

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 27 January 2020

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

Between :

DR. DONNA MOLAVI

**Claimant/
Applicant**

- and -

(1) GUY HIBBERT
(2) THE FORGE ENTERTAINMENT LIMITED

Defendants

-and-

(1) NIGEL MCCRERY
(2) BRITISH BROADCASTING CORPORATION

Respondents

MARK ENGLEMAN (instructed under Direct Access Scheme) for the Claimant
EDWARD CRONAN (instructed by Judge Sykes Frixou) for the First Respondent
ANDREW NORRIS (instructed by the IP Litigation Dept of the BBC) for the Second
Respondent

Hearing date: 27 November 2019

APPROVED JUDGMENT

John Kimbell QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is an application by the Claimant for an order under CPR 19.2 that Nigel McCrery (**‘Mr McCrery’**) and the British Broadcasting Corporation (**‘the BBC’**) be joined as Defendants to her existing claim against Guy Hibbert and The Forge Entertainment Limited. Both the Respondents to the application and the existing Defendants oppose the application. They submit that the Claimant’s application does not satisfy the conditions of CPR 19.2(2)(a) or (b). The Respondents also say that the claims the Claimant wishes to advance against them are not reasonably arguable in any event and that is a further reason why no order for joinder ought to be made.

The Proceedings as presently constituted

2. The Claimant is a qualified dentist. In 2011, she gave up dentistry in favour of screenwriting. She has had a number of screenwriting mentors, including the First Defendant (**‘Mr Hibbert’**).
3. Mr Hibbert is an established professional film screenwriter. He has won four Bafta TV awards and was the recipient in 2009 of the World Cinema Screenwriting Award for the film *Five Minutes of Heaven*.
4. The Second Defendant (**‘Forge’**) is an independent drama production company based in Clerkenwell. It was set up in 2014 by George Faber, who is now the Managing Director. It has produced amongst other things *The Miniaturist* for BBC1/WGBH (2017), *Ackley Bridge* (2017) for Channel 4 and most recently *Dark Money* for BBC1.

5. The Claimant's case against Mr Hibbert and Forge is that in April 2017, Mr Hibbert told her that he and Mr McCrery were working on an idea for a new TV series about a forensic pathologist which they wanted to pitch to ITV with the assistance and support of Forge. She says she was given a document containing six pages of ideas which had been produced by Mr Hibbert and Mr McCrery. She says she was told by Mr Hibbert that a meeting had been set up for 19 April 2017 to discuss the idea which would be attended by someone from ITV.
6. The Claimant claims that Mr Hibbert, with whom she was by this time in an intimate relationship, was on the point of pulling out of the meeting because he was not convinced that the ideas that he and Mr McCrery had come up with were good enough to be of interest to ITV. She says that she agreed with Mr Hibbert that if she could come up with a new idea for a series about a forensic pathologist, he would pitch it to ITV and that if it were accepted, she would write it.
7. The Claimant says that she worked through the night on 17 and 18 April to produce an outline for the main character ('**Work 1**') and synopsis for an opening episode ('**Work 2**') in time for the pitch to ITV on 19 April at Forge's offices.
8. Work 1 is 24 lines long. Work 2 is barely one side of A4 in length. It contains a four sentence long 'Plot line Architecture' and eight point 'Plot sub-structure'. Works 1 and 2 were informally referred to as "*Iran*" or "*Iran and cover up*".
9. The meeting duly took place as planned at Forge's offices on 19 April. The Claimant's case is that at the meeting, Works 1 and 2 were presented as being

by Mr Hibbert in breach of her agreement with him. Her role in their creation, she says, was kept secret. The use made of Work 1 and 2 at the meeting is said to have constituted an actionable breach of confidence by Mr Hibbert and Forge as well as an infringement of the Claimant's copyright in Works 1 and 2.

