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Case No: IP 2016 000050

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT (Ch D)**

Rolls Building  
Fetter Lane  
London, EC4A 1NL  
11 January 2021

**Before :**

**MR JUSTICE MEADE**

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**Between :**

**(1) NICHOLAS MARTIN**  
**(2) BIG HAT STORIES LIMITED**

**Claimants**

**- and -**

**JULIA KOGAN**

**Defendant/Part**  
**20 Claimant**

**- and -**

**(1) FLORENCE FILM LIMITED**  
**(2) PATHÉ PRODUCTIONS LIMITED**  
**(3) QWERTY FILMS LIMITED**

**Part 20 Defendants**

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**Tom Richards** (instructed by **Lee & Thompson LLP**) for the **Claimants**  
**Ashton Chantrielle and Beth Collett** (instructed by **Keystone Law**) for the **Defendant**  
**Jonathan Hill** (instructed by **Wiggin LLP**) for the **Part 20 Defendants**  
Hearing dates: 12, 13 and 16 November 2020

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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Covid 19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 8<sup>th</sup> December, 2020.**

**Mr Justice Meade:****Contents**

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## INTRODUCTION

1. This action concerns a dispute over the authorship of the screenplay of a film called “Florence Foster Jenkins”.
2. The trial before me was a retrial, ordered by the Court of Appeal on 9 October 2019, as a result of an appeal from the judgment of 22 November 2017 of HHJ Hacon sitting in IPEC, who heard the parties over two days, on 10 and 11 October 2017.
3. In the Claimant’s pleadings, the final version of the screenplay was referred to as “the Screenplay”, but the Defendant defined it to include earlier drafts, and in particular the first three drafts. This reliance on earlier drafts fed into one of the significant issues in the appeal, as the Court of Appeal held that HHJ Hacon erred in looking only at the final version and not taking account of contributions to earlier drafts (and the documents that preceded them). I will refer simply to “*the screenplay*” (lower case first letter) to refer to whichever draft I am talking about, as the context will indicate, or to the overall scheme of multiple drafts leading to the final version. Some of the documents use “script” as synonymous with “screenplay”. The issues for this retrial are defined in terms of “the Screenplay”, and that has to be understood in the context I have just explained.
4. I will refer to Florence Foster Jenkins herself as “*Florence*”.
5. Florence was an American socialite and opera singer. She was a very bad singer, but considered herself to be a very good one. As described below, she sang to large audiences on some occasions and eventually performed in Carnegie Hall.
6. I will refer to the film itself as “*the Film*”. The main events of the Film take place in the 1940s in New York. It was released in 2016 and starred Meryl Streep as Florence. Hugh Grant also starred as the male lead and there were other distinguished members of the cast. The director was Stephen Frears, who was famous and well-established. The film was a success.
7. Where I refer to “*FFJ*” I mean the general overall project of development of the screenplay and making it a commercial reality as the Film, and its various phases. I recognise that this lacks some precision but it is useful when not referring specifically or only to the screenplay, and was an expression used in the contemporaneous documents.
8. At the invitation of the parties I watched the Film prior to the trial before me (as did the Court of Appeal and HHJ Hacon). I found it useful to do so because it oriented me to the characters, the setting, the plot and the sequence of scenes. I bear in mind however that the Film is not the same as the screenplay, since it brings with it the acting, the sets, the costumes and many other things.
9. The main protagonists in these proceedings are:
  - i) The First Claimant (“*Mr Martin*”), who, it is common ground, was an author of the screenplay. He contends that he was the only author. Mr Martin is referred to as “*Nick*” in many of the documents, and that is how

Mr Richards referred to him in the course of cross-examination of the Defendant. The Second Claimant is his company; it will not be necessary to refer to it to any significant degree below.

- ii) The Defendant and Part 20 Claimant (“*Ms Kogan*”), who claims to be a joint author of the screenplay, which is the central issue. She is also referred to as “*Julia*” in the documents.
  - iii) The Part 20 Defendants (“*the Film Companies*”) are companies who optioned the screenplay and then financed and produced the Film.
10. Mr Martin and Ms Kogan were in a romantic relationship for much of the time when the screenplay was being created. Towards the end of that time they had a temporary break-up, then a reconciliation, and then a final break-up of their personal relationship, following which they remained on reasonable terms and had professional communications and interactions, before finally falling out completely.
  11. In circumstances that I describe below, Ms Kogan was the first to indicate the possibility of litigation by a letter before action in April 2015, but it was Mr Martin who brought proceedings, seeking a declaration that he was the sole author of the screenplay and the sole owner of copyright in it.
  12. Ms Kogan counterclaimed against Mr Martin for a declaration that she was joint author and joint owner of copyright of and in the screenplay, and relief for copyright infringement and infringement of her moral rights by Mr Martin’s exploiting it without her consent and without her being given a credit.
  13. Ms Kogan also brought a Part 20 Claim against the Film Companies. They too took the position that Ms Kogan was not a joint author, while saying that their position was provisional because they did not have full information. However, they said that even if she did have a claim, it was barred by estoppel and acquiescence on the basis that she had stood by and watched the production of the Film and, at least indirectly, by silence or through Mr Martin, represented that she had no right to stop their activities.

#### **Basis of and directions for the retrial**

14. The Court of Appeal directed that the case should be remitted on the following basis:

*“We will therefore allow the appeal and set aside the judge’s declarations and other orders. We will order a new trial before a different judge in the IPEC who should be a full-time circuit or High Court judge. There should be an early case management conference before the new judge. We would not wish to bind the new judge as to the directions he or she will give, but we would express our views as follows:*

- i) *We see no necessity for new pleadings or written evidence.*

*ii) The new trial should be on the basis that Ms Kogan (a) may rely all on her contributions to the Screenplay, but (b) accepts that her contributions after third draft were limited.*

*iii) The list of issues to be determined at the new trial should expressly include (a) whether there was a collaboration between the parties, and (b) the nature of that collaboration.*

*iv) The new trial should be on the basis that the defence of acquiescence/estoppel succeeded to prevent Ms Kogan interfering with the public performance of the film, but the film companies are not prevented from arguing, if so advised, that the defence should prevent other monetary and non-monetary relief. We say nothing about how promising that argument would be.*

*v) Ms Kogan should not be able to take advantage of the new trial to resurrect her unpleaded legal answer to that defence.”*

15. The action then came before Birss J for further directions, and he made an Order of 19 March 2020. Paragraph 1 was as follows:

*“1. The trial shall determine only issues of liability, namely those set out in the Schedule to this order. All issues of quantum, should they arise, will be resolved at a further trial.”*

16. The Schedule listed the following issues:

*“1. Was the Screenplay created by a collaboration between the First Claimant and the Defendant of the sort set out in paragraph 53.2 of the Court of Appeal’s judgment?*

*2. What was the nature of any such collaboration?*

*3. What was the nature of the Defendant’s contribution to such collaboration?*

*4. Was the Defendant’s contribution an ‘authorial’ contribution?*

*5. Was the Defendant’s contribution an expression of her own intellectual creation?*

*6. Was the Defendant’s contribution distinct from the Screenplay as a whole?*

*7. If the answers to 1, 4, 5 and 6 are yes, what were the relative amounts of Mr Martin’s and Ms Kogan’s respective contributions?*

*8. If the Court finds that the Defendant is a joint author of the copyright in the Screenplay, have the Claimants and the Part 20 Defendants infringed the Defendant’s copyright in the Screenplay?*

*9. Do the matters set out in paragraphs 7c and d of the Part 20 Defendants’ Defence provide a defence to any alleged wrongful acts other than public performance?*

*All matters of entitlement to relief (including whether the Defendant is entitled to any injunctive or monetary relief, given the overall circumstances, including the matters relied upon in paragraphs 7c and d of the Part 20 Defendants' Defence) shall be determined post-judgment."*

17. By paragraph 3 of the Order, there was to be cross-examination of Mr Martin, Ms Kogan and, at Ms Kogan's request, Mr Michael Kuhn (whom I introduce below).
18. By paragraph 4 of the Order, the time allocated for the trial was 3 days. This was one day more than the trial before HHJ Hacon, and has proved to be a good decision. Even with very efficient cross-examination, on which I comment below, there was a great deal to cover in the time.

