

Neutral Citation Number: [2019] EWHC 558 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
INTELLECTUAL PROPERTY LIST (ChD)

Claim No: IP-2019-CDF-000001

Cardiff Civil Justice Centre
2 Park Street
Cardiff, CF10 1ET

Monday, 11 February 2019

BEFORE:

HIS HONOUR JUDGE KEYSER QC
(Sitting as a Judge of the High Court)

BETWEEN:

HAPPY CAMPER PRODUCTIONS LTD

Claimant

- and -

BRITISH BROADCASTING CORPORATION

Defendant

Mr Prys Lewis appeared on behalf of the Claimant
Mr Norris appeared on behalf of the Defendant

APPROVED JUDGMENT

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JUDGE KEYSER QC:

1. This is an application by the claimant, Happy Camper Productions Limited, by application notice filed on Thursday 7 February 2019, for an interim injunction to restrain the defendant, the BBC, from broadcasting tomorrow night, Tuesday 12 February 2019, on BBC One Wales a comedy drama called “Pitching In”. The cause of action relied on is infringement of copyright. I am very grateful to both Mr Prys Lewis for the claimant and Mr Norris for the defendant for their assistance in succinct and focused written and oral submissions.
2. The work in which the claimant claims copyright is the script of a pilot episode, and perhaps the pilot film itself, of a comedy drama called “Down the Caravan”, written by one of the two directors of the claimant company, Kay Lockett; the other director is her husband, Jerry Lockett. The pilot film made from Mrs Lockett’s script was broadcast at various venues in Cardiff in March 2018.
3. “Down the Caravan” is based at a caravan site in West Wales. Its premise is that the owner of the site, a man in his 40s tricked into and thereafter trapped in a loveless marriage, finally succumbs to his long-suppressed passion for a lady who works on the site but, in the very act of doing so, also succumbs to a heart attack from which he dies a couple of days later. At his cremation is broadcast a self-made movie in which he addresses those present at the funeral and tells them of his plans, in particular that the site should thereafter be equally owned by his widow and his lover, thereby storing up predictable problems. The drama as it unfolded would have involved many characters and inter-relationships, until finally there was to be an ambiguous ending involving an offer of purchase by a larger enterprise, enough uncertainty being however left for the possibility of a further series to remain alive.
4. The claimant’s concern rests on the fact that the defendant’s programme, “Pitching In”, is a comedy set in a family-owned caravan park owned by a widower. The caravan park is in North Wales, not in West Wales. Paragraph 8 of the Particulars of Claim, which corresponds to the evidence in Mr Lockett’s witness statement, sets out numerous suggested similarities between the two scripts and films. I will not read out those similarities, which operate as a schedule of copying; they go to the location, the premise of the programme and the characters, including, for example, that each of them has a black character of West Indian origin but in fact hailing from Wales.
5. The case is put on the basis of threatened infringement of copyright both in script and film. It is difficult to understand the case so far as it relates to the film, and the argument before me focused on script. Infringement of copyright in the film would have to involve something in the nature of copying and pasting of the moving images from the pilot film; that does not seem to be suggested and would, one thinks, be utterly implausible. The claimant’s case is rather based on the allegation that the idea and features of the expression of the idea in its script have been used in the script for the defendant’s film.
6. There is some conflict on the evidence put forward by the two parties. The express conflict concerns the date when the script was delivered by Mr Lockett to Margaret Russell, who has acted as a producer of the defendant’s film. The implicit conflict

concerns the basic premise of the claimant's case: the supposition that Ms Russell, having obtained the script of the film, passed it on in some way so that it was used for the purpose of copying by those responsible for the script of the defendant's film.

7. Some points of chronology seem to me to be important. The claimant's evidence is that Mrs Lockett wrote the script in 2013 and that in July 2015 Mr Lockett, who was looking to market it, gave the script to Ms Russell at the Cameo Club in Cardiff, which is known for being popular with media and that sort. I have been given some extracts from documents which seem to confirm that at about that time Mr Lockett sent an email to Ms Russell asking her to have a look at something. She responded by pointing out that he had not actually put an attachment on his communication. The claimant's case is that shortly after that email exchange the two of them met and, instead of delivering the document by way of attachment, Mr Lockett handed it over in hard copy.
8. Ms Russell's evidence is that she has no recollection of receiving the script at that time and that, having previously worked for the BBC, in 2015 she working elsewhere in a different capacity, apart from a short period where she worked again for the BBC on a specific job. In other words, the tenor of her evidence is that she had no relevant involvement with the BBC at the time mentioned by Mr Lockett. The evidence from the claimant shows that at the end of August 2017 Mr Lockett sent the script by email to Mr Allen, who was responsible for Comedy Commissioning for the BBC in London, and received back a prompt response as follows:

“Unfortunately I can't see a future for 'Down the Caravan' at the BBC because we've commissioned a new show from Rob Beckett with a similar setting. It's on BBC One in a few weeks' time. All the best with landing your project somewhere.”
9. On 1 October 2017 Mr Lockett sent the script (whether for the first time or whether for now the second time) to Ms Russell by email. On 15 October 2017 there was an exchange of text messages between them. He wrote, “Did you have a chance to read 'Down the Caravan' yet?” She replied, “Hi Jerry, not yet. Just finished filming last week so it's been hectic but I will have time in the next few weeks.” On the face of it, that looks rather more consistent with the idea that it was on about 1 October 2017 that Ms Russell received the script: it would be a pretty lame excuse to say that things had been hectic because of recent filming if one had been sitting on the script for the previous two years. However, it is perhaps possible to see ways in which one could make sense of the alternative chronology, particularly if Ms Russell, having received the script, had then not been working for the BBC for two years. It is not my job to try to resolve conflicts of evidence at this hearing.
10. In February 2018 the claimant made the pilot film. I am told that it was funded by Mr and Mrs Lockett raising money by remortgaging their home. There were pilot screenings in March 2018. Shortly thereafter, in April 2018, there were two relevant meetings: one between Ms Russell and Mr Lockett and Cheryl Davies Keatley, whom he was engaging to be involved in directing the film; the other just between Ms Russell and Mr Lockett. In brief, Ms Russell said, “Sorry, the script is really not very good. It is not worth you sending this to London.” Mr Lockett informed her that indeed he had already sent it to London.

11. The exhibits to the claimant's evidence show that in August 2018 Ms Keatley sent to Mr Lockett an email saying, "Thanks honey, will send you the script [viz. of 'Pitching In']. You will be shocked and amazed." This evidence is said to show that the perceived similarities of the scripts were perceived by this stage.
12. I turn briefly to the chronology so far as it appears from the defendant's evidence. There are two particularly important statements: one from Daniel McGolpin, who is Controller, Programming and Daytime at the BBC in London, and the other from Colin James Paul McKeown, who is the sole director of LA Productions Company Limited. LA Productions Company Limited is an established production company with a track record for the BBC and others of producing successful programmes including programmes with scripts written by a team of scriptwriters, McAndrew and Hope, whose scripts have been successful in particular apparently in a drama called "Taxi for Linda". Their evidence is that there had been initial ideas that the BBC might commission a spin-off from "Taxi for Linda" but decided instead to look at a different project. In April 2016 the BBC held initial discussions with LA Productions about the possibility of a drama which was to be set in a caravan park in the North of England. By June 2016 LA Productions had got McAndrew and Hope on board as the writers. McAndrew and Hope had produced the pitch document (that is, the outline of where the script was going) by September 2016. That document is exhibited to Mr McGolpin's witness statement and it shows clearly the idea for the programme, then called "Butterkiss Sands", and sets out both the idea of the story and the main characters. The first script was submitted in June 2017; I have seen it. I am told that the script was not finalised until February 2018. In September 2017 it was agreed that, as the initially proposed avenue of funding had been closed down and in order to try to get funding from BBC Wales, the setting would be changed so that the drama would now be on the North Wales coast rather than in the North of England. Funding for the drama as so revised was approved in February 2018 and in that month, when the script was also finalised, Ms Russell had her first meeting with LA Productions. That is the evidence for the defendant.
13. The obvious point that the defendant makes, accordingly, is that, even if Ms Russell is wrong and she got the script in 2015, there are various hurdles to surmount before one is able to forge the link required to suppose that copying took place. One is that Ms Russell and, apparently, Mr McKeown are being dishonest because there must have been a form of collusion in passing the script on. Another is that the script will have had to go to LA Productions and to McAndrew and Hope who, as I say, are an established scriptwriting team, and that must all have happened in time for the production of the pitch document in September 2016. If the defendant's chronology is correct, the similarities regarding a location in Wales are a mere coincidence and therefore irrelevant, because the location resulted from a late amendment.
14. As I have said, the cause of action alleged is infringement of copyright under the Copyright, Designs and Patents Act 1988, on the basis that the claimant company has copyright in the script of the episode of "Down the Caravan" as being an original literary work within the meaning of section 1(1)(a) of the Act. The protection of copyright so far as original literary works are concerned rests in the protection of the skill and labour that the author used in creating the expression of the ideas in the original literary work.