10. The Defendants deny any wrongdoing. The Defendants say that two documents had been prepared in advance of the meeting: one by Mr McCrery and the other by Mr Hibbert. Both contained a short character outline of an independently-minded male forensic pathologist. Mr McCrery's main character was called Prof Jack Warner. Mr Hibbert's main character was called Edward Burrows. Mr Burrows was said to be as much a detective or psychologist as a pathologist.
11. The seven plot outlines in the documents produced by Mr McCrery and Mr Hibbert were virtually identical. The Defendants say that both Mr Hibbert's and Mr McCrery's ideas and those of the Claimant were both pitched to ITV at the meeting. They say they did not hand over either a copy of their plot outline or the Works 1 or Work 2. They say simply spoke about all the ideas in general terms. In so far as they pitched the Claimant's ideas, they plead that they had her express or implied consent to do so.
12. The Claimant alleges that it was her idea which attracted ITV's interest and that ITV went as far as to commission her idea but that work was stopped when ITV was told that Forge had "lost the writer". The writer being referred to was Mr Hibbert rather than the Claimant.
13. In his Defence, Mr Hibbert says that by September 2017, he had become too busy to take forward the idea of a forensic pathologist show. ITV informed

Forge on 13 February 2018 that it would not proceed any further with the project. Although her claim for damages is not presently expressed in terms of a loss of chance of ITV commissioning her idea as set out in Works 1 and 2, it seems to me that is what it must in substance amount to. I will refer to the existing claim for the sake of convenience as the ‘ITV claim’.

Works 3,4 and 5

14. During 2018, the Claimant continued to work on and develop the storyline of Works 1 and 2. It acquired the title *London Dark Web*. The idea was expressed in the form of three works, namely:
 - i) ‘**Work 3**’: A 22-page screenplay.
 - ii) ‘**Work 4**’: A 7-page synopsis
 - iii) ‘**Work 5**’: A 61-page screenplay (incorporating Work 3).
15. Works 3 and 4 were completed by 20 March 2018 at the latest when they were sent to Mr Stephen Wright, the creative director, of an independent production company based in Hampshire called Two Cities Television Limited (‘**Two Cities**’).
16. Work 5 was completed by 24 July 2018 at the latest when it was sent to Mr Wright.
17. Mr Wright informed the Claimant on 29 August 2018 that Two Cities was not interested in taking *London Dark Web* screenplay idea forward.
18. The Claimant’s personal relationship with Mr Hibbert terminated in May 2018.

Pre-action protocol letters and commencement of proceedings

19. The Claimant's first formal complaint letter about the misuse of Works 1 and 2 in the pitch to ITV was sent to Forge on 25 May 2018. Formal pre-action protocol letters were sent to both Mr Hibbert and Forge followed in September 2018.
20. The Claimant commenced proceedings in the Intellectual Property and Enterprise Court ('IPEC') on 31 October 2018. The claim pleaded was the ITV claim.
21. The claim form says:

"The Claimant's claim against the First Defendant is in breach of the express and implied terms of an oral contract, estoppel (sic), infringement of the Claimant's copyright in 2 works concerning the plot of a television broadcast and breach of confidence concerning the said plot.

The Claimant's claim against the Second Defendant is in inducing breach of the said oral contract infringement of the Claimant's copyright in said 2 works and breach of confidence concerning the said plot"

22. The Particulars of Claim which accompanied the Claim Form are settled by Mr Engelman. He is an associate professor of intellectual property law as well as being member of the intellectual property bar who accepts instructions on a public access basis. It is clear that the Claimant, assisted by Mr Engelman, was satisfied that she had a complete cause of action arising from an interference with her rights in Works 1 and 2 by Mr Hibbert and Forge to ITV in April 2017.
23. Before either Defendant had served a defence to the ITV claim, the Claimant served a Part 18 Request. The Defendants refused to provide the information

sought. The Claimant's application dated 11 December 2018 for an order that they do so was refused by HHJ Hacon on 11 January 2019. Shortly thereafter, the Defendants served their Defences.

24. In the ordinary course of events, the Claimant would have been expected to serve a Reply to both defences which would have led to a case management conference before the summer and directions for a trial of the ITV claim in late 2019 or early 2020. Unfortunately, this is not what happened.

