



Neutral Citation Number: [2017] EWHC 3175 (IPEC)

Case No: IP-2016-000174

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

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

Date: 07/12/2017

Before :

HIS HONOUR JUDGE HACON

Between :

**THE NATIONAL GUILD OF REMOVERS &
STORERS LIMITED**

**Claimant/
Appellant**

- and -

**(1) CENTRAL MOVES LIMITED
(2) SCOTT RUST**

**Defendants/
Respondents**

Jonathan Miller (instructed by **Coyle White Devine**) for the **Claimant/Appellant**
Scott Rust appeared on behalf of **First Defendant/Respondent** and on his own behalf

Hearing date: 21 November 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 from the order of Deputy District Judge Vary in the IPEC Small Claims Track dated 29 January 2016. In that order a claim by the Appellant (“NGRS”) against the First Respondent (“Central Moves”) for passing off was dismissed, but judgment was entered in a similar claim against the Second Respondent (“Mr Rust”). Mr Rust was ordered to pay damages and costs.
2. NGRS appeals the dismissal of its claim against Central Moves and also the quantum of damages and costs awarded against Mr Rust.
3. At the hearing of the appeal Jonathan Miller appeared for NGRS. Mr Rust appeared both as a litigant in person and on behalf of Central Moves. Mr Rust is the sole director of, and owner of all the shares in, Central Moves.

Background

4. NGRS is a trade body which promotes the interests of those trading in the removal and storage industry. Such traders may obtain membership of NGRS for a fee and among the benefits of membership is the entitlement to advertise that the trader is a member of NGRS.
5. Central Moves operates a removals and storage business in Twickenham. It is run by Mr Rust. Until December 2008 Mr Rust’s corporate vehicle for his business was Central Moves UK Limited (“CMUK”). CMUK ceased trading in that month and was wound up on 22 December 2008. Its business was acquired and continued by Central Moves from January 2009. CMUK was dissolved on 26 April 2011.
6. CMUK became a member of NGRS in late 2001 or early 2002. Membership was terminated on 15 November 2005.
7. CMUK had an entry on a page of an online trade directory called Loadup (“the Loadup Website”). Loadup is not used by the public, only traders. Its purpose is to allow haulage and removal businesses to offer and find spare capacity, generally available in trucks on otherwise empty return trips. CMUK’s entry read as follows:

“Central Moves UK Ltd
Removals and storage. National and International. BAR and GUILD
MEMBERS
<http://www.centralmovesuk.com>”

The reference to BAR is to another trade organisation of which CMUK was a member and which plays no part in this appeal.

8. After CMUK ceased trading its entry on the Loadup Website was not removed. This came to matter because of its online address, www.centralmovesuk.com (“the CMUK web address”), which appeared in the entry. Central Moves purchased that domain

name and from January 2009 the address in the Loadup entry served as a link to Central Moves' website.

9. Jon Martin, a director of NGRS, gave evidence at trial. He said that on 10 December 2012 he was contacted by a customer who drew attention to the CMUK entry on the Loadup Website and asked whether CMUK was a member. Mr Martin looked at the entry and clicked on the CMUK web address, which led him to the Central Moves website. He sent an email to Central Moves, asking it to remove the entry as a matter of urgency. The same day Mr Rust replied, saying that CMUK no longer traded and that he had asked Loadup to remove CMUK's entry altogether. On 11 December 2012 Loadup confirmed to Mr Rust that the entry had been removed. NGRS was informed of this the next day.
10. NGRS was not satisfied. On 30 July 2013 it started the present proceedings in the Patents County Court. By a consent order dated 28 May 2015 the claim was allocated to the IPEC Small Claims Track.
11. CMUK having been dissolved in 2011 was not a defendant. But NGRS alleged that it had passed itself off as a member of NGRS because of the entry on the Loadup Website and that Mr Rust, as the controlling mind of CMUK, was jointly and personally liable for such passing off. NGRS also alleged that because the www.centralmovesuk.com address in CMUK's Loadup entry had served as a link to the Central Moves website, Central Moves had also passed itself off as a member of NGRS.