### **Conduct of the trial before me**

19. Mr Tom Richards presented Mr Martin's case. Ms Ashton Chantrielle and Ms Beth Collett appeared for Ms Kogan with the former undertaking the oral advocacy. Mr Jonathan Hill appeared for the Film Companies.
20. Because of the nature of the factual dispute, it was agreed that the oral evidence should take place physically in Court rather than remotely. The closing arguments were done remotely because of the Covid pandemic and this worked well apart from some minor internet drop-outs at the Court's end. I am grateful to all the Court staff who assisted in both phases.
21. Following the trial I asked for and received further written submissions from the parties on the acquiescence/estoppel issues. I refer further to this below.
22. At the start of the trial I gave a number of directions and indications about the conduct of the cross-examination. In particular:
  - i) I noted that the hearing was a retrial, that the oral evidence from the first trial was not, as such, evidence before me, but that there might be occasions when each of Mr Martin and Ms Kogan was confronted with what they said at the previous trial. The parties did not dissent from this when given the opportunity. In the event, the occasions on which the advocates went back to the transcripts of the first trial were few, proportionate and appropriate.
  - ii) Subject to that, I said that I did not expect the cross-examiners to go through each incident or each contested part of the screenplay in view of the time available, but to use their judgment as to how to put their case overall.
  - iii) But I said that where it would be argued that a difference of evidence between the witnesses could not be accounted for by differences of recollection or perspective but only by one of them being deliberately untruthful, that must be put.
  - iv) Having in mind that all three witnesses who were going to give oral evidence were in Court, I said that they should feel free to give their accounts fully, but bear in mind the shortness of time and that short answers

would be helpful. This was not heeded by Mr Martin or Ms Kogan, as I comment further on below.

23. I also:

- i) Asked for Ms Kogan's case on estoppel/acquiescence to be expanded, in particular as to the relief sought, having already sent an email to the parties prior to the start of the trial about it. I return to this below.
- ii) Asked the parties (in the light of their opening skeletons) whether they expected that I would put a percentage on Ms Kogan's share of the copyright in the screenplay in the event that I found her to have been a co-author. Mr Richards and Ms Chantrielle said no, and Mr Hill said yes. Having reflected on it, I later said that I thought the definition of issue 7 in Birss J's Order meant that I should. I stand by this, and although my assessment of 20% is a very rough one, I do not think the precision would be improved by putting off the decision.

24. Against these constraints, I was particularly grateful for the way the advocates carried out the cross-examination. It went into an appropriate level of detail where necessary and covered the issues well but was concise enough to fit exactly within the estimates given. The matters that the cross-examination concerned were emotional ones for the witnesses and appropriate sensitivity was shown without sacrificing the cross-examiners' clients' interest in the evidence being thoroughly tested. I record that Ms Kogan needed a break at one point when she became especially upset but that this was the result of the matters necessarily under discussion and not the fault of Mr Richards, who showed great tact.

### **Dramatis Personae**

25. I have already introduced Mr Martin and Ms Kogan. Where useful to do so, I refer to them jointly as "*the Couple*".

26. Others to whom I will refer are:

- i) Mr Michael Kuhn ("**Mr Kuhn**"): the principal person at the Film Companies responsible for optioning the screenplay and producing the Film. Another producer at the Film Companies to whom reference is made in the documents is Cameron McCracken ("**Mr McCracken**"). Mr Kuhn gave oral evidence before me, which was clear and to the point and which I find was entirely honest. He did not give oral evidence before HHJ Hacon.
- ii) Mr Charles Walker ("**Mr Walker**"): Mr Martin's agent. He provided a witness statement but did not give oral evidence. As well as acting as agent, he gave Mr Martin feedback on his work as a "*sounding board*".
- iii) Mr Jonathan Powell ("**Mr Powell**"), who also gave a witness statement but not oral evidence. He was another sounding board for Mr Martin.



- iv) Mr Barry Simner (“**Mr Simner**”): a friend primarily of Mr Martin, who was also friendly with Ms Kogan, and in whom each of them confided from time to time. He was a screenwriter and also served as a sounding board.
  - v) Mr Ben Lewin and Ms Judi Levine (“**Mr Lewin**”, “**Ms Levine**”): a couple who work in the film industry in Los Angeles. Mr Lewin has had success as a writer, director and producer. They have a company called Such Much Films. They were involved in the development of the screenplay for a time. I will refer to them jointly as “**the Lewins**”, as Ms Kogan did, while intending no disrespect for Ms Levine’s preference for using her own surname professionally.
  - vi) Mr Sam Kogan (“**Sam Kogan**”): one of Ms Kogan’s children from a previous relationship. He gave a witness statement.
  - vii) Mr Martin’s ex-wife Gabriela, also referred to as “**Gabby**”.
27. Each of Mr Martin and Ms Kogan had children from their previous relationships (in addition to Sam Kogan). The children visited the Couple’s flats from time to time during the period when the Couple were living together.

### **Outline of the plot and main characters in the Film**

28. I hope it will aid reading of my chronological treatment of the facts below to set out a very high-level summary of the plot of the Film (and indeed, of the screenplay). This is how Mr Martin summarised it at paragraph 83 of his first statement:

*“Florence Foster Jenkins is a society lady with a love of music. She is supported by her loving husband, Bayfield, and together they put on musical events in wartime New York. Florence is a keen amateur singer and, inspired by the brilliant voice of Lily Pons, she decides to take more lessons. She hires a new pianist, McMoon, who is shocked to learn that she cannot sing a note and in order to keep his well-paid job he must accompany her in a public concert. McMoon learns that Bayfield protects Florence from critics by carefully inviting a sympathetic audience. The concert is a success but Florence becomes exhausted by the show and a doctor is called. She explains to him that she has suffered from syphilis for her entire adult life. When Bayfield goes away for the weekend with his young lover, Florence has something of a breakdown and books Carnegie Hall for a concert. Bayfield and McMoon are mortified but they stick with Florence and somehow she charms the huge audience. However, one critic cannot be bought off and the following morning Florence reads his review. She is so shocked that she suffers a stroke. She dies in the arms of Bayfield, having fulfilled her ambition of singing at Carnegie Hall.”*

29. As Mr Martin also pointed out, at paragraph 84, this “*is how the story ended up being told. It went through many iterations along the way.*”
30. This summary also identifies the main characters, to whom I will refer in dealing with the facts:

- i) Florence (played by Meryl Streep in the film);
  - ii) Her husband Bayfield (Hugh Grant);
  - iii) Cosmé McMoon (Simon Helberg), a pianist hired to accompany Florence; and
  - iv) Lily Pons, a noted soprano of the day (Aida Garifullina).
31. Also mentioned in the summary is Bayfield’s lover, who is called Kathleen (Rebecca Ferguson).
32. Not mentioned in the above plot summary but of importance to the parts of the Film focused on in the evidence and worth mentioning here are:
- i) Carlo Edwards, a well-known vocal coach (David Haig); and
  - ii) Kitty, Florence’s maid (Brid Brennan).
33. I have given the names of all the actors, but it is mainly Meryl Streep who is mentioned in the evidence and documents, to a lesser extent Hugh Grant, and Simon Helberg and Aida Garifullina each just a little.
34. Also worth adding to the events mentioned in the above summary is the fact that Florence has a meeting with a well-known record company, called Melotone (and also referred to as Homophone during the development of FFJ), and they make records of Florence singing when she pays them to do so. These events changed during the writing process, as I identify below.
35. What the above plot summary almost entirely lacks is a description of the characterisation, by which I mean the psychology, emotions and relationships of the characters. It also lacks how the characterisation ties in with the music that Florence performs, her attitude to and love of it, how she “*slaughters*” it, how her performance contrasts with that of Lily Pons, and how her lack of ability is comic and tragic.
36. I do not criticise Mr Martin for omitting those things in the above summary, in the sense of suggesting that he deliberately and wrongly left them out. But it is, I think, symptomatic of his approach, and his blend of skills and experience, to see his creation of screenplays much more as a sequence of words capturing a sequence of events, and much less in terms of characterisation. I shall have to consider how these things were brought into the screenplay, since they are undoubtedly important to its feel and its achievement, and to why it provided the potential for a successful film.