15. Mr Norris makes the point that there is no evidence from the author herself and that there is no evidence to show that the script is an original literary work. For the moment, I am prepared to assume that it is a reasonable inference that it is an original literary work. On this basis, the authorship of the work is that of the person who creates it (see section 9(1) of the Act) and the author of the work, here Mrs Lockett, is the first owner of any copyright in it, subject to certain provisions. In the case of an employee making the work in the course of employment, the employer is the owner of the copyright. There is no evidence that Mrs Lockett was employed by the claimant; indeed she is said to have written the work in 2013, which is before the incorporation of the claimant company. So it would appear that she is the owner of the copyright. If the company has the copyright, it can only be by way of assignment of the copyright. There is no evidence of such an assignment. Nevertheless, for the moment I pass that point over, on the basis that this appears to be a husband and wife company, formed specifically for the purpose of exploiting the copyright in the script. Even though the company is a different legal person, in the circumstances I do not think that an application at this stage ought to turn on such a point.

16. Section 16(1) of the Act provides in part:

“The owner of the copyright in a work has ... the exclusive right to do the following acts in the United Kingdom—

(a) to copy the work ... ”

Section 16(3) of the Act provides in part:

“References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

(a) in relation to the work as a whole or any substantial part of it,
and

(b) either directly or indirectly ...”

The essence of the case advanced is that there has been copying of a substantial part of the script.

17. I am concerned with an application for the grant of an interim injunction. The test to be applied is accordingly the familiar test in *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] AC 396. In very broad terms, the purpose of the exercise, without adjudicating on the case, is to seek to ensure that if one makes a mistake it is the least bad mistake one can make, in this sense: one is concerned with the question, Is it worse to have granted an injunction on an interim basis if ultimately it should be found that there is no entitlement to an injunction, or to have refused an injunction if ultimately it should be found that there is an entitlement to an injunction? That is the broad idea behind the test. I shall consider the test in rather more detail.

18. The first question is whether there is a serious issue to be tried. That sets the bar low. In *American Cyanamid* itself, Lord Diplock said that it is sufficient if the court asks whether the applicant's claim is "not frivolous or vexatious", although he also put the matter slightly differently in terms of asking whether there was a "real prospect" that the claimant would succeed in the claim for a permanent injunction at the trial. These are meant to be two formulations of the same test, although they have somewhat different emphases.
19. For reasons I shall come to presently, I do not think that the first question needs to be answered for the proper determination of this application. However, I doubt whether it can properly be said that there is a serious question to be tried on the evidence. There are two reasons for this. First, as I have mentioned, even if I can properly infer that copyright exists in the script, there is a real difficulty on the evidence in supposing that it is vested in the claimant. Nevertheless, as I have said, I would not let this doubt alone stand in the way of granting an injunction if I felt it were otherwise justified. Second, however, the claimant has a real problem in respect of the allegation of copying. I entirely understand why Mr and Mrs Lockett think that copying has gone on here. Ms Russell's involvement clearly spans both sides of the dispute, if I can put it that way. She was involved at a relatively early stage (how early is in dispute) with the claimant's script, and she has been directly involved in the production of the defendant's programme. She said that she did not like the claimant's script and shortly thereafter was found to be involved in a venture involving a script on a broadly similar theme. But closer analysis shows that the matter is far from that simple.
20. Mr Norris made a valid point when he suggested that the claimant is, so to speak, doing itself down when it finds evidence of copying in the similarities that are set out in the passage already mentioned in the Particulars of Claim. At a very broad level, there are clearly some similarities; I have referred to some of those. But the imaginative idea underlying the claimant's programme is very different. The claimant's programme revolves around the very distinctive idea of the deceased having broadcast more or less from the grave, to the chagrin and dismay of all those attending at his funeral. That is more than incidental; it is an important part of the whole concept. More importantly, though, the claimant is not in a position to identify copying of the script that Mrs Lockett wrote. There are some similarities at quite a high level of generality. But if one asks whether there has been copying of a substantial part of the literary work, the case does not seem to get off the ground. In this regard, I have been referred to passages in the judgments of Lloyd and Mummery LJ in *Baigent v The Random House Group Ltd* [2007] EWCA Civ 247, the "Da Vinci Code case". I have regard to those but shall not refer to them in detail. The claimant simply does not show that it is plausible to suppose that there has been any, let alone substantial, copying of the text. On the basic question of demonstrating a serious issue on copying of the script, the claimant falls short. On the basis of the evidence before me, the claimant, in response to the defendant's evidence, is reduced to saying, in effect, "Come off it. What you say cannot be true because of the obvious copying that has gone on." The point is that one cannot look at the chronology and, as it were, infer that similarities are down to copying. One has to rest on an initial assumption of copying, from which one would infer that the defendant's chronology was false. And the lack of particularity with which the supposed copying is identified presents the claimant with a huge problem in that regard.