The broadcast of *Betrayal*

25. On 4 and 5 February 2019, the BBC broadcast *Betrayal*. *Betrayal* is episode nine of season twenty-two of the long-running BBC crime series *Silent Witness*. The writers credited by the BBC for *Betrayal* were Michael Crompton and Virginia Gilbert.
26. The *Silent Witness* format itself dates back to 1994 when it was commissioned by the BBC. The idea for the format was invented by Mr McCrery and was based on a real-life forensic pathologist, Helen Whitwell, who worked for the West Midlands Police. Series one of *Silent Witness* was broadcast in 1996.
27. Mr McCrery ceased to be actively involved in the programme in 1998. Under an assignment of rights agreement signed in 2001, he is credited in each episode as being the original deviser and receives a fee. He retains the right to produce books using the *Silent Witness* name and format.
28. The synopsis of Part 1 of *Betrayal* provided on the film website IMDb.com is as follows:

Nikki's competence is called into question in a court case where a second post-mortem has a finding contrary to hers. Amanda Long, the pathologist providing the second finding had a previous relationship with Prof Chamberlain and is prepared to take advantage of that. Two rowers find a floating body in a wetsuit, a research chemist employed by a pharmaceutical company: Nikki does the post-mortem. Because of the previous court case, the senior investigating officer is reluctant to accept Nikki's finding. Nikki is excluded from internal discussions, becomes defensive and feels increasingly isolated. The investigation into the researcher's death raises questions about drug use in the company. The company CEO encourages staff to discredit the Lyell Centre. Nikki surreptitiously repeats and extends her original postmortem, with an independent observer reporting on camera.

29. The synopsis for Part 2 of *Betrayal* again on IMDb.com is as follows:

Nikki's repeat post mortem produces a surprising result, which Thomas shares with Amanda. Things start to go further wrong at the pharmaceutical company. The court recognises that something has gone seriously wrong in the case, and orders that a new investigation be carried out, independent of the two previous labs. Another researcher at the pharma company is found dead, with a suicide note implicating himself and the previous dead chemist. Clarissa confronts the CEO while Jack checks the crime scene. Nikki discusses the basis of her decisions with a junior colleague: the discussion clarifies her thoughts on presentation to the court. An unexpected relationship is exposed, and the solution falls into place, albeit not completely satisfactorily for Nikki.

30. On viewing *Betrayal*, the Claimant says she immediately formed the view that the plot bore a “striking similarity” to the plot of her Works 1- 5. In a witness statement filed in May 2019, the Claimant said of *Betrayal*: “It is a copy of my 5 Works”.

The Betrayal claim

31. The Claimant immediately wrote to the BBC and to Mr McCrery. Her letters of 26 February 2019 complain that *Betrayal* represented a breach of copyright and breach of confidence. I will refer to her complaint as the Betrayal Claim. However, rather than threaten new proceedings against the BBC and/or Mr McCrery, Mr Engelmann, writing on behalf of the Claimant proposed to the

BBC and Mr McCrery that they be joined as Defendants to the ITV claim. Both rejected the idea.

32. Mr McCrery's response to the substance of the allegation made against him was that he had had no involvement with Silent Witness since 1998 and had nothing whatsoever to do with Betrayal.
33. The response of the BBC was that Ms Gilbert and Mr Crompton had created the story without any access to any of the Claimant's ideas contained in Works 1 - 5. The BBC sent the Claimant the two draft treatments of the story and three draft scripts produced by Virginia Gilbert to show how the story for Betrayal came into existence and developed up to the point of broadcast. It was they said clear that it was developed independently of any contact with either *Iran / Iran Coverup* (Works 1 – 2) or *London Dark Web* (Works 3 -5).
34. The Claimant's response to these denials was: (a) produce and serve a draft amended Particulars of Claim which sought to combine the ITV claim and the Betrayal claim and (b) issue an application seeking an order that Mr McCrery and the BBC be joined to the present proceedings pursuant to CPR 19.2.

The order of 31 July 2019

35. Following an exchange of submissions in writing, on 31 July 2019, HHJ Hacon ordered that the present proceedings be transferred out of IPEC and into the general intellectual property list of the Chancery Division. The judge adjourned the Claimant's joinder application.

36. HHJ Hacon reserved the costs incurred to date but ordered that the IPEC costs cap should apply up to the date of the order. The costs incurred up to the date of transfer are not insignificant. The Claimant's costs of the joinder application alone are said to be £155,282 and the BBC's costs of responding to the application are £32,179.