### **Applicable legal principles – joint authorship**

37. The Court of Appeal considered extensive citations of authority, and summarised the legal principles applicable to addressing joint authorship at [53], where they said:

*“53. Drawing all of this together:*

1. *A work of joint authorship is a work produced by the collaboration of all the people who created it.*
2. *There will be a collaboration where those people undertake jointly to create the work with a common design as to its general outline, and where they share the labour of working it out. The first task for the court in such a case is to determine the nature of the co-operation between the putative joint authors which resulted in the creation of the work.*
3. *Derivative works do not qualify. Works where one of the putative authors only provides editorial corrections or critique, but where there is no wider collaboration, do not qualify. Ad hoc suggestions of phrases or ideas where there is no wider collaboration do not qualify.*
4. *In determining whether there is a collaboration to create a literary or artistic work it is never enough to ask "who did the writing?". Authors can collaborate to create a work in many different ways. For example there may be joint authorship if one person creates the plot and the other writes the words, or if either or both of these types of labour is shared.*
5. *Joint authors must be authors, in the sense that they must have contributed a significant amount of the skill which went into the creation of the work. Again, it is not correct to focus exclusively on who fixed the work in writing. The statutory concept of an author includes all those who created, selected or gathered together the detailed concepts or emotions which the words have fixed in writing.*
6. *Contributions which are not "authorial" in the above sense do not count. What counts as an authorial contribution is acutely sensitive to the nature of the copyright work in question.*
7. *The question of what is enough of a contribution is to be judged by the Infopaq test, i.e. whether the putative joint author has contributed elements which expressed that person's own intellectual creation. The essence of that term is that the person in question must have exercised free and expressive choices. The more restrictive the choices the less likely it will be that they satisfy the test.*
8. *The contribution of a putative joint author must not be distinct.*
9. *There is no further requirement that the authors must have subjectively intended to create a work of joint authorship.*
10. *The fact that one of the authors has the final say on what goes into the work may have some relevance to whether there is a collaboration, but is not conclusive. The author with the final say must be given credit in deciding on the relative proportions of ownership, for the extra work involved in making those choices.*

*11. It follows that the respective shares of joint authors are not required to be equal, but can reflect, pro rata , the relative amounts of their contributions.”*

38. In their opening written submissions, Ms Chantrielle and Ms Collett went into some detail of the cases considered by the Court of Appeal in reaching the above statement of the principles. I was concerned whether it was to be submitted that the Court’s statement needed modification or elaboration, but Ms Chantrielle confirmed in opening that the discussion of the cases in the skeleton was just for help and elucidation and that I could work straight from the Court of Appeal’s formulation. I will do so, bearing in mind the context. As will appear below, further legal submissions touching on point 11 (allocation of shares) were made on behalf of Ms Kogan, and I deal with them in that context.
39. I also found important the following paragraphs from the Court of Appeal’s judgment, which dealt with and rejected HHJ Hacon’s identification of development of plot and character as secondary skills, the primary skill (he had said) being choice of words. In doing so the Court explained that a screenplay is a *dramatic* work, and what that entails (my emphasis added):

*“65. The judge's distinction between primary and secondary skills in assessing contribution has no basis either in the statute or in decided cases. To draw such a distinction tends to imply that less weight is to be given to ideas than to written words, when both are essential components of the work. In our view the distinction is positively unhelpful. Depending on the facts, the person who contributed the ideas may be the "major" author: see per Laddie J in [Cala Homes](#) (cited above) at 836.*

*66. We think that a number of other specific errors are revealed in this passage. At [45] and [46] the judge describes a screenplay as a literary work, like a novel, and describes the primary skill as the selection and arrangement of words in the course of setting them down. **This passage fails to make what in our view is an important distinction between a novel and a screenplay. We think a screenplay is more accurately described as a dramatic work, as its primary purpose lies in being performed, as opposed to being read, like a novel.** The importance of the distinction is put in this way by the authors of *Copinger and Skone James on Copyright* , 17th Edition at para 7.93:*

*“... a basic distinction between literary works and dramatic works is that **the choice of dramatic incident and the arrangement of situation and plot may constitute, to a much greater extent, the real value of a dramatic work.** ... It should be remembered that dramatic works include not only plays and screenplays ...”.*

*67. Irrespective of this distinction, it is wrong to describe inventing plot and character as a secondary skill: see in this connection, the critique of this part of the judge's reasoning in *Simone* (cited above), at page 39. **The arrangement of situation and plot, as well as character development, can be of the essence of a literary or dramatic work.** We accept that the judge then went on to disclaim reliance on "a distinction in law between primary and secondary skills in relation to their intrinsic capacity to give rise to joint*

*authorship", but he nevertheless gave (at [50]) a fairly extreme example of where joint authorship "could not be ruled out": namely where a co-author contributed the whole of the plot and all the characters."*

### Burden of proof

40. It was submitted for Mr Martin and the Film Companies, and I accept, that by virtue of section 104 of the Copyright, Designs and Patents Act 1988 ("**the Act**"), the fact that Mr Martin's name appears alone on versions of the screenplay means that Ms Kogan bears the burden of proving that she was a joint author. I understand this was accepted before HHJ Hacon and I did not understand Counsel for Ms Kogan to seek to reopen the point.
41. It was submitted for the Film Companies in closing, on the basis of the judgment of Lord Mance in *Sienkiewicz v. Greif (UK)* [2011] UKSC 10, that if both sides present unreliable evidence then it may be necessary for the Court to resort to the burden of proof, and it is not obliged to make factual findings when it concludes that it is unable to do so. I did not understand it to be a submission that the Court *must* resort to the burden of proof where both sides' evidence is unreliable, and that would make no sense in my opinion. In this case the parties' evidence is unreliable in different degrees on different issues, but the overall effect is nonetheless that I am able to make findings on nearly everything. In a couple of isolated instances which I identify below I have not been able to do so (for example the Lewins' visit to the Couple's flat in March 2013). But they do not matter to my overall conclusions. In those circumstances, although Ms Kogan bears the onus, it has not been of any practical significance.

### **Assessment of witness evidence – legal principles**

42. There are two aspects to the assessment of the evidence of Mr Martin and Ms Kogan that I have to have in mind.
43. The first is the overall approach to the reliability of recollection of witnesses and the relative importance of memory on the one hand and contemporaneous documents on the other. The Court of Appeal dealt with this at [88] to [91] by reference to *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), *Blue v. Ashley* [2017] EWHC 1928 (Comm), *CXB v. North West Anglia NHS Foundation Trust* [2019] EWHC 2053, and *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413.
44. The overall gist of what the Court of Appeal decided can, in my view, be seen from [88] in its judgment where it said:

*"We think that there is real substance in this ground of appeal. We start by recalling that the judge read Leggatt J's statements in **Gestmin v Credit Suisse and Blue v Ashley** as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in **CBX v North West Anglia NHS Trust** [2019] 7 WLUK 57, **Gestmin** is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished*

*judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."*

45. The critical guidance is that while having regard to the fallibility of memory I must nonetheless take into account all the evidence, including witness evidence, the documentary evidence, and evidence upon which undoubted or probable reliance can be placed.
46. I interpret the reference to "*evidence upon which undoubted ... reliance can be placed*" to include matters which are admitted.
47. It may also be noted that the Court of Appeal said at the end of [88] that if a party's evidence is to be disbelieved, the Court must say why.
48. Then in [89] the Court went on to say that the observations in *Gestmin* about the role of documents were expressly addressed to commercial cases, whereas the present case involves two private individuals living together, rendering it unlikely that details of their interactions would be recorded in documents.
49. This trial has emphasised that there are parts of the chronology where there are very useful documents, including Skype exchanges where one can see minute-by-minute what was said, whereas by contrast for much of the time, for the reasons the Court of Appeal gave, there are no documents of any significance at all. I address these documents that exist below and have found that they can be used to assess the parties' working relationship and methods in general despite covering only short periods of time.
50. The second aspect of the assessment of the evidence I have to have in mind is how to deal with a situation, which I find arises on the facts, where I conclude that part of a witness' evidence is to be disbelieved. How then do I assess the rest? This did not arise for consideration in the Court of Appeal in the present case, or at least not nearly so acutely, because of the more basic point about documents entirely trumping the oral evidence, and because HHJ Hacon had held that the Couple were each telling the truth as they saw it.
51. I asked the parties for submissions on this, and in closing they referred me to *Gestmin*, *Blue v. Ashley* and *Staeclin v. ACLBDD* [2019] EWCA Civ 817 (approving *EPI Environmental Technologies v. Symphony Plastic Technologies*) [2004] EWHC 2945 (Ch). There was agreement on the principles that:

- i) Just because a witness is lying on one issue does not mean that the entirety of their evidence is to be rejected.
- ii) It should be borne in mind that a witness may lie to bolster a true story, or to try to bolster a false one.
- iii) A witness' evidence may be wholly wrong without his or her having lied – their recollection may be distorted by reinterpretation of what happened, or even delusion.

### **Presentation of Ms Kogan's case**

52. Ms Kogan's case is presented in several ways and through various documents. It is necessary to be conscious of what these are, and their status. I set this out not by way of criticism but because the documents that I describe in more detail below were referred to quite often in the evidence before me, as well as in the judgments of HHJ Hacon and the Court of Appeal.
53. First, there are Ms Kogan's statements of case and her witness statements. In accordance with IPEC practice the latter form part of her evidence and she confirmed them as part of her oral evidence (as did Mr Martin and Mr Kuhn). The statements of case and witness statements identified Ms Kogan's alleged contribution by way of headings and somewhat skeletal detail.

