

# **England and Wales Court of Appeal (Civil Division) Decisions**

**Neutral Citation Number: [2008] EWCA Civ 1260**

Case No: A3/2007/0631

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
MR JUSTICE LINDSAY  
HC003960**

Royal Courts of Justice  
Strand, London, WC2A 2LL

26 November 2008

**B e f o r e :**

**LADY JUSTICE ARDEN  
LORD JUSTICE LLOYD  
and  
LORD JUSTICE MOORE-BICK**

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**Between:**

**(1) PEER INTERNATIONAL  
CORPORATION  
(2) SOUTHERN MUSIC PUBLISHING  
COMPANY INC  
(3) PEERMUSIC (UK) LTD**

**Respondents  
Claimants**

**- and -**

**EDITORIA MUSICAL DE CUBA**

**Appellant  
Part 20  
Defendant**

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**James Mellor Q.C. and Martin Farber (instructed by Teacher Stern Selby)  
for the Appellant  
Pushpinder Saini Q.C. (instructed by Sheridans) for the Respondents  
Hearing dates: 8 and 9 October 2008**

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**HTML VERSION OF JUDGMENT**

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**Lord Justice Lloyd:**

1. Between May 2005 and October 2006 Lindsay J heard the trial of the second phase of a complex and strongly fought action concerning entitlement to the UK copyright in 14 songs written by Cuban composers. For three of the almost thirty days of the trial he sat as a special examiner in Cuba. On 16 November 2006 he handed down judgment, [2006] EWHC 2883 (Ch) (which I will call his main judgment), by which he declined to grant any relief to the Claimants, Peer International Corporation and two subsidiary companies. On 1 December 2006 he heard argument as to costs and on 4 December he gave his judgment on that aspect, concluding by making no order as to the costs of that part of the trial. The effective Defendant, Editora Musical de Cuba (EMC), contends that the judge erred in law in denying it, as the successful party, the recovery of any of its costs from the unsuccessful Claimants (which I will call Peer, it being unnecessary for present purposes to distinguish between the various Respondents). Permission to appeal was granted to EMC at an oral hearing by Lord Justice Sedley and myself. (EMC did not pursue its application for permission to appeal in relation to a later order for costs made by the judge, which related to a much smaller amount of costs.) Later Peer was given permission to serve a contingent Respondent's Notice. By that, Peer contends that, if (contrary to its primary case) the judge did err as a matter of law in making his order, so that the discretion as to costs falls to be exercised afresh, the correct order should be more favourable to Peer than that made by the judge.
2. It is not in dispute between the parties that if the costs order is to be set aside, it can only be on the basis that the judge erred in law in making it. It must be shown that the exercise which the judge undertook was flawed, either because on the face of the reasoning it can be seen that the judge misdirected himself, or because the result manifestly produces an injustice and falls outside the generous ambit within which reasonable disagreement is possible. EMC relies on both of these propositions to challenge the order, and also on an alleged inadequacy in the judge's expression of his reasoning.
3. A major factor leading to the judge's order as to costs was that EMC had raised a number of issues on which he said that they had failed, and some of which they did not have the necessary standing to raise. For that reason, I need to describe first the nature of the proceedings, itself somewhat unusual, and then the issues taken in the course of the hearing.
4. The proceedings took the form of a dispute as to title to the UK copyright in relation to 14 songs written by Cuban composers between 1930 and 1945, identified in a schedule to the judge's main judgment. By the end of the trial, Peer had abandoned its claim in respect of one of the songs, number 1 in the schedule, so that only 13 songs were then at issue. Payments had been made to the Mechanical Copyright Protection Society Ltd in respect of the rights to the 13 songs, which then found that competing claims to title were advanced, on the one hand by Peer, and on the other by one or other of two companies which derived title, if at all, from EMC: I can refer to those companies together as Termidor.
5. Peer started proceedings against Termidor in August 2000, seeking a declaration that it was the owner of the UK copyright in each song. Termidor defended the proceedings, but EMC was joined, on its application, as a Part 20 Defendant. Several issues were identified for decision as

preliminary issues. These were decided, favourably to Peer, at first instance and in the Court of Appeal, [2003] EWCA Civ 1156, [2004] Ch 212, leave to appeal to the House of Lords being refused.

6. In the light of those rulings, EMC served a Statement of Case on 7 March 2004 which, together with a number of further statements of case dealing with particular points, represented its pleaded case thereafter. Peer responded with a Reply to the Statement of Case in May 2004. Termidor, which had not appealed against the ruling on the preliminary issues, took no further part in the proceedings.
7. Because the songs had been written between 1930 and 1945, they were governed, as regards UK copyright law, by the provisions of the Copyright Act 1911. The particular feature of this Act which is relevant for present purposes is that, although the copyright lasted for the life of the author of the copyright work and for a further 50 years after his death, the author was only able to dispose freely of the copyright for the duration of his life and for 25 years from his death. (I will refer to this part of the term of the copyright as the original copyright, and to the remaining 25 years as the reversion.) So far as concerned the reversion, he could dispose of it by will (so as to be able to decide who should inherit from him) but he was not capable of disposing of it in any other way. The reversion devolved automatically on the author's legal personal representatives as part of his estate. Once the Copyright Act 1956 had come into force, the author could dispose outright of his copyright for pre-1956 Act works as well as for those created after that Act came into effect.
8. Peer's claims are put on the basis of agreements with composers dated between 1930 and 1945, except in the case of one song (number 5), where it also has a subsequent agreement dated 1958, after the 1956 Act came into force. At the time of Lindsay J's judgment, the composers of all except 3 of the songs had been dead for more than 25 years, so that the reversions were already running. In the case of two songs (numbers 2 and 3) the composer had died in 1982, so that the original copyright lasted until 2007, and as regards the third (number 4), it was written jointly by the composer who died in 1982 and by another who died in 1991, leaving the reversion to his rights outstanding until 2016. Of the contracts relating to the 13 songs, seven were governed by Cuban law and one (which related to six songs) by New York law.
9. Peer therefore had a claim to the whole copyright in one song, on the basis of the 1958 agreement, and to the remaining period of the original copyright, under its original agreements, in relation to three more songs. So far as the reversions were concerned, it set up a claim based on what the judge referred to as Further Dealings, entered into between 1998 and 2002, with persons identified as the heirs of the composers (or some of them). These dealings comprised a document called a Composer Confirmation of Rights (CCR) and another called an Addendum. The effect of these, in principle, was considered as one of the preliminary issues. It was held that the CCR was not effective by itself to assign the reversion, but that it did so when taken with the Addendum.
10. In the case of some of the songs, EMC sought to defeat Peer's claim by reference to a dealing between the composer and another Cuban entity known as EGREM, between 1960 and 1964. In most cases it also set up a dealing between one or more heirs and itself, in 2000.
11. EMC succeeded at trial in large part because the judge held that an assignment of the reversion under the 1911 Act had to be made by the composer's English personal representatives, not by his heirs, and accordingly Peer did not have title to any reversion, except in the case of song number 5, where it had an assignment from the composer made after 1957. EMC took this point by amendment at the outset of the hearing before Lindsay J. Peer responded, seeking not only to persuade the judge that this was not the correct conclusion, but also to avoid it if it were correct, including by applying for a grant of representation to each composer's estate in favour of themselves or of an appropriate professional person. The judge rejected that.
12. As regards song number 2, a separate point taken by EMC was that the original agreement was not with any of the Claimants. The judge accepted this, so that Peer could not show a title to the original copyright (which still had a short time to run at the time of the trial) any more than it could to the reversion.
13. That left songs 3 and 4 where Peer had a title to the original copyright, then not yet expired, and song 5 for which it had a title to the original copyright and the reversion. The judge had to consider whether he should grant declaratory relief limited to those three songs. He dealt with this

question first at paragraphs 91 and 92 of his judgment and then at paragraphs 172 to 176. Since the latter paragraphs set out the reasons why the judge refused to grant any relief to Peer in respect of the songs to which it had any claim to a title, it is convenient to quote them here (I will quote paragraph 92 later in this judgment):