The judgment

12. The District Judge found that the word 'Guild' in CMUK's entry in the Loadup website was likely to lead the relevant public to believe that the services offered by CMUK were connected with NGRS. He said that this was capable of being a misrepresentation. By inference, he found that it became a misrepresentation after CMUK ceased to be a member.
13. The District Judge held that Mr Rust was the controlling mind of CMUK and was therefore jointly liable for CMUK's acts of passing off. As regards Central Moves' liability, however, he found that (a) Central Moves had not acquired the contractual or tortious liabilities of CMUK, (b) the CMUK website address in the Loadup entry was not a misrepresentation by Central Moves and (c) there had been no common design between Central Moves and Mr Rust to represent that Central Moves was a member of NGRS. Accordingly Central Moves was not liable for passing off.
14. The District Judge assessed damages to be paid by Mr Rust on the user principle. He referred to and followed my judgment in *National Guild of Removers & Storers Ltd v Statham* [2014] EWHC 3572 (IPEC) in which I found that a typical member of NGRS paid annual fees of between £1,600 and £1,800 per annum. In that case the defendant business had represented that it was a member of NGRS on a consumer-facing website. The District Judge found that a freely negotiated licence between NGRS and Mr Rust in relation to the use of 'Guild' on the Loadup website, not a consumer-facing website, would have fixed the royalty rate at £900 per year. He said that the relevant period started at 30 July 2007 and ended when CMUK ceased trading in December 2008. He assessed damages at £1275.

15. It is not immediately clear to me why the relevant period started on 30 July 2007 since CMUK's membership of NGRS ended on 15 November 2005. But no doubt there was a good reason because it was not a matter complained of in the Appellant's Notice or in argument. I need consider it no further.

Grounds of Appeal

16. The arguments raised in the Grounds of Appeal and pursued by Mr Miller at the hearing were as follows:

Liability of Central Moves

- (1) The District Judge should have found that Central Moves was liable for passing off.

Extended liability of Mr Rust

- (2) He should have found that Mr Rust's liability as joint tortfeasor with CMUK continued after CMUK stopped trading until CMUK was dissolved in April 2011.

Damages

- (3) The District Judge approached the assessment of damages in the wrong way by applying the user principle. He should instead have based the assessment solely on the terms under which use of the NGRS name was licensed and in particular the post-termination fees due under those terms.
- (4) If, contrary to ground (3), the District Judge was entitled to assess damages on the user principle, he should not have based his assessment on figures derived from *NGRS v Statham*. He wrongly arrived at a figure which constituted his view of what Central Moves should have paid for the relevant hypothetical licence, as opposed to the sum it would have paid.

Costs

- (5) Costs were wrongly awarded on the basis that the claim had always been in the Small Claims Track. Until 28 May 2015 it was in the Multi-Track and costs up to then should have been awarded accordingly.

17. There was no Respondent's Notice.

Liability of Central Moves

18. Mr Miller, who appeared for NGRS, had an overarching argument based on a passage taken Spencer Bower & Handley, *Actionable Misrepresentation*, 5th ed., at 8-10:

“The general principle that no-one can profit from the fraud of another emerged in equity. Lord Eldon said in *Huguenin v Baseley* that ‘it was against conscience, that one person should hold a benefit, which he derives through the fraud of another’”.

19. In my view this observation of Lord Eldon's has no application to the present appeal. Of course, in certain contexts it will be important to consider whether a benefit held by a party has been derived through the fraud of another. The topic in hand is not that; it is whether Central Moves is liable in law for passing off within the meaning of that tort as defined and developed by the courts over the years, mostly since the early 19th century, as it happens by Lord Eldon among others, see *Hogg v Kirby* (1803) 8 Ves Jun 215; 32 ER 336 and *Lord Byron v Johnston* (1816) 2 Merivale 29; 35 ER 851.
20. Mr Miller had a more specific argument. It was accepted by Mr Rust that he had been the controlling mind behind CMUK and from January 2009 became the controlling mind behind Central Moves. The District Judge found CMUK liable for passing off and, because Mr Rust was its controlling mind, found Mr Rust to be jointly liable. Mr Miller submitted that when Mr Rust stopped controlling CMUK and began controlling Central Moves, he was the same man with the same knowledge. Mr Miller said that the District Judge should have looked more carefully at Mr Rust's knowledge and its relevance to Central Moves' liability.
21. Mr Miller drew attention to the contact details on CMUK's entry on the Loadup website, which changed from 'Scott@Centralmovesuk.com' to 'http://centralmovesuk.co.uk' between 2011 and 2012. He submitted that this must have been done at the instigation of Mr Rust. Therefore Mr Rust knew about Central Moves' entry on the Loadup website and was liable for it until the entry was removed in December 2012. In addition, Central Moves was jointly liable with Mr Rust. The District Judge had failed to appreciate that tortious liabilities could transfer to Central Moves from CMUK because they shared the same controlling mind, that of Mr Rust.
22. I think that this is to approach liability the wrong way around. A joint tortfeasor cannot transfer primary liability for a tort from a first party to a second just by ending his joint design with the first and taking up an activity with the second, even a similar one. Mr Miller did not take me to any authority which supported such a proposition.
23. When considering whether the second party is liable as a primary tortfeasor, the only question is whether any act done by the second party satisfies the requirements of the relevant tort.
24. In argument Mr Miller moved away from his initial submission of primary tortfeasance caused by transferred liability to an alternative one: on the facts Central Moves should have been found directly liable for passing off – its acts had satisfied the relevant requirements.
25. I doubt that it was open to NGRS to run this new argument. But for understandable reasons Mr Rust raised no objection to it and the point was debated, so I will consider it.
26. The District Judge held that there was an actionable misrepresentation by CMUK on the Loadup website and that Mr Rust was jointly liable as the controlling mind of CMUK. There appears to be no barrier in law to a finding that a party to an action is liable as joint tortfeasor in respect of a tort committed by a non-party, the primary tortfeasor. By implication this was the view of the House of Lords in *CBS Song Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013. Amstrad was found not to be