The application

37. The joinder application was not listed for hearing until 27 November 2019. It occupied a day of court time. At the hearing Mr Engelman relied on a 39 page skeleton argument dated 22 November 2019 and three witness statements by the Claimant dated 12 December 2018, 9 May 2019 and 26 June 2019. I will refer to these statements as Molavi 1,2 and 3 respectively. It was Molavi 2 which was referred to in the application notice as supporting the application.
38. Mr Norris, who appeared on behalf of he BBC relied on his skeleton served for the hearing listed in July and the witness statements of Richard Stokes dated 13 June 2019 and 11 July 2019, Virginia Gilbert dated 12 June 2019, Stephen Wright dated 13 June 2019 and 11 July 2019 and Dr Dean (undated).
39. Mr Cronan, who appeared on behalf of Mr McCrery relied on a skeleton updated since the hearing July 2019 and the evidence served by the BBC supplemented by two short witness statements from Mr McCrery.
40. The evidence filed for the application ran to five lever arch files in total.
41. Neither of the Defendants to the ITV claim were served with notice of the joinder application. In letters sent by Mr Engelmann to both Defendants dated

11 June 2019, they were informed that as the joinder application was not “against” them there was no need for notice to be given or for the evidence in support of the application to be made available to them.

42. In my judgment the refusal of the Claimant to serve the application and supporting evidence on the Defendants was mistaken. Whilst it is true, that the CPR 19.2(2) does not expressly require all applications to join or substitute a party to be served on the existing parties, it seems to me to be a matter of common sense that the existing parties to these proceedings ought to be served with copies of the application notice and evidence.
43. Where the addition of one or more parties will potentially increase the cost, delay or length of the existing proceedings, in my judgment, the existing parties ought to be served with the application and evidence in support. This was the practice in the Chancery Division under RSC O.15 r. 6: see *The Supreme Court Practice 1999* Vol 1 15/6/17 at p.229 citing Tildesley v Harper (1876) 3 Ch.D. 277 and Re Colbeck (1888) 36 W.R. 259.
44. Under CPR 1.3, parties are required to help the court further the overriding objective. When the Defendants asked the Claimant for sight of the joinder application notice and evidence, they ought, in my judgment, to have been granted it pursuant to CPR 1.3.
45. If there is substantial dispute about whether joinder is appropriate, in particular where it appears that joinder may cause delay or increase costs in the proceedings, then a case management conference ought generally to be convened for the court to consider the case management implications of the

proposed joinder in the round. While exceptionally some purely formal applications involving the substitution of say ‘X PLC’ for ‘X Ltd’ may not require such an approach and may well be capable of being dealt with by consent and without a hearing, a disputed application to add substantial new causes of action against new Defendants to an existing action seems to me to be a situation where the existing parties ought to be given notice of the application and for the application generally to be heard at a case management conference.

46. The Defendants in this case did eventually receive notice of the hearing and copies of the evidence served (from the Respondents). Mr Johnson for the Second Defendant served submissions in writing dated 21 November 2019. I found his submissions of great assistance, not least because they addressed the case management implications of the proposed joinder in greater detail than the skeletons submitted by either the Applicant or the Respondents. Neither of the Defendants in the ITV claim attended the hearing.

CPR 19.2

47. There is no inherent or general discretion to add a new party to existing proceedings. In re Pablo Star [2018] 1 WLR 738 at [47] Sir Terence Etherton MR put it very simply:

“CPR r 19.2 confers a discretion on the court to join a party if the conditions in rule 19.2(2)(a) or (b) are satisfied”.

48. CPR 19.2 (2) provides as follows:

“The court may order a person to be added as a new party if –

- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

49. The two limbs are different and independent. Even if one or other (or both) are satisfied, the addition of a party does not follow automatically. The use of the word ‘may’ in the first line shows that the court must stand back and exercise an overall discretion even if one or other (or both) of the threshold criteria are satisfied.

50. The power to add a party to existing proceedings is essentially a case management decision. An order will only be made if it would further the overriding objective in the concrete circumstances of the case. This is clear from In Re Pablo Star at [60], in which the following was said:

“In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) the lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1.”

51. The starting point for any application ought to be to identify which of the two limbs in CPR 19.2 (2) is being relied upon. The Claimant’s application failed to do this. Neither the application notice nor the draft order identifies the basis of

the order sought. The Claimant's 25-page witness statement served in support of the application also fails to identify which part of CPR 19.2(2) is being relied upon.