"172. It would be possible, despite the difficulties in Peer's path which I have described, to construct possible declarations in favour of Peer in some particular cases. Song (2) runs into the difficulty – the Para 4 defence – to which I have referred in para 96 above but as for songs (3) and (4), Peer has, until a date in 2007, no need to rely upon any Further Dealing, nor has it any need at all in respect of song (5). Even so, there are reasons not to do so, which apply also to song (2). Firstly, despite ample opportunity to amend the relief which it claims, an opportunity which it did exercise, Peer has never amended to claim for a declaration tailored as to all or any of those four songs. In turn, secondly, that means that EMC has not been called upon to answer a claim for any such particularised declarations to the extent it would have been had such relief been included in some prayer on Peer's part. Thirdly, the terms appropriate to any particularised declaration have accordingly not been the subject of argument. Peer says that tailoring the declaration is best left until the judgment has been delivered but, as it seems to me, that is back-to-front; by the Court tailoring should be informed by the argument that has led to the judgment.

173. To reduce the propensity to mislead, a tailored declaration, as it seems to me, would need to make it clear that it related (in some cases) only to 2007 or 2016, that it bound only as between EMC and Peer, that it was granted in proceedings in which the only opposing party was held in material ways to be bereft of locus standi and that there may be parties who would have locus who might wish to oppose Peer's claims to ownership and whose potential opposition to Peer, though not adjudged in these proceedings to be bound to be successful, has neither in fact been here ruled upon as hopeless. It would also need to be made clear that Peer's claims as to a wider declaration had failed. Without some such addition, assertions to others by Peer that, in long and heavily contested proceedings against EMC on extensive evidence in the neutral jurisdiction of England, it had been granted an unqualified declaration that it was owner of the English copyright in, for example, song (5) *El Diablo Tun Tun*, whilst (if I had granted such relief) being entirely true, would hardly paint an accurate picture of the outcome even as to that song. It would be likely to suggest to many a certified invulnerability of Peer's title which these proceedings would not have been able to confirm – see also the observations of Stanley Burnton J. in *Lloyd v Svenby*, unreported [2006] EWHC 315 QB at paras 80 to 85. Whether Peer would want, as a fallback, a declaration as qualified as I have mentioned I do not know but I do know that it has never framed what it would want short of its subsisting pleading and that EMC has thus not countered a claim which has never been put into due form.

174. Fourthly, if Peer is right in asserting that the MCPS commonly acts upon what is an apparent better title at the time than that of a present known competitor and does so without some more definitive court ruling, then for the limited period until the date 2007 or 2016 as to songs (3) and (4) and for the longer period appropriate to song (5) or, indeed, more generally, it may be that if Peer's true purpose is no other than the ostensible one of its being able to receive past accrued and future royalties from the MCPS as to these particular songs then not only the highly qualified declaration that I have described but no declaration at all may be necessary. The MCPS might find this judgment

sufficient for such their immediate purposes (although I am far from saying that they have to).

175. Fifthly, had Peer made it clear in its prayer that it would be content as a fallback and alternative, with such qualified declarations in respect of only the three songs I have described, EMC might (I only say might) have not resisted that as an alternative head of claim and, had Peer persisted but had only that relief been granted, EMC would have had a clear route to a judgment in costs in its favour. By never so framing its claim Peer denied EMC that possibility.

176. Whilst it is sometimes appropriate for a court to carve out of an excessive prayer some lesser relief as may be appropriate (and, of course, that is frequently the case in monetary claims) a difference is that there the party will have claimed the relief which it is awarded (e.g. damages consequent upon the events complained of) and it is merely the quantification thereof that differs. But in the case at hand there has never been a claim for qualified and alternative declarations of the kind of which I am speaking. Because of its incompleteness and propensity to mislead and the fact that it would be strenuously opposed I do not see it as the Court's task here to carve out some possible lesser relief that could be granted out of the unacceptably wide relief claimed. For these reasons I do not make any declaration even in respect of songs (3), (4) and (5). Peer has argued, as it has spent such time and, in particular, money in an attempt to obtain particular relief, that the Court should strive, if at all possible, to grant it. There is, though, fortunately, no principle that the more that a party spends in its attempt to obtain relief, the stronger is its entitlement to be granted it."

14. A passage of particular significance for present purposes is the judge's reference in paragraph 173 to the fact that "there may be parties who would have locus who might wish to oppose Peer's claims to ownership and whose potential opposition to Peer, though not adjudged in these proceedings to be bound to be successful, has neither in fact been here ruled upon as hopeless". For EMC Mr Mellor Q.C. contended that this shows that the judge took into account, as part of his reasoning for refusing any relief to Peer, some at least of the grounds of defence relied on by EMC, despite his having held that it did not have locus standi to raise them itself.
15. I must describe briefly what these points of opposition were, and their fate in the judge's judgment, as well as the main other points that arose, apart from those which I have already mentioned. There were separate issues as regards the making of the original agreements, the position during the subsistence (if valid) of the original agreements, and the Further Dealings. As a general point, EMC relied in a number of respects on dolus under the law of Cuba which, it was agreed, was at that time the same as in the Spanish Civil Code. Dolus is defined by article 1269 of that Code as follows:

"Dolus exists when, with insidious words or machinations, one of the contracting parties induces the other to formalise a contract which he would not have formalised without them."

One of the possible consequences of dolus is that the relevant contract may be avoided.

16. Taking EMC's substantive grounds of challenge from its statement of case, it contended in paragraph 7 that five of the contracts were void from the start under Cuban law because it did not allow an assignment of the copyright in future works.
17. In the alternative, it contended that all of the contracts were voidable under their applicable law for misrepresentation, undue influence and unconscionability: see paragraph 9 and the supporting details in paragraphs 10 to 15. It also relied on subsequent breach but that is in a different category.

- i) The misrepresentation case alleged that Mr Ralph Peer (the founder of Peer) and another man made oral representations to the composers in order to induce them to enter into the original contracts which were false, and were made fraudulently or recklessly, and that the composers relied on them in entering into the agreements. The misrepresentations were said to have been that the contracts would give Peer publishing rights in the compositions for 2 or 3 years, and that the composers would receive money from Peer in the future.
  - ii) The essence of the undue influence claim was that the composers were extremely poor, being forced to take other employment to survive, and that there was no other publishing company than Peer in Cuba in the 1930's and 1940's. Peer was said to have been aware of this and to have taken advantage of the circumstances to exert undue influence on the composers.
  - iii) As regards unconscionability, the composers were said to be extremely naïve as to commercial and legal matters, of which Peer was fully aware, whereas Peer was powerful and well informed in matters of commerce and law. Peer took advantage of the disparity of bargaining power, not advising the composers to seek their own independent legal advice, as well as misrepresenting the nature and effect of the contracts (as above), and in the absence of any negotiation of the terms of the contracts and of any person or organisation to represent the composers' interest, so as to coerce the composers into signing contracts which were manifestly disadvantageous to them.
18. In the alternative, EMC contended that the original contracts were unenforceable under their applicable law or under English law both for the reasons already mentioned and because they were in unreasonable restraint of trade. On the latter point EMC relied on a number of features including (a) the unduly restrictive extent of the rights assigned and the duration of the assignment; (b) the grossly unreasonable inadequacy of the remuneration; (c) the unduly onerous obligation on the composers to indemnify the publisher; (d) the absence of any obligation on the publisher to publish or exploit the compositions or to use any efforts to promote them; (e) the absence of any right for the composer to terminate them if the publisher refused to publish the works; (f) the absence of negotiation between the parties and the weak position of the composers.
  19. Moving on from the circumstances of the original contracts to what happened (or did not) under them, if they were valid, EMC alleged in paragraph 17 that, in breach of the express term that Peer would make future payments to the composers, Peer "made no payments to any of the composers after the original contracts were signed", and that they also breached the contracts by not supplying a quarterly list of royalties due. It was then alleged that, by reason of all those various matters, and of the absence of any contact by Peer with the composers for nearly 20 years, and the fact that Peer left Cuba in 1963, the composers were entitled to and did treat the contracts as repudiated. In particular they did so by entering into new contracts with EGREM between 1960 and 1964. EGREM was described as the forerunner to EMC, and it was alleged that, thereby, EMC acquired the entire copyright in all the relevant songs. In relation to the question of termination for breach, the issue of restitution also arose, since the effect of the original contract would have been to assign property, namely the original copyright, to Peer.
  20. Moving on to the Further Dealings, and leaving aside issues of title, EMC alleged in paragraph 46 that the CCRs were all voidable for misrepresentation, duress, undue influence and unconscionability. The points relied on were, in summary, as follows:
    - i) Misrepresentations, made fraudulently or recklessly, by one Isabella Cordova, a lawyer acting on behalf of Peer, to the signatories of the confirmations, to the effect that the original contracts were binding on the heirs, that the signatories were entitled to sign the confirmation as being the genuine and sole heirs, that the signatories had to sign the confirmations in order to receive payment of royalties collected under the original contracts, and that she was acting on behalf of EMC;