### Annex A

54. Second, there is Annex A to her first witness statement which contained the real detail of Ms Kogan's assertion about her contribution. It is part of her evidence. I will treat it as having the same status as the main body of her statement.
55. HHJ Hacon rejected Annex A as deeply flawed and not useful, but the Court of Appeal said at [101] that it was a genuine attempt to give a fair picture of the way in which Ms Kogan said she had contributed to the creation of the screenplay. I will treat it that way. The Court of Appeal clearly was not saying that the factual assertions in it were true – that is for me to decide – but rather that it was a genuine presentation of Ms Kogan's *assertions*.
56. I have found Annex A to be a useful document to see what Ms Kogan says about each scene (as matters stood at the seventh draft of the screenplay). It also contains a summary of the following *categories* of work that she says she contributed, in the form in which they were presented in the opening written submissions on her behalf, and which I have borne in mind:

*“100.1. **Concept Origination** – This category concerns the origination of the idea of using FFJ's life as a feature film and the dramatic framing of the story (see §62 Kogan 1 [B1/4/87-88]). Ms Kogan's position is that she was the originator of the idea to use FFJ's life as an idea for a screenplay, as well as the conceptual basis for the dramatization.*

*100.2. **Dialogue written solely by Ms Kogan** - This category relates to music-related dialogue that Ms Kogan says she was solely responsible for.*

*This dialogue contributed significantly to key scenes in the film such as when FFJ's pianist, McMoon, attends his first rehearsal with her and learns (as the audience does) for the first time how terribly she sings (see §§92 to 95 of Annex A [B1/5/135]).*

*100.3. **Joint Dialogue** - This category relates to dialogue that Ms Kogan says her and Mr Martin wrote together which is not capable of being separated out. Ms Kogan refers to "we" in the context of creating dialogue when referring to dialogue that falls within this category (see for example §65 of Annex A [B1/5/131]).*

*100.4. **Selection of events and scenes by Ms Kogan alone** – This category relates to the selection of events and scenes which Ms Kogan claims to have selected herself. Not everything from FFJ's life was suitable for a feature film, either because they lacked narrative interest or because there wasn't enough space to tell her entire life story. Decisions therefore needed to be made about what events to include and exclude. An example of this was the use of the leather briefcase that FFJ kept her will in and took with her everywhere (see §10 of Annex A [B1/5/120]).*

*100.5. **Joint Selection of events/scenes** – This category includes the selection of what to include or reject from the source material that was jointly decided by Mr Martin and Ms Kogan. This included life events, characters, scenes and dialogue from the source material, along with new scenes added to the script.*

*100.6. **Joint Dramatization** – This category relates to dramatization for which both Ms Kogan and Mr Martin were responsible and includes character development, which relates to the psychological makeup of the dramatized characters in the script. Ms Kogan claims that much of the significant character development, including that of the title role, came from her.*

*100.7. **Characterisation Through Music** - This category relates to the selection of music by Ms Kogan which contributed to the narrative of the story. One example of this is the use of Lakme's "Bell Song" for Lily Pons's performance at Carnegie Hall (see §50 of Annex A [B1/5/131] and §150 of Kogan 1 [B1/4/110]). This was not merely a musical scoring choice. It was a key narrative and characterisation device.*

*100.8. **No input by Ms Kogan** – this category includes parts of the above categories where Mr Martin was solely responsible for or responsible with others who worked on the script."*

57. One important way in which the factual assertions in Annex A must, I think, be rejected is that although Ms Kogan provided a category (the eighth) of "No input by me", she acknowledged almost nothing within it. Yet it is clear, in my view, that there was much work done by Mr Martin alone, and Ms Kogan knew that.
58. Annex A has the practical limitation that it is long; too long to cross-examine to its totality in a practical way. It could have been written more concisely but there is no getting around the large amount of detail that it contains, which was



necessary and appropriate to the presentation of Ms Kogan's case. It is an inevitable incident of the IPEC procedure as applied to this case (and many others) that it is not possible to cross-examine to all the details in the time given, and Counsel has to make a pragmatic assessment of how fairly to put his or her client's case in that context. I have commented above that Counsel achieved that goal in this case. In the event, that did not involve actually going to Annex A very much.

#### The six best

59. At the trial before HHJ Hacon and at his urging, leading Counsel for Ms Kogan put forward six matters as the high points of Ms Kogan's case. It was made clear that (as was repeated at this trial by and on behalf of Ms Kogan) these were not by way of limitation and I have not treated them that way. The Court of Appeal considered them individually, and both sides referred to them before me, and organised their submissions around them to a considerable extent. They played a bigger role before me than did Annex A, and are more tangible and manageable.
60. I will identify the six matters here with references to the Court of Appeal's judgment. As I have said, I consider that I must find the facts at this retrial, and the Court of Appeal was not undertaking that exercise, but it indicated in some instances that *if* the facts were as Ms Kogan alleged then certain consequences followed.
61. In listing the six matters it is convenient to express some of my overall findings of their significance, which I assess in the context of the trial as a whole.
62. The six were:
  - i) The Rehearsal Scene with Carlo Edwards (Court of Appeal [113] – [119]). This is a very memorable scene, and a pivotal moment in the plot, where the ghastliness of Florence's singing is revealed to the audience for the first time. It is highly comic, in part because of the use in the dialogue of some technical musical language accepted to have been provided by Ms Kogan, and also because of various double-entendres, the contributor of which is disputed, where Carlo Edwards says things like "*You have never sounded better*" – literally true even of a terrible singer such as Florence, but which could be received as a compliment (see the Court of Appeal at [116]). The Court of Appeal held at [119] that the contribution of this scene was of an authorial character and should have been considered, if Ms Kogan were to prove as a fact that it came about as part of a collaboration.
  - ii) The Scene in the Lift; and
  - iii) Further Rehearsal Scenes (Court of Appeal [120]). These both involve more dialogue about Florence's terrible singing, the former being a scene between Bayfield and McMoon in a lift in the absence of Florence which allows for more direct and open discussion. They were dealt with together by the Court of Appeal and it reached essentially the same conclusions as for the first Rehearsal Scene. It is worth noting for the later assessment of the factual evidence that the provision by Ms Kogan of the musical

terminology for the Scene in the Lift came much later, once Stephen Frears was involved.

These first three were characterised by the Court of Appeal as “Ms Kogan’s textual contributions”. The fourth to sixth were characterised as “Ms Kogan’s non-textual input”.

- iv) Lily Pons and the Bell Song (Court of Appeal [121]-[129]). As mentioned above, Lily Pons was a well-known soprano of the time and the Bell Song from Lakmé by Delibes was one of her well known performances. It has a long unaccompanied section which allowed emphasis of the beauty of Lily Pons’ voice and a stark and dramatic contrast with Florence’s. The time of its introduction into the plot changed as the screenplay developed, initially being right at the start and then moving in subsequent drafts to later on. Mr Richards pragmatically accepted in his written opening that if the facts were as Ms Kogan alleged then this contribution must also be authorial – Court of Appeal [126] – but said that Mr Martin would challenge those facts.
- v) McMoon Audition (Court of Appeal [130]-[133]). At his audition for the job as accompanist to Florence, McMoon plays The Swan by Saint-Saëns from Carnival of the Animals. This is said by Ms Kogan to meld with the development of the character of Florence who was into “*loveliness*” in music, an observation accepted by Mr Martin to have been contributed by Ms Kogan. The Court of Appeal’s analysis was essentially as for Lily Pons and the Bell Song and similarly it is accepted on behalf of Mr Martin that the contribution must be regarded as authorial if the facts are found as Ms Kogan alleges, but it is said that Ms Kogan merely made a suggestion of a piece of music which Mr Martin accepted. As with the Lift Scene, this input came late in the process.
- vi) Melotone (Homophone) Records (Court of Appeal [134]-[138]). This is rather a complicated point which will make more sense to describe after I have addressed the facts in more detail. The Court of Appeal referred to a plot change from Melotone offering Florence a recording contract to Florence paying for records to be made to “*please her false friends*”. Again, Mr Martin’s challenge is mainly on the facts in the light of the Court of Appeal’s judgment and focuses on the “*false friends*” part. As I shall explain, I do not think that the “*false friends*” aspect was the totality of what Ms Kogan contributed here.

### The marked-up Screenplay

63. Overnight between the two days of the trial before HHJ Hacon, Ms Kogan and her team marked up the Screenplay (and in this instance I mean specifically the final version) in three colours to show that which she said was contributed by her alone (red), that which she said was contributed jointly (green) and that which was contributed by Mr Martin alone (blue).
64. The marked-up screenplay was in the evidence bundle before me, but Ms Kogan made it clear that she did not want to make it part of her evidence for this trial. She explained this in her oral evidence and the two main points she made were

that it had been done in haste, and that because the exercise had by its very nature to be done by reference to the words used, it did not and could not reflect her non-textual contribution.