jointly liable for infringing acts done by purchasers of Amstrad's audio systems, but not because no infringing member of the public had been joined as a defendant.

27. Had there been the necessary evidence, it would have been open to the District Judge to go on to make findings of fact that would have resulted in Central Moves also being liable. I have in mind findings that when members of the trade clicked on the link from January 2009 onwards and thereby found Central Moves' website, a substantial proportion of such persons would believe that Central Moves was member of NGRS because of the link, even though there was no reference of any kind to NGRS on Central Moves' website. On those hypothetical facts, Central Moves would have been liable for passing off as a primary tortfeasor.
28. It seems from the judgment that NGRS did not even argue that there was evidence to support such findings. Mr Miller did not appear below, so he did not know.
29. Mr Miller instead directed my attention to this paragraph of the judgment:

“[42] I also do not consider that Central Moves' use of the www.centralmovesuk.com domain name of itself could result in a misrepresentation. A domain name is akin to an address. It tells a user's web browser where certain information can be found on a network, much as a business' street address indicates to a user where business may be found in a town. Consider the situation where an NGRS member placed advertisements which included the street address of his business premises. If the NGRS member then sold the premises to a purchaser who was not an NGRS member, would the purchaser become liable for passing off merely by operating from that street address? It seems unlikely.”
30. Mr Miller criticised the accuracy of the District Judge's analogy with a street address and said that a correct understanding of the position led to the conclusion that Central Moves should have been found liable.
31. Even if the District Judge's analogy were inexact it would not matter. In this paragraph the District Judge undoubtedly concluded that Central Moves did not pass itself off as a member of NGRS. No reason was advanced why the District Judge was wrong to reach that conclusion given that NGRS, which bore the legal and evidential burden, had not established the facts necessary to show that Central Moves committed an act of passing off.
32. In my judgment there is no basis for criticising the finding by the District Judge that Central Moves was not liable for passing off, whether as a primary or joint tortfeasor.

Extended liability of Mr Rust

33. NGRS's alternative ground of appeal on liability was that CMUK's passing off did not end just because it stopped trading in December 2008. Neither, therefore, did Mr Rust's joint liability.
34. Passing off has been authoritatively analysed in terms of a misrepresentation by a trader. In the well-known passage of Lord Diplock's speech in *Erven Warnink BV v J. Townend & Sons (Hull) Ltd* [1979] AC 731, at 742, Lord Diplock stated five

characteristics of passing off, including “(1) a misrepresentation (2) made by a trader in the course of trade”. Lord Fraser’s alternative five conditions for passing off (at 755-6) also treat passing off as a wrong confined to traders. It has been made clear subsequently that ‘trader’ is to be given a broad meaning and may include, for instance, charities and churches (see *British Diabetic Association v Diabetic Society Ltd* [1996] FSR 1) and political parties (see *Burge v Haycock* [2001] EWCA Civ 900; [2002] RPC 28.)

35. That leaves open the question whether a dormant company, even on the loosest interpretation not a trader, can be liable for passing off in the circumstances of CMUK after December 2008.
36. Mr Miller did not pursue the law on this question. Nor will I. Certainly, if active trading is not a prerequisite to liability for passing off, there would be no reason why CMUK did not continue to pass off after December 2008 until it was dissolved. But I think the District Judge had his eye on a different point. He gave no express reason why he adopted the cut-off date of December 2008, but referred to it (at [75]) in the context of damages, to which I now turn.