ii) Duress, by coercion of the signatories on the part of Peer by threats to withhold payment of royalties rightly due to them;

iii) Undue influence, by Peer by virtue of its powerful position in comparison with the poverty of the heirs, the transaction being manifestly disadvantageous to the heirs, and procured by (among other things) the misrepresentations already mentioned;

iv) Unconscionability, relying on the facts already mentioned in relation to undue influence and accordingly also the misrepresentations by Señora Cordova. Because of the way the argument developed in this court, I will set out the relevant paragraph from EMC's statement of case in full, making one agreed correction:

"53. The Part 20 Defendant repeats the facts and matters pleaded above in paragraph 52. In addition, the heirs were extremely naïve as to commercial and legal matters and did not understand the legal principles involved. The Claimants were fully aware of this fact. In order to exploit their vulnerability the Claimants did not advise the heirs to seek legal advice and the Claimants were fully aware that the heirs did not have access to legal advice. There was no negotiation of the terms of each document and no third party to represent the interests of the heirs. The documents were not explained and in addition, Isabella Cordova grossly misrepresented the basis and effect of the confirmations. The heirs signed them without understanding the significance of what they were agreeing to. With regard to confirmation 6 the original document was written in English which is a language none of the signatories speak. The confirmations do not mention "reversionary interests" and are phrased in language which does not make it clear that the heirs were the rightful owners of the copyright. In the premises, the behaviour of Isabella Cordova, acting on behalf of the Claimants, was unconscionable."

21. In addition to the points taken by EMC, a number of other points arose. One, given the time that had elapsed since all relevant events other than the Further Dealings, was limitation. The position under English law was clear enough, but Cuban limitation law needed to be investigated, with expert evidence.
22. Another issue on which Cuban law was relevant was whether EMC had the necessary standing to raise issues of dolus or otherwise so as to challenge Peer's claim, whether based on the original contract, or on breach of those contracts, or on the Further Dealings.
23. Similarly, the judge had to consider the position under the original agreements until the question of dolus was raised and also (a) whether and if so how they could be terminated for breach and (b) if so what was the position in the meantime. In relation to breach the judge had to consider an issue as to the intention required on the part of the party alleged to be in breach if the breach was to justify termination, Peer contending that there had to be a clear and unjustified intention to breach ("voluntade rebelde"), whereas EMC argued that it was sufficient that the conduct was objectively a breach, whether or not so intended.
24. In addition, Peer sought to rebut EMC's arguments based on the EGREM interventions by using a Cuban law point, based on a law known as Law 860, to argue that the EGREM interventions could not have had effect for more than 10 years.
25. The judge's conclusions in his main judgment may be summarised as follows:

i) He held in EMC's favour that assignments by heirs were not sufficient to give Peer title to the reversions, and he rejected all Peer's attempts to get round that problem, for example by making a grant of representation to the relevant estates under English law.

ii) He held that Peer had a title to the original copyright, not yet expired, for songs 3 and 4, but not for song 2, and a title to the whole copyright for song 5, but he refused to grant any declaration as to that, for reasons set out at paragraphs 172 to 176, quoted above.

iii) He held that EMC's plea that the original contracts were void as assignments of future works was unjustified. EMC contends that, though live on the pleadings, this was not argued at trial, and it therefore took up no time at the trial.

iv) He held that EMC did not have the necessary standing to challenge either the original agreements or the Further Dealings on the grounds of dolus, or to argue that the original agreements had been terminated for breach.

v) He held that under Cuban limitation law, a challenge to an original contract on the grounds of dolus would not yet be barred by limitation, and a defence on those grounds would never be so barred. Conversely, to the extent that any other law might be relevant, it was clear that limitation would be an effective bar to a challenge.

vi) He held that, until dolus is raised in relation to an original contract, the contract remains fully valid and effective under Cuban law.

vii) As regards breach of contract and its consequences, he held that, under Cuban law, termination was possible for breach even if the relevant conduct was not deliberately intended as a breach, so long as, objectively, what was done amounted to a breach. He also held that notice of termination for breach has to be given or, if it cannot be given, then proceedings for termination must be brought. If the party to whom notice of termination is given does not accept that the notice is effective, the contract is not terminated, or cannot be treated as having been terminated, unless and until the court has decided that it is to be so treated. He also pointed out that, to the extent that Peer had any copyrights vested in them as a result of the original contracts, they could only be deprived of them (if at all) by a claim for restitution, but no such claim had been brought.

26. Despite holding that EMC did not have the necessary standing to raise a defence of dolus, or of breach, the judge also addressed the question whether, on the evidence, a party with the right standing might have a prospect of succeeding on one or other of the points taken under these heads. In this respect his decisions were as follows:

i) The original agreements were not vulnerable under English law as regards restraint of trade, because any such claim would also be affected by English limitation rules, and would be time-barred.

ii) The concept of dolus was sufficiently flexible to include factors which in English law would give rise to a restraint of trade plea, and in relation to nine of the songs (including songs 4 and 5 but not song 3) there might well be substance in the complaint that Peer could stultify the composer's work by putting the work in a drawer and taking no steps to publish or promote it, or could otherwise frustrate the composer's rights in respect of his work. That was one part of the basis of what the judge said at paragraph 173 as to possible adverse claims.



iii) As regards other grounds of attack based on the circumstances of the agreements, the judge held that the original agreements were not vulnerable on grounds of dolus, fraud, misrepresentation, undue influence or unconscionability, for lack of the necessary evidence.

iv) When it came to breach, the judge rejected EMC's case that Peer had made no payments to the composers, or none after the signature of the original contracts. He recognised that the US embargo had presented difficulties for Peer as regards paying royalties to Cuban composers, but he said they could at least have sent royalty statements whereas in fact, in the words of their witness Mr Jaegerman, there was "38 years of nothing" from 1960 to 1998. Again, a claim based on alleged breach and termination would, he said, be time-barred if English limitation rules applied, but not under Cuban rules. He could not regard a claim of termination for breach under Cuban law as hopeless if brought by the right party.

v) As regards issues relating to the Further Dealings, the judge heard evidence from a number of witnesses, including those whom he heard as special examiner sitting in Cuba. From the point of view of EMC the highpoint of the evidence, as the judge saw it, was that of a witness who was the nephew of a composer who had made contracts with Peer, but whose works were not the direct subject of this litigation. The judge said at paragraph 133:

"Senora Cordova had told Senor Nicholas that there were past royalties collected by Peer but that, to get them, he had first to sign a document. She gave him a cheque for US\$1,500 as past royalties. He signed what he seems to have understood to be a receipt for a cheque. No notary was present. He said, though, that he had read the whole batch of documents presented to him for his signature. They went well beyond a mere receipt for a cheque. His evidence was far from clear, but left me with the impression that Senora Cordova, whilst not deceiving the witness by telling him that all he was signing was a receipt, may (and I put it no higher than that) have improperly required a signed CCR from him as a pre-requisite of the payment even of past royalties. For her to require confirmation of heirship for the purpose would not have been wrong, but to require a CCR *even as to past royalties* would, as I have already touched upon, in my view have been improper on her behalf."

vi) Having considered the evidence of these witnesses, and of others including Señora Cordova herself, he was unable to find that she had "deceived any relevant signatory to a Further Dealing as to the meaning or effect of any CCR, affidavit of heirship or addendum or to hold that any Further Dealing had been falsely procured by some false inducement for which she or Peer was responsible" (paragraph 154). He continued:

"It follows, I believe, had any party having locus to do so complained of any Further Dealing on grounds as to deception on Peer's behalf similar to those raised by EMC, but had failed to produce evidence other than as EMC had, that it would have failed to deny to the Further Dealings the effect to which their true construction points. Given that EMC's experienced solicitors had assiduously visited Cuba to collect evidence, I am, I think, entitled to expect that no party having locus would now be likely to be able to produce evidence more conducive to that party's success on such grounds than had EMC to its."

vii) The judge expressed his conclusion on the issues other than restraint of trade, as an aspect of dolus, at paragraph 160, as follows:

"Having now reviewed the evidence, I conclude that even had EMC had locus in these proceedings to complain, as it does, in the absence as parties of the composers or their personal representative or heirs, that the respective original agreements were void or voidable on grounds other than their true construction, EMC would have failed and would have failed, moreover, even if limitation under Cuban or Spanish law had been no bar to its success. On the ground derived from the true construction of the original agreements – restraint of trade in England under English law – EMC, even had it had locus, would have failed, if only because the English rules as to limitation."

- viii) Thus, the Cuban equivalent of restraint of trade, as an aspect of dolus, was the one point on which he held that there might, on the evidence before him, be a valid and effective challenge to the original agreements, together with a possible claim based on termination for breach, if brought by the composer or someone properly representing his estate, under Cuban law.
27. Mr Mellor submitted that the judge had failed to deal with an important aspect of EMC's case as regards the Further Dealings, and that accordingly this was a point on which EMC could not be said to have lost. I will return to that point, and describe the issue which it is said the judge failed to decide, later.
  28. The judge also held that the EGREM interventions (and to some extent the EMC interventions) represented real impediments to any unqualified declaration in favour of Peer. On that point he rejected Peer's argument that Law 860 operated so as to limit the effect of the EGREM interventions to a maximum of ten years.
  29. The trial occupied all or parts of almost 30 days. It started in May 2005, with 8 days of hearing. It had been hoped that the evidence of witnesses in Cuba could be taken by video-link, but the arrangements failed, and the case was then adjourned on the basis that the judge would sit in Cuba as a special examiner to hear witnesses who could not be expected to come to England. He did so for 3 days in September 2005. The trial was to have continued in October 2005, but at that stage EMC had obtained an expert report on issues of Cuban law, and there was a further adjournment until March 2006. At that stage the judge sat for 10 days, including four of submissions. There was then an adjournment in order that Señora Cordova could be recalled for further cross-examination. Her resumed evidence was taken by video-link in May 2006. Four more days of submissions then followed. The last day of the hearing took place in October 2006, devoted to the point taken late by Peer based on Law 860 (see paragraphs [24] and [28] above).
  30. The parties made submissions to us as to how much time was devoted, during the trial and in terms of preparation, to various different aspects of the case and different issues. There was no agreement between the parties on this, and it seems to me impossible for this court to form any clear view as between the parties on this aspect. If and so far as an assessment of that kind is necessary in order to decide a question of costs, this is one of the many respects in which the judge of first instance is, realistically, the only person who can make the assessment. In theory a costs judge can do so, but the inordinately time-consuming nature of such an exercise is one of the reasons why the CPR provide that an order that requires it to be undertaken should only be made as a last resort: see rule 44.3(7).
  31. Having handed down his judgment dismissing Peer's claim, for the reasons referred to above, the judge heard argument as to the terms of the order to be made on 1 December 2006. Each side put in a skeleton argument, referring to the relevant parts of CPR 44 and some authorities. EMC referred to the relevance of the case being a test case, the scope of which was chosen by Peer, and to the absence of any representative of any of the composers, or any of the heirs. Though recognising that EMC had lost on the issue of standing, it argued that it had been reasonable to raise the underlying points on which it lost for this reason, because their existence was relevant to the denial of declarations. It sought 80% of its costs. Peer, by contrast, argued that EMC should pay 80% of Peer's costs and that Peer should pay 20% of EMC's. It said that "the very substantial

and time consuming issues raised by EMC, a party found to have no standing to raise such issues, were unreasonably raised and pursued". It argued that EMC had lost on every point of substance except the succession point and the issue of discretion as regards the grant of a declaration, and that its root and branch attack on Peer's conduct and contracts in the 1930's and 1940's and its more recent dealings was exaggerated and unsustainable, but required substantial disclosure and court time, including the expensive trip to Cuba and factual and expert evidence. Peer's Counsel formulated a list of the points decided in the judgment as a check list of respective success and failure (from A to U) so as to provide the basis for a broad analysis of the result, which it used to make the submission that "the most substantial costs in this action were incurred on issues which ... EMC were unreasonable in raising and even more unreasonable in pursuing."

32. The judge delivered judgment orally on 4 December on the question of costs. He considered two discrete items of costs separately, namely those referable to the adjournment which was necessary because EMC sought and obtained an order for the recall of Señora Cordova to give evidence (for reasons which it is not necessary to explain) and also those referable to the judge's visit to Cuba to hear evidence as a special examiner. As regards the first he held that they should not be segregated but should be part of the general body of costs at issue as between Peer and EMC. As for the second, they had been borne in practice by EMC as a consequence of the judge's order under which the visit took place. The question was whether they should be brought back into the general costs. The judge said:

"The expenses relating to the Cuban visit were required, by earlier order, to be borne by EMC "In the first instance" and that has been the case in the sense that EMC has already paid them. At this stage, I will leave such costs as part of the body of costs which EMC has incurred in the action but I do comment that I would see little justice in visiting on Peer any of its or the Court's travelling and accommodation costs attendant upon the hearings in Cuba which Peer had strenuously resisted and which yielded so little relative to the costs involved."

The consequence of his decision to make no order for costs was that those costs remained the responsibility of EMC.

33. As regards the general issue of costs the judge's reasoning is set out in eight paragraphs of his judgment, which it is convenient to quote in full:

"27. Peer's skeleton argument, by Mr Saini, sets out, not unfairly, a résumé of success and failure on a whole number of issues, represented by each letter of the alphabet from A to U. There is occasional exaggeration; for example, although it is true that Mr Jaegerman gave evidence over five days, it was truly only some three days' duration worth of evidence because of adjournments and part-days. But Mr Saini's summary is broadly fair. Of course, within those issues A to U, there were sub-issues in many cases.

28. It is undoubtedly the case that, as Peer asserts, outstandingly the majority of those issues were won by Peer. But Peer recognises that the very great cost involved in a full issue-by-issue approach to assessment makes it unattractive and notes also CPR 44.3(7). Peer asks instead, not for a full issue-by-issue approach but a percentage award, albeit a percentage award based on its success on many of the issues. As a full issue-by-issue approach would be likely to require a highly detailed examination of time spent issue-by-issue on each side, it would, as it seems to me, be a very long, expensive and highly contestable operation. EMC also resists that type of full issue-by-issue approach.