65. There was nonetheless cross-examination on the document.
66. I think it was entirely open to Ms Kogan not to make the document part of her sworn evidence, and indeed if she was not happy with it then it would have been wrong if she had done. Equally, it had been put forward on her instructions (even if unhappily) to a Court and it would have been unsatisfactory for her entirely to disclaim it. That is not what she did, though, and I thought her reservations were generally fair. It was also a fair subject of cross-examination, some of it very effective, and I return to that below where I deal with incidents that came into the screenplay after the third draft.
67. One thing that is clearer from the marked-up screenplay than from Annex A is an idea of the extensive areas where Ms Kogan indicated that Mr Martin was the sole contributor, although I acknowledge, as I have already, the reservation that it was done in haste.

#### **Agreed/undisputed facts**

68. There are deep and strongly felt disputes between the parties on the facts. I felt throughout the hearing that these were in danger of being allowed to crowd out the facts which are not in issue. These form an important part of the evidence as a whole, particularly given the unreliability of aspects of the witness evidence.
69. It is not in dispute that Ms Kogan introduced Mr Martin to Florence.
70. It is not in dispute that Ms Kogan provided *some* input (to use a neutral word) to the creation of FFJ.
71. Aspects of her input were accepted in paragraphs 99-100 of Mr Martin's first statement as to the "first treatment" phase:

*"99. Julia's involvement in this first treatment phase was in four main ways:*

- (a) Encouragement and support;*
- (b) Sounding board / criticism;*
- (c) Editing – spelling correction and typos; and*
- (d) Information on New York music scene of the time in particular that Caruzo had died; that Homophone was not a major record label; that the Met would not have held a luncheon in Florence's honour; and that (in relation to the tag line) Florence had not actually sold out Carnegie Hall.*

*100. Julia also observed that Florence's musical taste was for "loveliness" and this led me to the idea, in scene six, that McMoon gets the job as her pianist because he plays gentle music. She also noted Florence's slight pause*

*before hitting the high notes. This suggested she had some doubts about her ability, but it didn't stop her from having a go. I thought this amusing and helpful."*

72. And in paragraph 132, Mr Martin said as follows in relation to the phase in which the draft scripts were in preparation:

*"132. Whilst she never wrote anything, she was a great support in other ways:*

- (a) She proof read much of my work, correcting typos, grammar and spelling, I am mildly dyslexic and even the wonders of spell check miss some things;*
- (b) She provided historical background about the musical world in which Florence moved, about opera and about New York society at the time;*
- (c) She made many suggestions for and about the music;*
- (d) She provided a very limited number of observations about scenes, the vast majority of which were either rejected by me, or were later cut from the script entirely, either by me or in script meetings;*
- (e) She was a sounding board for some of my ideas, someone with whom I could bounce ideas off; and*
- (f) She provided an invaluable source of encouragement and support."*

73. With reference to (a), I mention that there are various typos in documents written by Mr Martin consistent with his mild dyslexia and errors slipping through automated spell checkers, but in general his dyslexia was not significant to the conduct of the trial or the issues I have to decide.

74. It is not in dispute that Ms Kogan provided musical terminology, some of which was used verbatim in the screenplay, and technical knowledge of opera singing, acknowledged in paragraph 136 of Mr Martin's first statement.

75. Further:

- i) It is not in dispute that Ms Kogan was highly knowledgeable about opera and about Florence prior to any work being done on the screenplay.
- ii) It is not in dispute that neither of these things applied to Mr Martin.
- iii) It is not in dispute that Ms Kogan had been, and still was, a singing teacher.
- iv) It is not in dispute that Mr Martin knew a lot about writing scripts and Ms Kogan did not.
- v) It is not in dispute that the Couple spent a lot of time together in their flat while work on FFJ was being done (although of course by whom is disputed), but that there were other times that one or other was abroad.

## CHRONOLOGY

76. The numerous disputes on different issues and different parts of the screenplay as they developed over time make it challenging to organise factual findings. I have concluded that the best and clearest way is to make a chronological pass through the events of the whole period from the Couple meeting to the inception of the litigation. I recognise that it is very dense in places but I have tried to make it readable. There are some issues that do not fit neatly into a chronological treatment, and I have dealt with them separately later.
77. In places in this chronological assessment I express factual findings, including some which are important to my reasoning. I make it clear that I have considered these findings in the overall context of the case and the materials before me. They are not findings made in isolation with regard only to whatever I am dealing with when I express them.

### **Mr Martin's professional experience and working practices up to 2011**

78. I borrow gratefully the following summary of Mr Martin's career from the Court of Appeal at [5], which is based on his witness statement and was not challenged in the oral evidence before me:

*“Mr Martin was and is a professional writer of film and television scripts. The judge's findings do not provide a picture of his career up to the point at which he wrote the screenplay for the film, but his first witness statement provided an outline of it. He began his professional career in 1991 but, in his words, by 2000 he had not had a big television hit and none of the feature film scripts he had written had been produced. Between 2000 and 2006 no show which he had written was produced, a period of his career which he described as “testing”. In that period he had written, amongst other things, a series of scripts entitled *The Music Room*, which concerned a corrupt policeman who fell in love with a music teacher, and also worked on a script for a feature film, *The Angel of Ferrara*, a historical thriller set during the Italian renaissance. In 2007 he wrote episodes of the television police drama *The Bill* and from 2008 to 2011 episodes of the television detective series *Midsomer Murders*. By 2012 he had written 55 television scripts of which 32 had been produced. He had also written 12 short films, three plays and nine feature films.”*

79. In 2011 Mr Martin had lost his regular work on *Midsomer Murders*. This was not through lack of performance on his part but because the producer had been removed and the replacement brought their own writing team and did not renew the contracts of the existing writers, including Mr Martin.
80. When asked in cross-examination if this, and other misfortunes, meant that he was in a “tricky” position, Mr Martin replied that his work as an independent writer was constantly in flux and so he was always in a tricky situation. This was putting a brave face on it, and I find that he was in a particularly difficult position following the loss of this work (not that that is any personal criticism) and this informed his anxiety over FFJ as time went on. Some of the Skype transcripts contain expressions of his acute concern, verging on desperation.

81. Mr Martin explained in detail in his witness statement how he went about writing screenplays. He used the classic three-act structure and would map out the plot using cards on a story board so that he could move them around, followed by drafting narrative treatments, and then moving to writing actual screenplays on specialist software called Final Draft, which, prior to and during the time when FFJ was in progress, he had on an old desktop Dell and a laptop.
82. Mr Martin emphasised, and I accept, that when he was creating screenplays in this way he thought about the practicalities of how that which he wrote might be filmed in due course, and the impact his decisions would have on the budget for filming.
83. Looking at Mr Martin's career as a screen writer overall, he had had some significant measure of success including on well-known television shows, but he had never had success with feature films.

### **Ms Kogan's professional experience up to 2011**

84. Again, I gratefully borrow from the Court of Appeal's judgment:

*"The judge described Ms Kogan as "principally a professional opera singer", but again did not refer in any detail to other aspects of her career which were covered in her evidence. She had attended Ohio State University where she was an English Literature and Vocal Performance major. She had authored three children's books while in her twenties. From 2006 she began creating her own theatre/music projects, the first of which was Troika (2006-2011), an album on which 8 composers set poetry of her choosing to music. The Lad (2008-2013) was an opera ballet which she claimed to have conceptualised. She says that she adapted and translated the libretto, as well as structured scenes. In 2010 she began researching lost and forgotten personal songs written by exiled composers in Hollywood for a recording project."*

85. This was borne out by the written and oral evidence before me, though on the basis of her cross-examination her reliance on having written children's books was somewhat overstated. Her evidence was apt to give the impression that she had had three books published, but in fact while she had written them, none had been published.
86. In addition to the accomplishments identified by the Court of Appeal, Ms Kogan also taught singing, including during her relationship with Mr Martin, when it was a cause of friction owing to the noise it made in the flats they shared.
87. The points of importance about Ms Kogan's professional experience are as follows:
  - i) She had extensive musical experience;
  - ii) She had extensive experience as an opera singer;
  - iii) She had been a music teacher, specifically a singing teacher;

- iv) She had writing experience (librettos and books); and
  - v) Her writing experience did not include writing screenplays, although she started to show an interest in this during the Couple's work on FFJ and this has continued and increased.
88. In addition, she had a long-term interest in the life and music of Florence, which I return to below. Her interest was at least partly professional, as opposed to recreational, because of the episode with Souvenir to which I also refer below.
89. I mention these points because they are relevant to the plausibility of her account of the events which took place during the writing of FFJ, and her contribution.
90. Just as Mr Martin was in a difficult financial position when the parties met, so was Ms Kogan.