Damages

37. The foundation of Mr Miller’s argument on damages was the speech of Lord Wilberforce in *General Tire Co v Firestone Tyre Co. Ltd.* [1975] 1 W.L.R. 819, in particular the identification (at 824-7) by Lord Wilberforce of three alternative approaches to the calculation of damages in an inquiry in a patent case: (1) loss of profit to the patentee resulting from loss of sales due to competition from sales of infringing products, (2) loss of licence royalties where the patentee exploits the patent by granting licences and there is an established royalty rate, and (3) according to the user principle, i.e. damages are equivalent to the royalties that would have been paid by the infringer had the patentee and infringer agreed a licence as willing licensor and willing licensee. Lord Wilberforce indicated that the third approach is to be adopted where either of the first two is not available (at 826).
38. The District Judge adopted the third approach, the user principle, referring to and following my judgment in *NGRS v Statham* [2014] EWHC 3572 (IPEC).
39. Mr Miller argued that by adopting the user principle the District Judge had wrongly ignored the hierarchy implicit in the three approaches to damages set out by Lord Wilberforce. NGRS licensed the use of its name and therefore the District Judge should have adopted the second approach and awarded damages based on the standard licence agreement, in particular the post-termination rates or the ‘run-off fee’ applicable under an NGRS membership agreement. Mr Miller submitted further that this what HH Judge Birss QC correctly did in *NGRS v Silveria* [2010] EWPC 015, resulting in damages of £633.33 per month for an early period of infringement, rising to £733.33 per month for a later period. By way of a secondary argument, Mr Miller said that if I were to reach the view that calculating damages this way resulted in too high a figure, I should at least use the run-off fee as the critical starting point and mark it down a bit as Judge Birss had done in *NGRS v Jones* [2011] EWPC 004. Even with a mark-down, the damages awarded in *Jones* came to £650 per month for the early period, rising to £866.67 per month for the later period.

40. Mr Miller submitted that the District Judge had been led astray from the correct application of law by the judgment in *Statham*. In *Statham*, he said, quite aside from the error of adopting the user principle at all, I had been wrong in several ways. To begin with, I had not based the hypothetical royalty on the run-off fee. Thereafter, having decided to use the annual membership fee, I had gone on to make further mistakes. First, I had ignored the headline annual membership fee of £5,200 and used the rate that NGRS charged its members in practice which, on the evidence, was between £1,500 and £1,800. (I used the higher figure of £1,800, so £150 per month). Secondly, I had wrongly assessed royalty on the hypothesis that the parties had negotiated a fee for use of the NGRS name only on the website on which the infringement had taken place. Thirdly, I had wrongly assumed that the negotiations would have been for a licence only for the period during which the infringing sign had appeared on that website, as opposed to the considering the number of full years into which the infringement fell.
41. Mr Miller made no bones about submitting that I had been wrong on all five counts. I had strayed from the correct guidance provided by the judgments in *Silveria* and *Jones*.
42. The difficulty with criticising my judgment in *Statham* is that after it was given NGRS applied to the Court of Appeal for permission to appeal. Shortly before the hearing of the present appeal, the solicitors for the defendants sent me a copy of the Order dated 17 March 2015 made by Floyd LJ in *Statham*, refusing NGRS permission to appeal. The reasons given by Floyd LJ were these:
- “I do not think there is a real prospect that the Court of Appeal would interfere with the decision of a specialist judge on the assessment of damages (necessarily an imprecise operation), given the following:
- 1) The judge awarded the claimants damages of £5,400 which is based on the generous assumption that the defendants would have paid the highest figure which the evidence showed that they actually charged for full membership in a situation where the defendants had made extremely limited and inadvertent use of the logo. He could equally well have chosen a much lower figure for annual membership, increased it by reference to the run off rates and arrived at a figure of the same order.
 - 2) It is not arguable that the hypothetical negotiation would yield a figure based on the run-off rates (£26,866.77) and the claimants rightly no longer contend for this figure. Instead the claimants now seek a figure of £10,500 (not contended for below and coincidentally £500 in excess of the open offer made by the defendants at the time the defence was filed). It is not clear to me on what basis they calculate this figure.
 - 3) Overall, it is not clear to me that £10,500 is any more clearly justified than the figure at which the judge arrived.”
43. Mr Miller did not say that NGRS took its application to appeal any further. He had no answer to the obligation on me to be consistent with Floyd LJ’s reasons, an obligation which I raised at the hearing.