52. The Claimant's updated skeleton argument served for this hearing is also completely silent as to the basis of the application. Moreover, it failed to engage with any of the case management implications of the order sought. When I asked Mr Engelman to identify which of the limbs of CPR 19.2(2) he was relying on as justifying the joinder of each of Mr McCrery and the BBC to the ITV claim, he eventually said that he relied with equal force on both provisions in relation to both of the Respondents. I was left with the uncomfortable impression that he had given little if any consideration to this question before the hearing. This was not a promising start to the application.
53. It also proved to be a somewhat tortuous and time-consuming exercise to obtain basic case management information about the ITV claim and the potential impact of combining it with the Betrayal claim. Had the application been made at a case management conference, the court would have at least been provided with the standard information contained in the case management information sheets.
54. Eventually, by means of oral questions and answers at the hearing the following case management points emerged:
- i) The ITV claim would, if tried as presently constituted, be suitable for trial in the short and flexible trial scheme. It would be at most a 2-3 day

claim with factual evidence from at most four witnesses, limited disclosure and no expert evidence.

- ii) The Betrayal claim would involve between nine witnesses of fact, would involve far more disclosure than the ITV claim and may require expert evidence (on word clusters / comparative script analysis).
- iii) The Betrayal claim would not be suitable for trial in the short and flexible trials scheme. It followed that joining the Betrayal claim to the ITV claim would inevitably take the ITV claim out of the short and flexible trial scheme.
- iv) The ITV claim is of uncertain value but it is not a high value claim. The Betrayal claim had the potential to be worth significantly more than the ITV claim because of the success of the Silent Witness brand
- v) If joinder were ordered, progress in the combined action would not be swift. Although the Claimant had produced a draft amended Particulars of claim, no application had been issued for permission to amend. The draft Amended Particulars of Claim was said to be merely indicative of how the claim might be put but the Claimant wished to reconsider the draft if joinder were ordered.

55. The status of the draft amended Particulars of Claim was further confused by the fact that prior to the adjourned hearing of this application in July 2019, the Claimant had asked IPEC to order that the “existing pleadings of C, D1 and D2 stand as pleading for trial in the Ch.D” after transfer to the general intellectual property list. This would suggest that at least at one stage the Claimant was

intending to produce a separate pleading for her claim against the BBC and Mr McCrery.

The application under CPR r 19.2(2)(a)

56. In re Pablo Star, the Court of Appeal held in [48] that the first limb of CPR 19.2(2) should be interpreted as containing two conditions: (1) the new party can assist the court to resolve the matters in dispute in the proceedings and (2) it is desirable to add the new party to achieve that end”. The Court of Appeal also stated that CPR 19.2(2) ought to be given a wide interpretation. The words “in dispute” ought to be read as “in issue”.
57. In light of the matters in issue in the ITV claim, it is in my judgment obvious that the BBC cannot assist the court to resolve them. The BBC had no involvement at all in the pitch to ITV.
58. As to the application in respect of Mr McCrery, in my judgment, that does potentially satisfy the first condition of CPR r 19.2(2)(a). He was clearly involved in the crucial meeting alongside Mr Hibbert. He may well be able to assist the Court with resolving the matters in dispute between the Claimant, Forge and Mr Hibbert.
59. However, in my judgment it is not desirable to add him as a new party to achieve that end. Such assistance as he can provide to the court can be achieved as a witness. It is open to either or both parties to approach him for a further witness statement or for permission to rely on his two statements produced to date. He has stated what he recalls of the run up to the pitch to ITV in paragraphs 16 –

20 of his witness statement dated 13 June 2019. He has also voluntarily provided documents requested by the Claimant.

60. In the circumstances, in my judgment, the court will gain nothing of substance from ordering him to be added as a Defendant. All the matters in dispute can be resolved fairly without the addition of Mr McCrery as a Defendant. To take this step would not be in accordance with the overriding objective because it would only increase costs and delay without assisting in the resolution of the issues.
61. Mr McCrery was not joined as a Defendant to the ITV claim because the Claimant did not perceive him as having breached any duty to her. The reason why the application has been made to join Mr McCrery now is because of his involvement with Silent Witness and that is of relevance only to the Betrayal claim. Whilst it is true that the draft amended Particulars of Claim seek to make him formally a party to the breach of confidence in relation to Works 1 and 2, that seems to me to be without any proper evidential basis. Mr McCrery has said in his second witness statement that he knew nothing about any agreement between Mr Hibbert and the Claimant. He also says he did not see Work 1 or 2. Mr Hibbert in his witness statement confirms that he did not show either document to Mr McCrery. This is unsurprising given that on the Claimant's own case her agreement with Mr Hibbert was made orally only a day or so before the meeting with ITV.
62. The Claimant did not assert that since issuing the claim form in these proceedings that she had discovered any new facts about Mr McCrery's involvement with the pitch to ITV which constituted a basis for a claim against him or which made it desirable that he be joined as Defendant. In my judgment,

there is no evidential foundation that Mr McCrery did anything other than attend the meeting with ITV in order to pitch of his own and Mr Hibbert's work. To the extent that Mr Hibbert went beyond that Mr McCrery is a potential witness to a claim against Mr Hibbert and/or Forge but nothing more.

