the hypothetical negotiations in issue would have been in relation to worldwide use of the Photograph. On the other hand, the use was on a website offering holiday cottages for rent only in Wales. I have already declined to speculate as to whether the fact that the website is accessible outside the UK would lead courts abroad to find that there could be actionable infringement of the local copyright in the Photograph. But I think that in the hypothetical negotiations between Media and Mr Bowen immediately before Mr Bowen's use of the Photograph the parties would have been little concerned with potential access to the holiday homes website outside the United Kingdom. These hypothetical negotiations are assumed to have been conducted *reasonably* on both sides and I can see nothing wrong in the District Judge (by implication) taking the broad brush view that access to the website abroad would have been treated as adding nothing much of value to Mr Bowen's use of the Photograph for 17 days.
50. Thus, when the District Judge considered Mr Bowen's offer of £250 within days of being contacted by Mr Price, I think he was entitled to disregard the fact that this offer was made in relation to a licence only under the UK copyright.
51. Mr Price also argued that it was unfair to ask about offers made and be informed about Mr Bowen's offer before the District Judge had delivered his judgment. I can see that it was not ideal. But by doing so the District Judge avoided another round of

argument about costs after the judgment – if my experience is anything to go by, it would not have been brief – and the further expense involved. Bearing in mind the very minor nature of the infringement in issue in these proceedings, I do not think that the District Judge can be criticised for acting in the way he did.

Conclusion

52. The District Judge made no error of principle and I find no reason to interfere with his conclusions. The appeal is dismissed.

Costs of the appeal

53. I make no order for costs in the appeal.