### **Mr Martin's and Ms Kogan's other screenwriting projects**

91. Each of Mr Martin and Ms Kogan worked on other screenwriting projects. Mr Martin had worked on them for many years; Ms Kogan worked on some alongside FFJ and thereafter. Reference to them is necessary because they help to date some of the other events, and because they explain, or were said to explain, aspects of the Couple's conduct. However, it was also sought, in particular by Ms Kogan, to look at the details of these other projects and the working approach adopted by the Couple if they both were said to have worked on them and to compare them with the Couple's work on FFJ. I found this unhelpful and burdensome and luckily not too much time was spent on it.

## **2011**

### September

92. Mr Martin and Ms Kogan met through a dating site, and after a few weeks of email correspondence they met in person at the end of the month (Mr Martin says October in his witness statement and I think he must have been wrong by a few days, but it is unimportant).
93. It is common ground that they had an immediate rapport. There were some emails from this period in the trial bundles. It is necessary to view these having in mind that they were each trying to make a favourable impression on the other for obvious romantic reasons. Be that as it may, it is clear that they compared notes about their professional interests and situations, and in an email of 19 September Ms Kogan mentioned her interest in writing as well as music by reference to a libretto she was working on.

### October

94. On 2 October Ms Kogan was seriously injured in a car crash. Her injuries included damage to her left hand. In due course she also needed gastric surgery. Ms Kogan and Mr Martin continued to correspond and he visited her in hospital. They continued to see each other.

95. Ms Kogan went to France to recuperate and on 16 October Mr Martin sent her a draft of his screenplay *Art House Faggots* “for [her] reading pleasure”. At this stage, I find, his sending the screenplay was not with the intention of getting Ms Kogan’s help, but to promote the closeness of their relationship. Ms Kogan commented briefly and positively on the screenplay by email on 17 October.

#### November to December

96. The relationship between Mr Martin and Ms Kogan developed; they spent more time together and when Ms Kogan was not in London they corresponded and talked by email or Skype. Mr Martin sent other screenplays to Ms Kogan, and she commented, in a similar manner as with *Art House Faggots*. They also discussed *Art House Faggots* again when Mr Martin received a rejection of it.
97. On 17 November Ms Kogan emailed Mr Martin about an idea for a non-fiction television series inspired by and having the feeling of Jim Jarmusch’s *Night on Earth*. Mr Martin replied that it was an interesting idea but “tricky for TV” and that Ms Kogan should “keep thinking”. This was a very minor incident and I mention it only because it was the subject of some cross-examination (as it was at the first trial). Mr Martin’s evidence was that he was rather letting Ms Kogan down gently and that “keep thinking” was some general encouragement. I accept this but do not consider it of any real relevance.
98. I find that nothing at this stage amounted to anything near collaboration on any of Mr Martin’s work in general or screenplays in particular, but nor was he hostile to such feedback as Ms Kogan gave. The most detailed comments she gave were in respect of a draft idea for a TV series called *The Source* when Mr Martin, who at this point was abroad, sent a draft on 26 December. Ms Kogan sent comments with nine detailed points on 1 January of 2012, and Mr Martin replied immediately saying that her notes were thoughtful and “touched on all the points I knew I needed to address”. In fact he then only made the most minor changes in response. Mr Martin said in his witness statement and in oral evidence that in general he liked to tell those that commented on his work that their points were appreciated even if in fact he did not think much of them. I accept that he sometimes did that, but nonetheless this sort of thing demonstrates a potential move to closer working between Mr Martin and Ms Kogan.

### **2012**

#### January

99. I have mentioned Ms Kogan’s comments on *The Source* in relation to December 2011.
100. In January Mr Martin was back in London and he and Ms Kogan were spending more time together. Ms Kogan was readmitted to hospital urgently for further abdominal surgery as I have mentioned above. She was in hospital until February.



February

101. Ms Kogan remained in hospital for at least some of the month. She and Mr Martin remained in close contact and he supported her in her ill-health, which continued after she left hospital.
102. Mr Martin and Ms Kogan started living together at Mr Martin's flat at some point during the month. The exact date is not clear and does not matter. Similarly, it is not clear exactly when she left hospital, and possibly she was in and out of it. Again, it does not seem to me to matter.

March

103. At some point in March Mr Martin watched clips of Florence on YouTube, played by Ms Kogan.
104. Mr Martin said in his statement that it was 4 March and that he came across Ms Kogan in the spare room watching the clips.
105. Ms Kogan, on the other hand, said that in the previous year she had talked to a musical collaborator of hers called Edwin Cahill about the possibility of being in a play about Florence, a Parisian production of an earlier on-and-off Broadway production called *Souvenir*. The fact that she had been so asked is supported by other later documents in the case and I accept it. I also understood Mr Martin to accept it, and that Ms Kogan told him about it. Ms Kogan said that in the light of *Souvenir* she could not understand why no one had made a film about Florence and that it was this that led her, actively, to show the YouTube clips to Mr Martin. Further, she said that she suggested that "*a script should be written as soon as possible*".
106. Mr Martin disputed that it was Ms Kogan who proposed a script about Florence. He said it was his idea.
107. On this issue I prefer the evidence of Ms Kogan. Her knowledge of Florence and the *Souvenir* incident make it more likely. In addition, she had the "pieces of the puzzle", by which I mean knowledge that Mr Martin was a screenwriter, and knowledge of Florence (including the notion, from *Souvenir*, of making a fictional work about her), before Mr Martin did.
108. It was not suggested that Mr Martin was deliberately lying on this issue and I do not think he was. I think it is one of the areas where his recollection is distorted by his desire to believe that he was the sole creator when it came to FFJ. In any event, while it is part of the picture as to which of the Couple had the initial idea, it is far from the most important part of the disputed contributions.
109. Mr Martin said, and I accept, that when he first heard Florence on YouTube he was "*really struck by the extraordinary quality of Florence's voice that was both hilarious and tragic*". I accept this. It was put to him that he cannot have known that there was any tragedy at such an early stage because he knew nothing about her story. But he explained, and I accept as both true and very plausible, that the tragedy (and hilarity) was obvious from the awful quality of the singing and the

lack of ability it showed, in the context of trying to perform the most ambitious pieces.

110. At about this time (middle to end of March 2012), Mr Martin ordered a documentary by Donald Collup about the life of Florence, and he and Ms Kogan talked about the possibility of a film about her. They talked about this period in somewhat different terms in their written and oral evidence, but there is not sufficient material for me to make a separate decision about it, distinct from my overall findings about their work and communications.
111. It is not in dispute that there is much important factual information in the Collup documentary that would provide raw material for potential use for FFJ. But I felt that Mr Martin took the approach that anything that was in the documentary had to be entirely discounted when assessing any contribution by Ms Kogan. However, his approach neglected that it was necessary to select from the documentary that which was most promising for the telling of Florence's story in an emotionally engaging way, and then to develop it. This is perhaps most significant when it comes to the Bell Song and Lily Pons.
112. In any event, on 7 March Mr Martin emailed Charles Walker to say that he had "*come across the incredible story*" of Florence and asking if it might be a "*good idea for a movie*", possibly with Meryl Streep. This is neutral as to which of Mr Martin and Ms Kogan had the idea. Charles Walker said that it had potential.
113. On 22 March Ms Kogan left for the US.
114. Starting on 25 March, Mr Martin worked on an outline document called "*First Thoughts*". He worked on this until 27 March. It is common ground that he did not send this document to Julia. He also said in his witness statement that he wrote the document entirely alone in his flat. He said that Ms Kogan was in the USA which gave him "*the time and space to work*".
115. This is one of the periods when the Couple were apart but which is evidenced by Skype conversations. Thus, one can see that on 25 March when Mr Martin was working on the First Thoughts document the Couple were in contact by Skype and they had a discussion by that medium on the nature, for example, of the Bayfield character. This is a true dialogue in my opinion: they talk about the kind of person that Bayfield was and his relationship with Florence. I refer to the discussion in particular from 11:41 AM on 25 March to 11:48 that day.
116. There are also references to Mr Martin's very difficult financial situation and some redacted material which no doubt relates to intimate details of the relationship between the Couple. So although Mr Martin is correct in his witness statement to say that he was alone physically, it is not correct that he and Ms Kogan were not talking about FFJ.
117. Although it is clear that Mr Martin typed the First Thoughts document himself, it is a matter of dispute to what extent it reflects input from Ms Kogan. I will need to return to this when I summarise my findings and impressions of the way that the Couple worked together.