29. Mr Mellor makes the sound points, firstly, that time taken up in oral evidence or argument on a particular issue does not necessarily reflect the time

and money spent in research on that issue, especially, I would add, when some issues involved a need to inquire into foreign law and some others required trawls through very many documents. Secondly, he says that some issues were quite brief, in terms of time spent upon them at the hearing and some were long and that a simple headcount of issues would not yield a true picture of the proceedings or of costs.

30. I am no more attracted than are the parties by a full issue-by-issue basis of approach. It would involve a massive assessment process and be very expensive and time consuming. Nor would an issue-by-issue approach sufficiently reflect CPR 44.3(2)(a) and the general rule.

31. Should I then, as Peer claims, award EMC 20% and Peer 80% of their costs, once the separable costs of phase one have been taken out? Mr Saini argues that any award that does not reflect that EMC raised and unreasonably prolonged many issues which failed and, moreover, did that without even having the locus to raise many of them (which, in both respects, I hold that to be the case) would serve to encourage the taking of bad points at unnecessary length so as unnecessarily to prolong and add to the expense of trials. Or should I, as EMC claims, award EMC 80% and Peer only 20%, reflecting that Peer brought EMC to court yet obtained no relief against it? Neither, in my judgment, would be appropriate.

32. Peer's suggestion fails adequately to reflect the general rule that the unsuccessful party should pay the cost of the successful party. Peer ask for certain relief, EMC resisted that relief; EMC warned Peer of the flaws in its position including those arising out of the fact that it neither joined the Public Trustee, nor itself acquired a grant, nor required assignors to it to acquire a grant and then assign to it. Peer was not granted any relief and to that extent EMC was successful.

33. On the other hand, EMC's suggestion fails adequately to recognise that it raised, prolonged and lost a host of, issues and that it thereby unnecessarily prolonged the hearing and, moreover, that many of the points it raised were points it had no locus to raise. Quite apart from the simple headcount of issues which were lost, EMC raised but failed on issues which included dolus or fraud and to raise an issue of fraud and yet fail upon it has always had consequences that resound in costs. And I should bear in mind too, as I have mentioned, that issues were raised by EMC as a person who had no locus to raise them; it is not as if the possibility that EMC had no locus had not been brought to EMC's attention.

34. I am asked to step back from the details and look at costs in the round. Both EMC and Peer recognise that their 80%, 20% split, whichever way round one looks at it, may need adjustment but in my judgment the award that best responds to the arguments which I have heard and the arguments presented in the skeleton arguments and that best fits all the relevant principles and all the circumstances of the case is that, in relation to the costs of the corpus of the proceedings between EMC and Peer, there should be no order as to costs as between those parties. I thus leave the costs of the Cuban visit to lie where they fell, namely to be borne by EMC."

34. In paragraph 31 and again in paragraph 34 the judge referred to EMC's proposition, incorrectly, as including that it should pay 20% of Peer's costs, but in paragraph 19 the judge had recorded

- EMC's contention accurately, and in any event nothing turns on this point, substantial though 20% of Peer's costs would no doubt be.
35. For EMC Mr Mellor argued that the judge's reasoning was legally flawed in several respects. I can summarise the grounds of appeal as follows:

- i) The judge failed to take account of the fact that it was a test case, of the highly unusual nature of the case, of the way in which Peer's case developed, and why it did so;
- ii) His reliance on the A to U analysis was incorrect because it was not broadly fair as a summary of the result;
- iii) He was wrong to hold that EMC had unnecessarily or unreasonably raised or pursued issues, so prolonging the hearing, and he should not have relied on any such matter without identifying the issues in question;
- iv) He was wrong to say that there were special costs consequences of raising an issue of fraud and failing in it, and certainly wrong to apply that to any issue of dolus.

The second and fourth of these points assert misdirections, and the third, in part, relies on an alleged inadequacy in the expression of the judge's reasoning. Otherwise the grounds of appeal assert, in substance, that the judge's conclusion is manifestly unjust, having regard to the matters mentioned, and outside the scope of any reasonable order as to costs.

36. So far as the A to U summary is concerned, I would accept Mr Mellor's criticism that it does not deal with every point that involved significant expense; for example it does not include the point taken late by Peer about Law 860, on which EMC won, having had to incur substantial late expenditure on expert evidence. I also accept that the way in which it was presented involved a risk that, if taken merely as a head count, some points would be given disproportionate weight, either because they involved no significant court time at all (such as whether the original contracts were void from the start) or because essentially the same point was repeated under several heads (such as EMC's lack of standing which affected a number of headings). I do not accept that the judge could have been misled by these features. Having written his lengthy judgment, which he had handed down only a fortnight before, he would have been at least as well aware as anyone of the nature, balance and weight of the respective issues. Nor would he have overlooked the fact that there were other issues arising consequentially: he referred expressly to there being sub-issues. I do not accept that the judge misdirected himself when he described the summary as being "broadly fair" at paragraph 27. Nor do I accept that when the judge spoke, in paragraphs 29 and 33, of a "simple headcount", he was referring to the A to U summary as such.
37. It was fair for the judge to say that outstandingly the majority of the issues were won by Peer. Peer won on the following issues:

- i) Whether the original contracts were void from the start;
- ii) Whether the original contracts were voidable for fraud or other misrepresentation, undue influence or unconscionability or restraint of trade (under English law) or any other aspect of dolus other than a Cuban equivalent of restraint of trade;
- iii) Whether the Further Dealings were voidable for misrepresentation, duress, undue influence or unconscionability;

- iv) Whether Peer had been in breach of contract by making no payment at all to the composers under the contracts, or none after signature of the contracts, before 1960;
- v) What the position under the original contracts would be under Cuban law pending any claim for breach or any challenge on the basis of dolus;
- vi) Whether notice of termination was necessary if the contract was to be terminated on the grounds of the other party's breach;
- vii) Whether restitution was necessary under Cuban law if a contract was terminated, and whether it could be obtained otherwise than on a claim by the party not in breach;
- viii) Whether anyone other than a party to the contract could raise a defence of dolus or breach.

38. By comparison, EMC won on the following issues:

- i) Peer's lack of title to the reversion to all songs other than number 5, and Peer's attempt to avoid the consequences of that;
- ii) Peer's lack of title to the original copyright in song 2;
- iii) Whether the original contracts might be vulnerable to a claim by a composer or his proper representative based on dolus by way of a Cuban equivalent of restraint of trade;
- iv) Whether a claim by a proper representative of a composer might succeed in proving that Peer had been in breach of the original contract so as to allow it to be terminated, by reason of the "38 years of nothing" from 1960, and that Peer would not have to be shown to have been deliberately intending to break the contract;
- v) That neither of such possible claims would be barred by Cuban limitation law;
- vi) That the EGREM interventions were not affected by Law 860;
- vii) That accordingly it would not be right, as a matter of discretion, to grant declarations in relation to the three songs for which Peer had a title to some or all of the copyright.