63. In so far as the application to join the BBC and Mr McCrery is made under CPR 19.2(1)(a) it is accordingly rejected.

CPR 19.2(1)(b)

64. For an applicant to succeed with an application under CPR 19.2(1)(b), three conditions must be met: (1) an issue must be identified between the proposed new party and an existing party (2) the issue must be connected to the matters already in dispute in the proceedings (3) it is desirable to add the new party so that the court can the issue identified in condition (1).
65. As to Condition (1) it is clear that it is not necessary for the issue between the new party and the existing party to be a cause of action: see XYX v Transform Medical Group [2014] EWHC 4056 at [22], in which a number of authorities are cited to the this effect.
66. Condition (2) is the critical condition. The issue between the existing and the proposed new party must be *connected to* the matters already in issue in the proceedings. The nature of the required connection is not prescribed. In some cases, the connection will be in the form of an overlap of factual evidence between the existing proceedings and issue with the proposed new party – see, for example, Dunlop Haywards (DHL) Ltd. v Erinaceous Insurance Services Limited [2009] EWCA Civ 354 at [88].

67. In other cases, the connection is that the new party is concerned in with the outcome in some way such that it is desirable to have all parties connected to the dispute before the court in one set of proceedings so that they are bound by the outcome. This was the case for the excess insurers proposed to be added as defendants in Dunlop Haywards (DHL) Ltd. v Erinaceous Insurance Services Limited [2009] EWCA Civ 354 at [89].
68. In some cases, it is an existing Defendant who raises an issue which makes it desirable that another party be joined: see e.g. Sheikhar Dooma Shetty v Al Rushaid Petroleum Investment Company [2011] EWHC 1460 (Ch) at [15].
69. Connection is clearly a matter which can only be determined on the facts of the individual case.
70. Under Condition (3) the court must be satisfied that the joinder is desirable to resolve the issue between the existing party and the proposed new party. In other words, even if there is a connection between the new issue and the exiting issues in the proceedings, the question is whether it is really desirable that the proposed new party be joined to resolve that issue or whether it is better to let it be resolved in separate proceedings.
71. Condition (1) is, in my judgement, met in this case. The Claimant has a clearly articulated claim for infringement of copyright against the BBC. The claim against Mr McCrery is less clear but the Claimant appears to be saying that Mr McCrery was a route by which the BBC came to use her work.
72. Condition (2) is in my judgement not satisfied for the following reasons:

- i) There is no significant degree of overlap in the factual issues or evidence. The ITV claim is concerned with events in 2017. At the heart of the ITV claim is the pitch at the meeting on 19 April 2017. The Betrayal Claim by contrast concerns a series of events in 2018 and 2019 culminating in the broadcast of the allegedly infringing work in February 2019. The trial of the Betrayal claim requires consideration of the development of the script for Betrayal following Victoria Gilbert's pitch to the BBC in May 2018 on the one hand and the Claimants own development of Works 3 – 5 in the course of 2018 together with consideration of how if at all there was any connection between the two. The only minor evidential overlap is that fact that Works 3 – 5 had their origin in the ideas expressed briefly in Works 1 – 2.
- ii) Although the Claimant is the author of all the works, the works in issue in each of the claims are distinct. The ITV dispute is confined to Works 1 and 2. The Betrayal claim is concerned with comparing Works 3 – 5 (but mainly Work 5) with the allegedly infringing work, Betrayal as broadcast.
- iii) The BBC has no interest in the outcome of the ITV claim and the Defendants to the ITV claim have no interest in the outcome of the Betrayal Claim. There is no sense in which make sense for the BBC to be bound by the outcome of the ITV claim.
- iv) The centre of gravity of the two disputes are different. The centre of gravity of the ITV claim is an alleged breach of contract and/or breach of confidence by Mr Hibbert and/or Forge. The Betrayal claim has as its

centre of gravity an infringement of copyright claim. The focus of the evidence will be on the BBC's case of lack of access / independent generation.

