

A paler shade of white

By Keith Chapple SC

How do you think you'd feel?

Forty years ago you wrote a pop single that did it all. Number one in the UK. Number five in the United States. It sold 6,000,000. It was a monster.

But it kept on going – forever. It's on every compilation ever made. And it has now received the ultimate accolades – it's the music in a Nissan ad and can be downloaded for a mobile phone ring tone.

Then someone else comes along in the twenty-first century and says 'I wrote it'. Or more correctly, 'I wrote it as well and I want a credit and some of the money'.

This was the background to Justice Blackburne's judgment in *Fisher v Brooker and Onward Music Ltd* [2006] EWHC 3239 (Ch) late last year.

A Whiter Shade of Pale was one of the most successful singles of the sixties. Recorded by Procol Harum it was released in 1967 to universal acclaim. The writers of the song until December 2006 had always been regarded as lyricist Keith Reid and music writer Gary Brooker. In, with respect, an erudite and well written judgment, Justice Blackburne found that the plaintiff Matthew Fisher, the Procol Harum organist, was the co-author of *A Whiter Shade of Pale* and a joint owner of the musical copyright. He awarded him a 40 per cent share of future earnings.

In an extraordinary case there were two amazing features.

The first was, of course, that it had taken Matthew Fisher almost 40 years to stake his claim. There was apparently a conversation in 2003 between Brooker and Fisher [referred to at paragraph 79 in the judgment] where Fisher seemed to talk himself out of any real claim to earnings. The next year, after what proved to be very valuable advice, lawyers' letters were exchanged and a short time later the case was up and running. The colour must have drained from Gary Brooker's face when he took the call from his solicitor in 2004 telling him that Fisher had started proceedings.

The second feature was that during the course of the hearing, equipment was provided in the courtroom for people to play on and illustrate their musical contributions.

The judgment sheds valuable insight on the rights of those involved in the sort of collaborative effort that goes into the construction of many pop hits.

There seems no doubt that Reid and Brooker wrote what Mr Justice Blackburne called 'the song' – Reid the words and Brooker the music. The song is a very different thing to the end product, 'the work' that is 'A Whiter Shade of Pale' as performed by Procol Harum, the smash hit. Of major importance is the very distinctive organ part on the record.

It seems that Gary Brooker called on Matthew Fisher in early 1967 after seeing an ad in *Melody Maker*. Fisher appeared to be one of the few people in England with his own Hammond organ and was advertising his services with it. At that stage Brooker was able to play a far more basic version of the song himself on a piano for Fisher, who went on to become one of the main members of Procol Harum with Brooker for many years.

A short time after Brooker and Fisher's first meeting, Procol Harum rehearsed in school and church halls in the English countryside, 'inventing' and 'improvising' with the song as they cut it down from its original 10 minute length to its final four minute form. Integral to the end result was Fisher's contribution to the work. In essence, it seems that the original song as written by Brooker had touches of JS Bach's *Air on a G String*. On the final recording, Fisher's tweaking of Brooker's song and his own contributions to the striking organ part, said to be inspired by a choral prelude again by Bach *Wachet auf, ruft uns die Stimme* (Sleepers awake, the voice is calling), were seen by the judge as elements which qualified him for the title co-author.

The judge noted [at para 38] that Keith Reid's view when interviewed in 1982 seemed to be fairly straight forward, namely

that it was Matthew Fisher who wrote the organ part.

I must have heard the record as much as anybody else and it's perfectly clear that the most dominant feature of it is the organ part. Dominant features are not unusual in pop records. The opening chords of *Gloria*, the relentless guitar riff in *The Last Time* and the start of *Eagle Rock* spring to mind as well. There are plenty of other examples.

One major revelation in the judgment was that apart from Matthew Fisher and what Mr Justice Blackburne described as a 'languorous drum beat', there were in fact other musicians playing on the recording, including Brooker himself on piano. I defy anybody to hear them, that's how good the organ part is.

Because of the protracted history over the decades since 1969, Mr Justice Blackburne had to consider other issues such as acquiescence, laches and estoppel. As for estoppel, he provides a useful application of what was referred to by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 151 outlining what must be established by a party who seeks to set up an estoppel and the need for detriment.

The end result is that the plaintiff now has 40 per cent of the future of *A Whiter Shade of Pale*. For Fisher, it is vindication.

So that was the music side of *A Whiter Shade of Pale*. What about Keith Reid's impenetrable lyrics I hear you ask as you wander through your playing cards?

Well, there's only one response to that: there is no reason and the truth is plain to see.



Matthew Fisher, (C) the organist in the 1960s British pop group Procol Harum, arrives at the High Court in London, 13 November 2006. Photo: AFP Photo: Leon Neal / Newspix