39. Those two lists, in which (as in Peer's A to U summary) individual items are not all of the same weight or significance, either as regards their costs implications or their importance in the litigation, do not include any treatment of the witnesses, which did feature in the A to U summary. Again, I have no doubt that the judge was well aware of the relevance of both factual and expert witnesses and of the time taken by them as groups and individually, and the extent to which their evidence was of assistance and bore on issues decided one way or the other.
40. The judge knew perfectly well that EMC had won the case, and on what basis it had done so. He cannot have overlooked the fact, which he had discussed at length in his main judgment, that among the reasons why Peer had failed to get even a limited declaration as to rights in 3 songs was that a claim might possibly succeed, on the part of a representative of a composer, to set aside the contract for restraint of trade under Cuban law, as an aspect of dolus, or to have it terminated for breach, and might still succeed despite the lapse of time because of the judge's conclusion as to Cuban limitation rules. I cannot suppose that he regarded the question of the scope and essence of dolus generally, or that of restraint of trade, or that of termination for breach on account of the "38

- years of nothing", or the related issues of limitation or (as regards breach) voluntade rebelde, as having been unnecessarily or unreasonably raised or pursued.
41. However, on all the other issues on which the original contracts and the Further Dealings were challenged, EMC did lose (subject to the point which I have reserved until later, as to whether the judge failed to decide an important aspect of EMC's case). In the case of the original contracts, the judge expressed the view that not only had no evidence been put before him on which the claims could properly be based, but also that there was no reason to think that such evidence could now be found. Mr Mellor submitted that this was not a fair conclusion, but it seems to me that it was one on the basis of which the judge was entitled to proceed. So far as the Further Dealings are concerned the judge did hear evidence, though the best evidence for EMC was not from people who had anything to do with the songs directly in issue. The judge was evidently unimpressed with the relevant witnesses. Although he found that, on the other side, Señora Cordova was a liar in certain respects, he made the point in his main judgment that if it was to be a feature of EMC's case that she had deliberately cheated heirs of their rights, she would have had to have been more directly cross-examined on this than she was. Conversely, it might be said, if she was not to be cross-examined in such a way as to put to her plainly the case that she had deliberately cheated the heirs by what she said to them, EMC could not properly run a case based on the proposition that she had done so.
  42. Mr Mellor showed us a passage in the judgment of Waller LJ in *Straker v Tudor Rose* [2007] EWCA Civ 368, in which he said that if a costs order is to be based on the proposition that a successful party unreasonably pursued an allegation, there must be a clear finding of which allegation was unreasonably pursued. That was not available to the judge, the judgment having been given on 25 April 2007. I do not wish to question that proposition in any way, but the basis of it is that the parties need to know on what basis the judge has decided the case. In many cases it is likely to be clear what issue or issues is or are involved, not least from the terms in which the judge has decided the case. In fact in *Straker* there had been no finding by the judge below that any point had been unreasonably raised or pursued.
  43. In the present case the judge had dismissed Peer's claim because of his conclusion on several of the issues raised in the litigation. The most important was the point about the heirs not having title to the reversion; a minor point was Peer's lack of title to the original copyright to song 2. Two other issues on which EMC succeeded were relevant in a more indirect manner, that is to say because it had been able to persuade the judge of the possibility of a successful claim by a third party, albeit not of a valid claim by itself, which would show that Peer did not have a good title to the copyright in one or more songs. However, EMC had also raised a number of other issues on which it had failed altogether; on some of these it was possible for the judge to take the view that the evidence was so inadequate that the point had been unreasonably pursued.
  44. Mr Mellor submitted, fairly, that if a party is to be criticised, with adverse consequences as to costs, for unreasonable conduct as regards a particular issue, the judge must avoid the benefit of hindsight, and must assess whether the party was unreasonable on the basis of the information available at the relevant time. It is for that reason that it may well be relevant to distinguish between taking a point in the first place and pursuing it later. In his costs judgment the judge used the word "unreasonably" only in relation to prolonging "many issues which failed". He is therefore not to be taken as having proceeded on the basis that any points taken by EMC were unreasonably taken from the start.
  45. Mr Mellor submitted that the judge must be taken to have formed the view that all the points on which EMC was found not to have the necessary standing were points on which it was acting unreasonably in pursuing the issue. He based this argument on a close analysis of what the judge said at paragraph 31. In particular, the phrase "that EMC raised and unreasonably prolonged many issues which failed and, moreover, did that without even having the locus to raise many of them (which, in both respects, I hold that to be the case)" showed, he contended, that the issues which the judge held had been unreasonably prolonged were not limited to those on which it did not have the right standing. By contrast the later phrase "it raised, prolonged and lost a host of, issues and that it thereby unnecessarily prolonged the hearing and, moreover, that many of the points it raised were points it had no locus to raise", in paragraph 33, is not open to the same construction. I would reject Mr Mellor's submission that the terms in which the judge expressed himself in paragraph 31

show that he must have been proceeding on the basis that one or some issues not affected by the standing point had been unreasonably prolonged. In my judgment the judge's language in paragraphs 31 and 33 is to be understood, in the context of his main judgment, as referring to the issues as regards the challenge to the original contracts, on all aspects other than Cuban restraint of trade, and to the validity of the Further Dealings. These were: fraudulent misrepresentation, undue influence and unconscionability in relation to the original contracts, and fraudulent misrepresentation, duress, undue influence and unconscionability as regards the Further Dealings. It seems to me that the judge could properly describe these as a "host of issues" (see his paragraph 33). On all of these, EMC failed in a way in which the judge could properly, and as it seems to me did, regard as justifying the criticism that it had at least unreasonably prolonged these issues, thereby unnecessarily prolonging the length of the hearing. (I do not, in this, overlook Mr Mellor's separate point about unconscionability in relation to the Further Dealings, to which I will come later, and which he said the judge did overlook.) The judge's language, in both the main judgment and the costs judgment, does not suggest that he regarded EMC's conduct in relation to the issue of its standing as having been unreasonable.

46. Mr Mellor next focussed on the judge's comment in paragraph 33 about raising but failing on an issue of fraud as resounding in costs. He submitted that although there were traces of a principle to the effect that the judge mentioned in old cases dealing with allegations of fraud, first, there was no recent case of that kind and certainly no such case since the introduction of the Civil Procedure Rules, and secondly that it would be wrong to extend such a principle, if it still existed at all, to whatever might be included in the concept of *dolus*. Accordingly, he argued, this was a specific misdirection by the judge.
47. It seems to me that Mr Mellor sought to make altogether too much of the judge's observation in this respect. As the judge had reminded himself at paragraph 18, he had to take account of all the circumstances, including the matters of conduct referred to in CPR rule 44.3(5), of which the question of the reasonableness of raising or pursuing a particular allegation or issue is one of the more relevant examples. EMC had made allegations of fraud both in relation to the original contracts (as regards Mr Peer's representations) and as regards the Further Dealings (based on what Señora Cordova was alleged to have said). The judge regarded the first allegations as wholly unfounded, and they certainly were put forward in general and sweeping terms (summarised at paragraph [17(i)] above), while he rejected the latter allegations for the reason, among others, that Señora Cordova was not cross-examined appropriately, despite her recall.
48. It does not seem to me that the judge's observation shows anything more than that he took this into account as one of the relevant factors, and did so as a point significantly adverse to EMC. In my judgment, he was fully entitled to do so. I do not draw from the relevant sentence in paragraph 33 the inference that he intended to refer to failure on issues other than fraud as such. By mentioning the word *dolus* he did no more than include a reference to the Spanish and Cuban concept as being that under which the case of fraudulent misrepresentation was advanced; in context it was the equivalent of fraud.
49. I must now address Mr Mellor's submission that the judge failed to decide an important aspect of EMC's case as to the defects in the Further Dealings in his main judgment, and that accordingly he should not have regarded EMC as having lost on this issue.
50. The point was identified most clearly in Mr Mellor's skeleton argument in reply on the appeal. He said that EMC's case, before the judge, at least by the stage of the closing submissions, was that the drafting of the CCRs signed by heirs, and the *modus operandi* used to get them signed in Cuba, resulted in unfair and unconscionable bargains, amounting to *dolus* under Cuban law. EMC accepted by then that Señora Cordova did not understand the CCRs and did not explain them to the heirs, and contended that the heirs had no chance of understanding what the documents meant or what was their significance. He also contended that it should have been apparent from EMC's closing submissions before the judge that this was, so far from being unreasonable, a compelling case. For convenience of reference I will call this the *modus operandi* point.
51. Mr Mellor pointed out that the judge did not refer in his main judgment to the underlying purpose of the provisions as to reversions in the Copyright Act 1911, and similar legislation in other jurisdictions including the USA, namely to prevent a composer from signing away his rights for the full term of the copyright, and to give the estate the right to bargain afresh for the sale of the



reversion, not constrained by the terms of the original assignment which might have been made at a time when the composer was in a weak bargaining position. It is not to be supposed, he argued, that those who were invited to sign CCRs had the faintest idea about any of this, or of the effect of the document which (taken with the later addendum) operated not only as an affirmation of the original contract, despite any vitiating factor that it might have had, but also as an assignment of the reversion. The signatories would only have understood, he said, that they could obtain what by Cuban standards were large sums of money by signing the new document, and that they had to sign the document in order to receive the money, whereas, subject to identifying the correct recipients (plainly a legitimate concern for Peer) the sums in question were already due regardless of any confirmation or assignment.