44. Given those reasons and the refusal of permission to appeal, save for one matter I believe that I am entitled to assume that the approach taken in *Statham* was correct in law.
45. The one matter is the question whether the user principle was appropriate to the assessment of damages in the first place. That was not an issue raised in *Statham*.
46. I therefore turn back to Lord Wilberforce's judgment in *General Tire*. In his discussion of the second approach to assessing damages, appropriate where the patentee exploits the patent by the granting of licences, Lord Wilberforce referred to the judgment of Sargent J in *AG für Autogene Aluminium Schweissung v London Aluminium Co. Ltd.* (1923) 40 R.P.C. 107 and said this:

“These are very useful guidelines, but the principle of them must not be misapplied. Before a ‘going rate’ of royalty can be taken as the basis on which an infringer should be held liable, it must be shown that the circumstances in which the going rate was paid are the same as or at least comparable with those in which the patentee and the infringer are assumed to strike their bargain.”

47. Thus, a successful claimant in an inquiry as to damages cannot claim damages equivalent to the royalty charged under his standard licensing terms if the terms give the licensee the right to carry out acts significantly broader in scope than those which were unlawfully carried out by the infringer. The fact that the rightholder grants licences is not a trump card allowing him to fasten on to Lord Wilberforce's second approach and to require the infringer to pay the rightholder's usual royalty rate, whatever it may be and whatever may be the acts licensed for payment of the usual royalties.
48. Lord Wilberforce made this clear again when he turned to consider the third approach to assessing damages, i.e. the user principle at p.826 (he referred to the approaches here as 1, 2 and 3):

“3 In some cases it is not possible to prove either (as in 1) that there is a normal rate of profit, or (as in 2) that there is a normal, or established, licence royalty. Yet clearly damages must be assessed. In such cases it is for the plaintiff to adduce evidence which will guide the court. This evidence may consist of the practice, as regards royalty, in the relevant trade or in analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and of any other factor on which the judge can decide the measure of loss. Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant of weight, in the face of the more concrete and direct type of evidence referred to under 2. *But there is no rule of law which prevents the court, even when it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of judicial estimation of the available indications.* The true principle, which covers both cases when there have been licences and those where there have not, remains that stated by Fletcher Moulton L.J. in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1911) 28 R.P.C. 157, 164–165: though so often referred to it always bears recitation.

‘There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price — in other words, where he grants licences at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the courts consider that every single one of the infringements was a wrong, and that it is fair — where the facts of the case allow the court to get at the damages in that way — to allow pecuniary damages in respect of every one of them. I am inclined to think that the court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the court to consider what would have been the price which — although no price was actually quoted — could have reasonably been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure. But I am not going to say a word which will tie down future judges and prevent them from exercising their judgment, as best they can in all the circumstances of the case, so as to arrive at that which the plaintiff has lost by reason of the defendant doing certain acts wrongfully instead of either abstaining from doing them, or getting permission to do them rightfully.’” (Italics added)

49. Mr Miller emphasised the first sentence from the *Meters* case quoted by Lord Wilberforce. It cannot be isolated from the whole passage I have set out above, not least the two sentences from Lord Wilberforce’s speech which I have italicised.
50. It was not in dispute that the rights granted under NGRS’s membership scheme went much wider than the right to refer to ‘Guild’ on a single website – not even one used by the public. That being so and following the guidance provided by Lord Wilberforce, it was not appropriate to adopt the second approach to the assessment of damages unconditionally. Once turning to the user principle, the full annual membership fees, for instance, could have served as a starting point when assessing the hypothetical royalty. But necessarily the assessment would move on to a consideration of how much the annual membership fee should be marked down to take into account the limited nature of CMUK’s use of ‘Guild’. It is hard to see how that could have been better approached than by assessing what the parties would have agreed as willing licensor and willing licensee. In my view, the District Judge was correct to take such an approach.

51. There is a final matter to consider under this head, namely the period for the hypothetical licence that would have negotiated between NGRS and Mr Rust. The District Judge said that this was from 30 July 2007 to December 2008. As I discussed above, on one view of the law the presence of ‘Guild’ on the Loadup website continued to be a misrepresentation after December 2008 even though CMUK had ceased trading. But the specific issue is how NGRS and Mr Rust would have dealt with this period in the hypothetical negotiations.
52. It is in the nature of hypothetical negotiations in an inquiry as to damages that they may throw up matters unlikely to occur in real life. The present case provides an example: would the parties have agreed a royalty fee for the period from January 2009 until CMUK was dissolved in April 2011, during which period CMUK was dormant? The two key considerations in my view would have been (a) that such a licence would be of no benefit at all to CMUK and (b) that the presence of ‘Guild’ on the Loadup website in that period could cause no possible loss of business to other NGRS members since CMUK was not trading. Although he did not spell it out, in my view the District Judge was entitled to conclude, as he appears to have done, that the parties would have agreed that no royalty was payable for that period.