118. There are also a number of references in the Skype discussions for the period from 25 and 26 March which gives the impression of the Couple working together on their various writing projects. For example, on 26 March at 4:50 Ms Kogan wrote “*I feel like I am more useful working on things on your end at the moment*” and she then referred to *Art House Faggots* and *All Our Children*. As I have said above, I do not think any detailed analysis of how the Couple worked on other projects is proportionate, but this shows a sense of teamwork and is of some relevance, if minor.
119. Although Mr Martin did not send the First Thoughts document to Ms Kogan he did tell her about having written it and this can be seen from a Skype exchange of 27 March in which he asked her to remind him of the name of the noted soprano who attended Florence’s Carnegie Hall show. Before she could reply he wrote “*Too late. Lily Pons. I’ve not hear[d] from you all day ... I’ve written a rough outline for Flo. It wrote itself. I like it!*”
120. Ms Kogan replied “*Gimme !!!!*” and then “*where is the rough outline ?*”.
121. On 28 March 2012 Mr Martin reached the stage where he was able to send a draft story outline or treatment (a “treatment” being a sort of story outline of about ten pages, much shorter than a screenplay and with less if any dialogue and shooting directions). I will refer to this as the “**First Treatment**”. It can be seen from the contemporaneous documents that this was sent by email on 28 March and the email opened with the words “*OK birthday girl!*”; it was Ms Kogan’s birthday that day.
122. In the Skype dialogue just before the email, Nick said “*Florence on the way to you. x*” and this immediately followed a voice call of just under 50 minutes. The voice call cannot have concerned the First Treatment specifically, as the call came before the email (although Ms Kogan made a confused effort, which I reject, to suggest that the timings might be wrong because of different time zones) but that does not mean it did not involve discussion of FFJ. I find that it probably did, although no doubt it also touched on personal matters, particularly in the light of it being Ms Kogan’s birthday.
123. The email also included the following statements by Mr Martin:
- “at this sta[ge], I think we are most interested in the general sweep of the piece, rather than detail but make of it what you will.”; and*
- “I plan to give it to Jonathan tomorrow, but love your in put [sic] first (as you are my special collaborator now).”*
124. Mr Martin explained in his cross-examination that in the first of these statements he was using “we” in an instructional sense, rather than to refer to the first person plural as embracing him and Ms Kogan. It is possible that it was a bit of both, but the second part of the sentence clearly invites Ms Kogan's input.
125. As to the second statement, Mr Martin said in his cross-examination that he meant Ms Kogan was his special collaborator simply because of their personal relationship. I do not accept this. In the context of FFJ the relationship between

the Couple had moved to a different kind of collaboration than that which he was used to with people that he used as sounding boards in a more arm's length way (as evidenced by the interchange over the character of Bayfield, for example, and given my finding that the initial idea came from Ms Kogan).

126. About an hour and a half later Ms Kogan replied "*my Angel, Caruso died in 1921 ...*", and the Skype dialogue then closed until 29 March.
127. In an email of 13:10 on 29 March Mr Martin wrote "*I'm going through Florence now and putting in the changes we discussed. I wasn't sure how much you liked the story. I know that some of the musical inaccuracies caught in your craw, but, hopefully, when these have been addressed, you'll like it.*" This evidences a discussion about musical inaccuracies and changes being made by Mr Martin at the suggestion of Ms Kogan.
128. At 16:39 Mr Martin sent another email which said "*Baby, I've incorporated much of what we discussed. Would you mind having a look? I'd be so grateful if you could wiz [sic] through it for typos too. I'd like to send it to Jonathan [Powell] and Charles [Walker].*"
129. With this email Mr Martin sent the second draft treatment (the "**Second Treatment**") which indeed Ms Kogan checked for typos. She sent back a further draft with a modest number of corrections. In his witness statement Mr Martin said that the reference to incorporating much of what was discussed was merely to the substitution of Toscanini for Caruso. It is hard to evaluate exactly what had been discussed and therefore what had been taken in by Mr Martin, but in my view his assertion that the changes were so very limited is a significant understatement.
130. Between these two emails the Couple had another dialogue on Skype. Ms Kogan said that she would "*look at Flo quickly first xxx*". She then made some comments about the date of Florence's concerts and went on to refer, among other things, to a reception at the Met, a fundraiser at the Met headed by the Verdi club and McMoon assuring his friends that "*Flo has a phenomenal voice*".
131. The Couple then discussed the ways in which double meanings might be used to give comic effect to the dialogue concerning Florence's voice. Ms Kogan made two suggestions, one that "*she is like no one you have ever heard or will ever hear, again!*" and another with the single word "*unique?*". To that, Mr Martin replied "*yes!*". This is all very reminiscent of the Rehearsal Scene with Carlo Edwards as it later came to be, and is evidence of the Couple developing dialogue ideas together.
132. There was also discussion of the Melotone (Homophone) Records aspect of the story. Ms Kogan made some suggestions and Mr Martin responded positively. This is where Ms Kogan made the suggestion about Florence paying to have recordings made "*to please her false friends*".
133. On 30 March Mr Martin finished another draft treatment, the third (the "**Third Treatment**"). In the Skype dialogue he said at 4:53 "*I am just about done with the next pass at Flo.*" He referred to "*the briefcase stuff*". At 6:00 he wrote that

he had sent “*Flo*”, by which he meant the Third Treatment, and this can be seen by a very brief email of 15:59. To my mind, the changes made clearly reflect suggestions made by Ms Kogan in the course of the discussion of the Melotone (Homophone) Records part of the story.

134. On 31 March, in the small hours of the morning, Ms Kogan replied by email attaching a document which contained some minor editing changes and three paragraphs or more of substantive suggestions. The email opened with the words “*My baby, you are really getting there now, it is gorgeous.*” and the third paragraph ended with the words “*of course, please ignore whatever you please at what I say, this is totally your baby.*”
135. Of the changes suggested in this email, Mr Martin said that very few were made in the next version, to which I will refer in a moment, but he did not really dispute that he gave them consideration.
136. The Skype dialogue does not cover the events from 31 March onwards.
137. On the morning of 31 March, Mr Martin replied by email, saying (second full paragraph):

*“Anyway, thank you so very much for going through this again. I think in future there’s probably no point in correcting the spelling n’ shit until the final draft. I’m going to think about your comments today. All I would say at this stage is that I’m only interested in selling the document, and the more fun and dramatic the situations the better.”*
138. This suggests that Mr Martin regarded Ms Kogan as providing both typographical corrections and substantive comments, and that the latter might make the situations “*more fun and dramatic*”.
139. Still on 31 March, Mr Martin prepared the fourth draft treatment (the “**Fourth Treatment**”) and he sent this to Ms Kogan by an email in the afternoon at 15:29, the first sentence of which said “*A new versions [sic] incorporating most of your suggestions.*” I note that “*suggestions*” is in the plural.
140. The email continued “*I’ve altered the recording scenes a bit, but we need some way for Bayfield and McMoon to save the day.*”
141. I have noted, and doubted, Mr Martin’s suggestion of the word “*we*” being used in an instructional sense in the “*special collaborator*” email, but here I think it is clearly being used in the ordinary and unpretentious sense of referring to the Couple themselves. They, together, needed “*some way*” to advance the story in the way identified.
142. The email concluded “*let me know what you think.*”
143. In his witness statement Mr Martin said the reference to “*suggestions*” was to Ms Kogan’s comments about Melotone (Homophone) and the reception, and he said this was typical of how he would say to sounding boards or those commenting on his work that he had taken into account everything even if he had not. He said in

fact it was only two factual points. In my view it was more than two factual points because the Melotone (Homophone) Records subplot was a significant part of the story.