52. We were shown EMC's closing submissions at trial in which this point was developed at some length. (Those submissions do include an assertion of express representations by Señora Cordova that heirs had to sign the CCR in order to receive accrued royalties.) Presumably the *modus operandi* point was also covered in oral submissions. To judge merely by looking at the written formulation of the point, there could be some substance in it. One question raised in argument on the appeal was how this point emerged from EMC's statement of case. On that Mr Mellor pointed to paragraph 53, quoted above, at paragraph [20]. Not all aspects of this argument are mentioned there in terms, but a good deal of the material is there. The paragraph does include the allegation of misrepresentation on the part of Señora Cordova, but Mr Mellor pointed out that it is a separate allegation: "The documents were not explained and *in addition*, Isabella Cordova grossly misrepresented the basis and effect of the confirmations" [my emphasis]. Even if EMC accepted, having heard the evidence, that Señora Cordova did not make misrepresentations as to the basis and effect of the documents, because she did not herself understand the documents and did not attempt to explain them, Mr Mellor submitted that the *modus operandi* point was available to EMC on the basis of the rest of the paragraph.
53. The judge did not deal with this aspect of the case in his main judgment. He did not need to deal with it, since it is another point on which EMC did not have the necessary standing to challenge the Further Dealings itself, and Peer's case based on the Further Dealings had failed because of the point about title. Nonetheless, the judge did deal with a number of aspects of EMC's case as regards the Further Dealings, as well as on the original contracts, even though this was not strictly necessary. In particular he did deal with EMC's attack on the Further Dealings based on the allegation that Señora Cordova had made misrepresentations to the signatories. He rejected this case in terms at paragraph 154, from which I have quoted at paragraph [26(vi)] above.
54. At paragraph 159, in a section of his judgment headed "Composers' failure to understand their contracts", after rejecting EMC's case as to the composer's lack of understanding of the original contracts, he dealt with what he called "a similar argument" in relation to the Further Dealings, namely that:

"they were not understood by the heirs or the heirs were misled as to their effect by Senora Cordova."

He rejected the case based on Señora Cordova having given, even by inadvertence, misleading advice as to the effect of the documents, and he also said that some of the evidence as to a failure to understand the documents was "entirely unconvincing". He ended that paragraph by saying:

*"On the evidence I have heard in these proceedings I do not hold Senora Cordova or Peer to have deceived heirs as to the meaning or effect of the Further Dealings."*

55. If the *modus operandi* point as a formulation of EMC's case was as central to its final position as Mr Mellor submitted, it does seem surprising that the judge did not deal with it more explicitly in the course of his main judgment.
56. When it came to submissions to the judge on costs, Mr Mellor did not, in his skeleton argument, attempt to summarise the issues won and lost, but Mr Saini did, as I have mentioned. It does not

- seem that, in his oral submissions, Mr Mellor contended that the A to U summary was defective because it did not take account of the *modus operandi* point, nor did he submit that the judge should take into account the fact that he had not decided this issue either way. In those circumstances it is not surprising that the judge did not allude to this in his judgment on costs.
57. I note also that the proposition that EMC did not lose on the *modus operandi* point did not feature in EMC's Grounds of Appeal, served with the Appellant's Notice which was filed on 26 March 2007. It can be detected in the skeleton argument on the appeal dated 3 May 2007, at paragraphs 28, 29 and 64.2. It was further developed in EMC's skeleton argument in reply.
58. Mr Mellor's submission that the *modus operandi* point was, by the end of the trial, central to EMC's case on the Further Dealings seems to me to be open to some doubt, given that the judge's failure to deal with it directly seems not to have been noticed, or at least commented on, either at the stage of the argument about costs (to which, as a point not decided against EMC, it was of particular relevance) or when the grounds of appeal were drafted.
59. Moreover, I do not see how the judge can fairly be criticised for failing to take account of EMC not having been the unsuccessful party on the *modus operandi* point, when this was no part of EMC's submissions to him at the stage of the argument about costs.
60. I have left until last EMC's first ground of appeal, in which the complaint is that the judge failed to have any, or proper, regard to the fact that the litigation was a test case, and to a number of particular features of it, including some aspects of Peer's conduct of the case.
61. Mr Mellor does not, and could not, submit that the judge overlooked the fact that it was a test case, on which more than the fate of UK royalties for 13 songs depended. He knew that Peer had in its catalogue songs by some hundreds of Cuban composers, written in the 1930's and 1940's. It was the very fact that the judge was well aware that the outcome of the case might be taken as applicable not only, in England, to other songs by other Cuban composers, but also to these and other songs in other jurisdictions, that made him so wary about granting declarations. That is apparent from what he said at paragraphs 173 and 176 quoted above, and also from his earlier passage about declarations, in particular at paragraph 92:

"92. To what use would the declarations sought by Peer be likely to be put? Peer could say that it simply wished to obtain them in order to be able to produce them to MCPS and hence to do no more than recover the fruits of the English copyright in the particular 13 songs. But that would not be credible and it has not been said. One might reasonably expect, if that were to be said, that Peer would first have considered whether the game was worth the candle; whether the likely costs of the proceedings it was embarking upon were justified by the likely recovery from the MCPS. That, of course, would have required some assessment by Peer of what the recovery from the MCPS would be likely to be in the case of the 13 songs. But it became quite apparent during the hearing that Peer had really very little idea of what the recovery in respect of the 13 songs would be. At first it thought it was just a few hundred pounds that was already at stake; further investigation disclosed that it could be a few thousand pounds at stake. In either case I cannot believe that Peer would have embarked on the proceedings, ones of exceptional complication, had they been intended to do no more than to lead to the recovery of such relatively minor sums as accrued royalties or prospective royalties. Whilst the case has never been marked out as a test case by Peer, I cannot believe other than that it has been hoped by Peer that the relief obtained in it would be capable of being used as if the case had been a test case despite the absence of a prior consideration by the parties together or by the Court of what would be the appropriate subject matter (in particular which would be the appropriate songs of Peer's 600 or so) if the case were to be a test case. Peer has been free to choose its best examples and I am unconvinced that its selection of these 13 songs has been solely by reference to careful selection from its 600 or more songs of various different classes of the many contracts under which copyrights or reversions were acquired in such a way that each of the 13 represents a discrete class separate from the others."

In the light of that, he went on at paragraph 94 to say this:

"If, for example, a case were to emerge, despite EMC, for want of locus, being unable usefully to assert the annulability of an original agreement or of a Further Dealing, that such relief might very well be open to a composer's heirs, an unqualified declaration in Peer's favour, in the absence of some prior indication by the heirs that no such relief was to be sought (and there is no such indication), would, as it seems to me, be almost irresponsible in its potential to mislead."