Costs

53. The District Judge awarded NGRS its costs on the small claims track scale, for the reasons he gave in his paragraphs 26-35. NGRS argued that it was entitled to its costs on the multi-track scale for the period between the start of the action and my order of 28 May 2015 which stated that the case should be ‘transferred’ from multi-track to the small claims track. The District Judge rejected the argument. NGRS renewed it in this appeal.
54. Part 63.27(1) and (3) provide:

“63.27

(1) A claim started in or transferred to the Intellectual Property Enterprise Court will be allocated to the small claims track if –

(a) rule 63.13, but not rule 63.2, applies to the claim;

(b) the value of the claim is not more than £10,000;

(c) it is stated in the particulars of claim that the claimant wishes the claim to be allocated to the small claims track; and

(d) no objection to the claim being allocated to the small claims track is raised by the defendant in the defence.

...

(3) If either –

(a) the requirements of rule 63.27(1)(a), (b) and (c) are satisfied, but in the defence the defendant objects to the claim being allocated to the small claims track; or

(b) the requirements of rule 63.27(1)(a) and (b) are satisfied, but not (c), and in the defence the defendant requests that the claim be allocated to the small claims track,

the court will allocate the claim to the small claims track or the multi-track in accordance with Part 26 (case management – preliminary stage). For that purpose the court will send the parties a directions questionnaire and require them to file completed directions questionnaires and to serve them on all other parties within 14 days.

55. Assuming that the requirements of Part 36.27(a) and (b) are satisfied, if the Particulars of Claim state that an IPEC case should be in the small claims track and the defendant agrees in the Defence, it is automatically allocated to small claims when the Defence is filed.
56. In an instance such as the present one, where the claim has been issued in the multi-track but the Defence requests that it be allocated to the small claims track, the claim remains for the time being in the multi-track and the question of allocation is decided at the case management conference. If the court decides that it should be heard in the small claims track, formally it is allocated to that track, for the first time, at the CMC. I therefore agree with the District Judge that although my order of 28 May 2015, following the CMC, stated that the case was transferred to the small claims track, strictly it was *allocated* to that track, for the first time.
57. CPR 46.11 and 13 provide:

“46.11

(1) Part 27 (small claims) and Part 45 Section VI (fast track trial costs) contain special rules about –

(a) liability for costs;

(b) the amount of costs which the court may award; and

(c) the procedure for assessing costs.

(2) Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.”

“46.13

(1) Any costs orders made before a claim is allocated will not be affected by allocation.

(2) Where –

- (a) *claim is allocated to a track; and*
- (b) *the court subsequently re-allocates that claim to a different track,*

then unless the court orders otherwise, any special rules about costs applying

—

- (i) *to the first track, will apply to the claim up to the date of re-allocation; and*
- (ii) *to the second track, will apply from the date of re-allocation.*

(3) *Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track, it may restrict those costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place.*

58. CPR Part 46 does not apply to the IPEC small claims track, see r.63.28(2) and (3). However, Part 27 is applied to IPEC small claims, see part r.63.28(2). A note in the White Book in relation to Part 27, at paragraph 27.14.2, points out that Part 46.11 and 13 govern what happens to costs when there is allocation or re-allocation into or out of the (regular) small claims track. It says:

“CPR r.46.11(2) governs the position in respect of costs prior to allocation. It provides that if a claim is allocated to the small claims track, then the small claim track costs provisions apply before allocation as well unless the court or a practice direction provide otherwise. If a claim is re-allocated from another track to the small claims track, then CPR r.46.13 applies and small claims track costs will only apply from re-allocation unless the court orders otherwise.

59. As that note states, CPR 46 provides guidance as to costs for the period preceding allocation or re-allocation, as the case may be, although the overall discretion of the court is reserved. In my view, exactly the same approach should be taken in relation to costs before the allocation or re-allocation into or out of IPEC small claims.
60. In my judgment, the District Judge was entitled, and was right, to say that the costs in the present case before its allocation to the IPEC small claims track on 28 May 2015 should be assessed according to the IPEC small claims rules.

Conclusion

61. The appeal is dismissed.