21. However, even if I were to assume that there was a serious question to be tried, I should still refuse an injunction. In the first place, damages are an adequate remedy. The point has been made by Mr Norris that the claimant has no scripts for subsequent episodes and does not complain of infringement of any such scripts. There is a script for a one-off pilot episode, albeit that the script might have value in terms of its potential to lead to future episodes. The purpose of the claimant company is to exploit that script commercially. Its own evidence is that it would do that by selling the copyright or licensing the use of the script. If the copyright has any value, it is necessarily a commercial value. The valuation of an infringement of copyright (that is, the assessment of the extent if any to which the infringement has diminished the value of the copyright) may be a difficult matter. Lots of valuation exercises in all sorts of areas are difficult matters. That is not itself a good reason for holding that damages are not an adequate remedy. It just means that the court's task may be more or less difficult in a given case. Mr Norris submits that in this case damage to the copyright would be quite easy to value. I do not have to go that far. But it seems to me that the remedy in damages would be adequate and sufficient. That suffices to dispose of the application for an interim injunction.
22. If, however, I were wrong—if there were a serious question to be tried and damages were not an adequate remedy—I should have to consider the balance of convenience. In that regard, the matter lies all one way, namely in the defendant's favour. The claimant's script was written in 2013 and has had no commercial success until now. There is no indication that it has a real prospect of commercial success. Any harm to its value can be compensated in damages. On the other hand, if an injunction were granted, the defendant on short notice will have to pull from its schedule a programme that is listed for broadcast tomorrow evening. That has costs implications which are set out in its supporting evidence. In my judgment, it also has implications in terms of reputational damage: all the defendant could do would be either to say that it had ended up in a legal dispute about the programme (which, put like that, would be potentially very awkward) or to say there had been a copyright challenge (which would be equally awkward) or to say nothing and simply pull the programme. In the last case, as well as the embarrassment of pulling without explanation a programme that has been advertised, the defendant would lose from its schedule a programme that fulfils part of BBC One Wales' obligation in respect of the broadcasting of programmes with Welsh content. My understanding on the evidence is that the replacement programme at this juncture would not be a programme that would fulfil that requirement.
23. There are two further points. First, this application is dreadfully late. The evidence indicates that the claimant has known about this matter, at least to some extent, since August 2018. That is a six-month period, yet this application comes at the last minute. That in itself means that strong justification, and something rather more than simply commercial damage in respect of copyright to a comedy programme, would be required for the grant of an injunction in these circumstances. Second, there is the question of a cross-undertaking in damages. The BBC's evidence suggests that, quite apart from things which cannot be compensated in damages, it would stand to incur losses in the order of £130,000. For the BBC that may of course not be a dreadfully large amount of money, as Mr Prys Lewis indicates, but that is not really the point. Those are losses that it would be entitled to be indemnified for if it were the subject of an injunction to which the claimant failed to show its entitlement at trial. The claimant company is a dormant

company. It exists solely for the purpose of holding and exploiting the copyright in this particular work. It has no apparent means of paying damages. Its directors, as Mr Prys Lewis says, would then have a choice whether or not to pay. That is cold comfort when it comes to an undertaking in damages to protect the BBC at this stage. Even if an undertaking were to have been offered on behalf of the directors, which it has not been, there would still be the question of their personal ability to meet an award in damages, especially where it appears that they remortgaged their home in order to fund the pilot.

24. For all of those reasons I have no hesitation in refusing the application. As I say, I am grateful to both counsel. I should say that Mr Prys Lewis said everything that could be said in support of the application. I am grateful for that and also for his candour in accepting what he could not say.

(After further submissions)

25. I am assessing costs on the standard basis. It is invidious for me to descend too much into the detail of a schedule that is duly verified. Broadly speaking, in the circumstances and given the issues, I do not regard the figures or the times claimed as surprising. It might be questioned whether three hours reviewing counsel's skeleton argument was necessary but that is something of a quibble. Looking at the matter in the round, having regard to reasonableness and proportionality, and at the risk of appearing arbitrary, I propose to assess the costs at £20,000. Subject to any further representations, that sum will be payable within 14 days.

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This transcript has been approved by the Judge