62. Those were the considerations which led the judge to decide that he should investigate and rule on the challenges to both the original contracts and the Further Dealings which EMC put forward, even though he had by then decided that EMC was not a party entitled to raise such challenges itself.
63. It is not plausible to suggest that the judge overlooked the nature of the case in this respect when he came to decide on costs, nor that he ignored the fact that, because of the wider significance of the outcome of the case, each party might well wish to raise a wider variety of issues than would otherwise have been regarded as relevant or appropriate if nothing other than the UK copyright to 13 songs was at stake. But it does not follow that, if an issue is raised in such circumstances and the party raising it completely fails to make it good, the fact that it arose in a test case necessarily makes the consideration of the implications of that failure as regards costs different from that which would arise in a case which did not have this potential wider significance. While Peer lost altogether on its claims under the Further Dealings because the document had not been executed by the person in whom the title to the reversion was vested, a point which no doubt applied to every such song, not just those directly relevant, equally EMC completely failed in its attempt to show that the original contracts were voidable on the basis of fraudulent misrepresentation, undue influence or unconscionability, an attack which was also directed to all relevant songs, not just those directly at issue.
64. Mr Mellor argued that, once the point on title under the Further Dealings had been taken, Peer were bound to fail, and that their conduct of the case thereafter needs to be examined with care as to its implications. Peer attempted to avoid the consequences of the title point in two ways: first by contending that they had a "better title" than EMC, and secondly by arguing in favour of a grant of representation to themselves, or an independent professional; they failed entirely (and, it might be said, predictably) on those points. They did not, however, abandon any other point already in issue. Mr Mellor submitted that the reasons why they did not do so were to be found in the fact that it was a test case, so that Peer's reputation in the relevant commercial world would be adversely affected if they abandoned points already taken. He also submitted that Peer may have hoped that they would win, notwithstanding this fatal point, by reason of their financial strength as compared with the financial difficulties for EMC in fighting the case, with the consequent need to have available, and to spend, large amounts of hard currency. He said that, at one point, Peer did get very close to that, EMC having entirely run out of cash at a time when it needed to comply with an unless order in order to remain active in the litigation.
65. On behalf of Peer, Mr Saini made the converse submission that EMC could have limited its attack to the title point, once that had been taken, and thereby saved a vast amount of time and expense for both sides.
66. It does not seem to me that either of these submissions meets the point entirely, not least because, for song 5, the title point was not an answer, though I understand that the 1958 agreement only emerged in the course of the trial, so that at the beginning of the trial it may have seemed that this song would also be covered by the same point. There were also three songs for which the original copyright was still subsisting, to which the title point was not relevant.
67. The judge did not overlook the fact that it had been a test case, and I am not persuaded by Mr Mellor's submissions that he overlooked any relevant implication or consequence of that fact when coming to his decision on costs.

68. Other aspects of Peer's conduct of the case which Mr Mellor submitted that judge should have taken into account, but did not, or not adequately, included its having taken at a very late stage the point under Law 860 which I have mentioned at paragraphs [24] and [28] above, and its belated disclosure of documents, including its resistance to disclosure of a document known as the OFAC letter on grounds of privilege. The point under Law 860 was taken by way of a very late amendment by Peer. EMC dealt with it by way of two expert reports, whereas Peer did not use its Spanish law expert on this point. The judge dealt with this point in paragraphs 55 and 163 to 167 of his main judgment. It is clear from what he said there that the point was raised very late by Peer, that EMC adduced expert evidence on the point, whereas Peer did not, and that in the absence of such expert evidence, the judge preferred EMC's case on the point. It is not to be supposed that the judge overlooked those facts when he came to give his judgment on costs.
69. As for disclosure, EMC put in issue what Peer had done under the original contracts, not least by its allegation that the composers had been paid nothing under the contracts. Peer eventually disclosed documents on this subject from which it was possible for it to show that some of the composers had indeed been paid certain amounts before 1960. The US embargo after 1960 did lead to there being no payments at all for many years thereafter. Eventually the embargo was relaxed somewhat and payments were possible. That led to the steps which Peer took, using Señora Cordova as its agent, to obtain the CCRs from heirs and, where it could obtain such a document, to pay accrued royalties to the relevant heirs (but, with almost no exceptions, not to an heir who would not sign a CCR). The OFAC letter to which I have referred was a letter from Peer to the Office of Foreign Assets Control of the US Treasury Department dated 1 September 1999, by which Peer sought to be able to make payments to the appropriate people in respect of royalties which had accrued before 1988. Royalties after that date had been freed for payment already by action taken by the US Government to relax the embargo to a limited extent. Peer refused to disclose the letter originally, but eventually it was disclosed, with part redacted on the grounds of privilege. Mr Mellor criticised Peer for its delays in disclosure, both generally and as regards this letter, in his skeleton argument on costs, at paragraphs 27 to 30. He made the point to us that it was in part this attitude to disclosure by Peer that led to a need to cross-examine Peer's witness Mr Jaegerman for 3 days. I assume that he made the same point to the judge, before whom the length of time taken by Mr Jaegerman's evidence was the subject of specific comment (see paragraph 27 of the costs judgment). His evidence is dealt with in two long paragraphs of the main judgment, 156 and 157.
70. The judge did not refer in terms to this point, but it does not seem to me that it was necessary for him to do so. He was well aware of the heavy documentation involved in some issues: see his comment in paragraph 29. He knew of the significance of Mr Jaegerman's evidence, of which he had taken a broadly favourable view in his main judgment. In relation to a trial as long and complex as this one, with the main judgment having been delivered so recently, it does not seem to me that the judge could reasonably have been expected to mention each point which might have been regarded as relevant to the question of liability for costs.
71. Mr Mellor made another point, in passing, by reference to paragraph 175 of the judge's main judgment, quoted above, and its allusion to the consequences in terms of costs if Peer had succeeded only to the extent of limited declarations which EMC had said in advance that it would not oppose. He said that, if in that case EMC could have had "a judgment in costs in its favour", how much more should it be entitled to such an order having successfully resisted the grant of any declarations at all. The outcome which the judge postulated would have been materially different, since Peer would, on the face of it, have been the successful party, but EMC could have protected itself by a Part 36 offer as to limited success. Even in that event, however, under the CPR it would have been relevant to consider whether EMC had lost on particular points which it had taken, and if so whether it had raised or pursued them, or some of them, unreasonably. Given the generalised and hypothetical nature of the judge's comment in paragraph 175, it seems to me that no weight can be placed on it, by comparison with the actual outcome, to show that the latter is wrong as being inconsistent with the judge's earlier thinking.
72. Another point on which Mr Mellor laid considerable stress was the financial strain for EMC of having to litigate in England, that forum having been chosen by Peer, where not only is litigation notoriously relatively expensive anyway, but it requires the expenditure of hard currency which

for a Cuban entity, suffering from the US embargo, is especially difficult. He referred to EMC having applied to stay the proceedings at an early stage so that they, or certain issues, could be tried in Cuba, which Peer resisted successfully. I understand the problems for EMC in this respect. However, first, an issue as to UK copyright as such had to be tried in the UK. Secondly, if the litigation was to be of value to either party as a test case, it had to be in a "neutral" jurisdiction, that is to say neither in the USA nor in Cuba. It does not seem to me that this aspect of the matter bears significantly on the issue what was the appropriate order for costs at the end of the day.

73. As Mr Mellor submitted, it is unusual to deny a successful party the recovery of the whole of its costs of a trial. Nevertheless, I am unable to accept his submission that the judge misdirected himself as a matter of law, or that he failed adequately to express his reasoning, in his costs judgment. Standing back from the detail, and considering, as best an appellate judge can, the comparison between the scope, course and nature of the trial, and the outcome on the various issues and aspects of the trial, on the one hand, and the order for costs made by the judge, on the other, I do not accept the submission that the judge's order manifestly produces an injustice, so that it must have been the product of an erroneous approach. I do not consider that any of the points argued in support of the appeal shows any error of law on the judge's part, and I would therefore dismiss this appeal. It follows that it is unnecessary to consider the Respondent's Notice.

**Lord Justice Moore-Bick**

74. I agree

**Lady Justice Arden**

75. I also agree.