- v) Whilst Mr McCrery plays a role in both the ITV claim and the Betrayal claim his roles in both claims are peripheral. In the former, he is at the critical pitch to ITV; in the latter he is said to be a potential route by which the BBC came to have access to the Claimant's work. His involvement in both claims is in my judgement a connection but an insignificant one.

73. In summary, Mr Norris was, in my judgement, right when he submitted that what the draft amended Particulars of Claim does is to "shunt" together two separate and distinct claims.

74. Condition (3) is also, in my judgement, not satisfied. I cannot see any respect in which it would be 'desirable' to try the Betrayal claim as part of the ITV claim. The evidence and legal argument in the ITV claim will not assist the trial judge to decide the Betrayal claim. There will be no saving of costs or time in hearing them together. On the contrary, if the two claims were joined together, all the time when the court is concerned with argument or evidence in the ITV claim, the witnesses and legal representatives of the BBC would be looking on as uninterested observers. Even worse, whilst the much longer and more detailed evidence and argument is heard in the Betrayal Claim, Mr Hibbert and Forge's legal representatives would be sitting idly by incurring costs for no useful purpose.

75. In my judgement, it would also be contrary to the overriding object for the existing ITV claim, which ought to be capable of being tried quickly and relatively cheaply in the short and flexible trials scheme, to be delayed and bolted on to a non-short and flexible trial scheme trial in which the Particulars of Claim are not even finalised yet. Not only am I not convinced that is desirable to have the Betrayal claim incorporated into the ITV claim, I am sure that the opposite is the case. Given the different nature and scope of the two claims, I am sure that it would be better for the Betrayal Claim to proceed as a free-standing set of proceedings. The lodestar of the overriding objective points firmly away from joinder.

Conclusion on joinder application

76. For the reasons set out, the Claimants application to join the BBC and MrCrery as Defendants to the claim against Mr Hibbert and Forge fails both under CPR 19.2(2)(a) and (b) and is therefore dismissed.

Directions

77. On the handing down of this judgment, I propose to give directions for the future conduct of the case within the short and flexible trials scheme.

The alternative argument: no reasonable prospects of success

78. Having decided that neither Mr McCrery nor the BBC should be joined as a party to these proceedings, it is unnecessary for me to consider whether, had I been satisfied as a matter of case management that this was desirable, I ought nevertheless to decline to do so because the Claimant's claims do not have

reasonable prospects of success. Although, the court clearly has a power decline to order a joinder on this basis, see PeCe Beheer BV v Alevere Ltd [2016] EWHC 434 (IPEC), I consider it undesirable for me to do so in this case for a number of reasons:

- i) Any views I might express on the strength or otherwise of the claims as presently set out in the draft Amended Particulars of Claim would not only be obiter but would not give rise to a res judicata estoppel for the benefit of the Claimant, the BBC or Mr McCrery. This is because in the absence of an order for joinder, there is no lis between the Claimant and either the BBC or Mr McCrery which is an essential requirement for res judicata to operate – see *Phipson on Evidence* 19th edition (2017) para 43-24.
- ii) It became clear in the course of the hearing that in light of the evidence served by the BBC and Mr McCrery, the Claimant needs to reconsider the claim as presently drafted in any event. It is possible that having now heard the case for the BBC and Mr McCrery the claim will not proceed at all. Whether it does or not and if so on what new or different basis, is a matter for the Claimant.
- iii) If the Claimant does decide to advance the Betrayal claim in the form of proceedings against the BBC and Mr McCrery, it will be for the Defendants to decide whether to seek a summary dismissal of that claim or not and if they do so the court's judgment would be then binding on all the parties.

- iv) The evidence of how the Claimant's ideas developed in the course of 2018 and how Betrayal came into existence is not straightforward. It is a more appropriate use of the court's resources to wait to see whether formal proceedings are issued against the BBC and Mr McCrery before a full factual and legal analysis is carried out.

- v) It is fairer to the Claimant to give her a chance to reflect on the evidence served to date and to give her an opportunity to set out her claim in a fully pleaded form before the court adjudicates on its prospects of success whether on an application for summary disposal or at trial.