### April

144. Ms Kogan responded by email, now on 1 April, commenting on the “tag line” at the beginning of the treatment. In the Fourth Treatment, Mr Martin had changed this to “*The true story of Florence Foster Jenkins; the world's worst soprano, who broke box office records at Carnegie Hall .*”
145. Ms Kogan's comment was “*Ack, baby, this is not true at all ....*”. She said “*for a similar effect maybe you could say something like: “The true story of Florence Foster Jenkins, the world's worst soprano who sold out Carnegie Hall and/or whose recordings became legendary? Or something like that?”*”.
146. Later on 1 April Mr Martin produced a fifth outline (the “**Fifth Treatment**”). He changed the tagline in line with Ms Kogan’s comments, although he used the noun “*legend*” rather than the adjective “*legendary*”. He sent the outline to Jonathan Powell who responded by telephone to say that the story was “*rather good*”. Mr Martin also sent the Fifth Treatment to his agent, Charles Walker.
147. Mr Martin then told Ms Kogan, by another email of 1 April, that he had sent out the Fifth Treatment in this way. He wrote “*Thanks for all your help, it's really come on! I think the suitcase and all the inheritance stuff helps greatly. And it's good that she makes enemies - every story needs a villain.*” He explained in his witness statement that the villain that he had in mind was the music critic, Wilson. He said, and I accept, that the conception of Wilson as the villain came from him.
148. Before Mr Martin received any feedback on the Fifth Treatment from Mr Walker, Ms Kogan wrote him an email on 2 April which said “*Flo is so good, my love, I am dying to know what people will think. It is such fun for me to work on these things with you. I hope we will get to do much more...*”.
149. Charles Walker replied and Mr Martin sent his comments on to Ms Kogan by an email later on 2 April. Mr Walker's comments were not entirely encouraging, but nonetheless Mr Martin began submitting the Fifth Treatment to producers in London. This did not meet with any success and he therefore “*shelved the project*” for the next nine months.
150. I found the contemporaneous documents from this period illuminating and helpful. I think that they give a good insight to the creative process that the Couple used generally in the period while the work was on the development of the treatments and prior to the scriptwriting phase to which I refer next. I take into account that it is only a snapshot. It only covers a few days. But this is at a critical time in the creation of FFJ when the characters and key plot events were being shaped. The interaction between the Couple is reflected in the documents in a way which struck me as very authentic and unaffected. It is a true dialogue; each makes suggestions on which the other comments; some are taken in and others rejected (with Mr Martin as the final arbiter); Mr Martin expresses himself in the Skype transcripts and emails as interested in and accepting of Ms Kogan’s

input, and as grateful for creative input on top of the secretarial work of correcting the text.

151. Ms Kogan said in her witness statement that during the hiatus in work on FFJ from April on, she worked on a project referred to as “*Collaborators/Sumner Jackson*”, and she said that that work further illustrated how she and Mr Martin worked together. I accept that some work of this general type took place but the time available at trial did not permit it to be explored in detail, as I have said above.
152. At about this time the Couple also talked about a project called “*Hold Me Close*”, also and more often referred to as “*Complications*”, which was intended to be a romantic comedy based on the story of how they met.
153. At some point Ms Kogan suggested that the two of them should co-write *Complications*.
154. In his witness statement Mr Martin said that in a conversation on 26 July 2012 as the Couple were driving to Oxford, Ms Kogan made the suggestion and he firmly rebuffed it. He said that she reacted testily. He also said that Ms Kogan commented that she had been writing since she was three, and he replied that he'd been singing since he was three, so perhaps he should join her on stage.
155. In her first witness statement Ms Kogan disputed part of this account (which had been set out in pre-action correspondence), in particular as to the date, because the first treatment of *Complications* was finished in June and she had brought up the subject of co-writing at the beginning.
156. It is not possible on the materials I have to resolve the dispute about the date with confidence, although Ms Kogan's point has cogency. It is clear that such a conversation took place and that Mr Martin rejected the suggestion of co-writing in this context. I deal later in this judgement with the parties' thinking in respect of what “*co-writing*” did and did not include.
157. As with *Collaborators*, the time available at trial did not permit a detailed exploration of the creative process that went into *Complications* and I do not draw conclusions one way or another from it, other than that it was the setting for the disagreement about co-writing that I have just mentioned.
158. By August 2012 a final treatment of *Complications* existed, which was written, in the sense of at least doing the actual typing, by Mr Martin.

## **2013**

### January and early February

159. In January 2013 Mr Martin decided to have another try with FFJ. Through a contact at the National Film and Theatre School he was given the name of Mr Lewin. Mr Martin was told that Mr Lewin was a long standing fan of Florence.

Mr Martin got in touch with Mr Lewin and Ms Levine, who invited him to visit them in Los Angeles to discuss the FFJ project.

160. Having made contact with Mr Lewin, Mr Martin worked on two new treatments before travelling to Los Angeles on 29 January, having sent the most recent draft to Ms Kogan on 27 January under cover of an email which said “*Thanks so much for your help!*”.
161. Mr Martin gave evidence in his third statement about the changes involved in these new treatments, some of which he said were used in the film. Ms Kogan did not say much by way of detail about these two treatments in her written evidence and there is little by way of documentation to give an insight into what passed between the Couple at this stage.
162. Mr Martin spent some time in Los Angeles working with the Lewins and some of their collaborators. While he was there, further treatments were produced. Some emails between Mr Martin and Ms Kogan from the period while he was in the US were in the trial bundles but they are only in the nature of friendly chat and some moral support from Ms Kogan to Mr Martin. Mr Martin’s evidence, which I accept, was that because he was working with Mr Lewin and his team in Los Angeles, Ms Kogan was not involved. This is in contrast to the period in March/April 2012 when only Mr Martin and Ms Kogan were involved.
163. Mr Martin returned to the UK on 4 February, and on the same day Ms Kogan left for France. On 6 February Mr Martin completed another new treatment (the “*Final Treatment*”). He explained in his written evidence that again this contained some significant developments that would survive into FFJ. He said that Ms Kogan had very little involvement in this because she was in France for most of the period. Again, I accept this. There are no significant documents to show any detailed interaction at this time.
164. Mr Martin also said in his written evidence that this was the final treatment before he began to write a first draft of the script, and that about 50% of the story and the structure was in place. He points out, as is correct, that up until this point Ms Kogan and he had been largely apart while work on FFJ was done.
165. Mr Martin said that in about the second week of February 2013, while Ms Kogan was still in France, he started work on the first draft of the script. Ms Kogan, on the other hand, said the writing of the first draft began in January. This seems unlikely since it is much more probable that work on the script began after Mr Martin’s return from Los Angeles. I do not think that the date matters very much, though.

#### Mid-February to April 2013

166. Subject to the point about the exact start date, I do not think it is in dispute that the first draft of the screenplay (the “*First Draft Screenplay*”) was written in this period. Apart from a brief trip by Ms Kogan to France at the very end of March,



the Couple were in London all this time. They were living together at Mr Martin's flat in SW12 (and they later moved to SW17, in May 2013).

167. A consequence of the fact that the Couple were living together is that there are limited documents to show what passed between them in relation to FFJ. Neither side attempted a really detailed chronological account of what was written in terms of specific content.
168. Ms Kogan's account is, as I have already mentioned, largely contained in Annex A to her witness statement (to which Mr Martin responded in his exhibit NM3). Mr Martin's account is in fairly general terms as well and sets out the plot changes made by comparison with the Final Treatment of 6 February.
169. I therefore cannot deal with the individual points on the screenplay as they arise during this period in a chronological way, and will, rather, deal with them thematically below.
170. I can, however, address the parties' evidence about the working method that they used. The main factual dispute is about whether Ms Kogan herself typed any of the screenplay.
171. Mr Martin gave evidence, which I understood to be agreed, and which in any event I accept, that he wrote the screenplay on an old Dell desktop computer because the screen was quite big. He used a piece of software called Final Draft, which he described as a specialist script writing software programme that enables a writer to set out lines of dialogue and stage direction as one would expect to see them on a script. Mr Martin also had Final Draft installed on a laptop. He explained that Final Draft takes a bit of time to get to know and only allows the user to write within the accepted screenplay format, so that if a user did not know what that was, the programme would be confusing. I accept this too.
172. Mr Martin said, and Ms Kogan in her oral evidence accepted, that she did not have a copy of Final Draft on her own computer.
173. Ms Kogan did acquire Final Draft for herself later on, and in February 2015 she had an email interchange with Mr Martin in which she said she was still getting used to it. There is a palpable sense about those emails that she was then very unfamiliar with Final Draft, and I reject her evidence that she was able to use it during March/April 2013 and that as long as Mr Martin had set up the screenplay format, she could type into it without needing to know the software in any detail.
174. In addition to Ms Kogan's unfamiliarity with Final Draft, it is necessary to consider her physical ability to type given the injury to her hand which she sustained in the car crash in 2011. Her evidence on this was inconsistent when she was cross-examined, first saying that her fingers were not damaged but later, when shown her witness statement that she submitted in personal injury proceedings in 2015, she said that her fingers were damaged but not in a way that affected typing.
175. Ms Kogan has consistently maintained that she did a large amount of the typing of the actual screenplay on Final Draft. I reject this. Her lack of knowledge of

Final Draft and injuries make it very improbable to the point of impossible. In addition, my finding that Mr Martin was very possessive about the process of actually producing the words of scripts, which of course is part of Ms Kogan's explanation for statements she made that he was the author in respect of FFJ (considered in detail below), make it very unlikely that he would have been willing to surrender any material part of this task to her at all.

176. I cannot exclude the possibility that Ms Kogan typed the odd word or sentence on Final Draft, but I think that even this is unlikely, and I hold that Mr Martin did, in substance, all the typing and was responsible for the choice of the great majority of the words used.
177. I further find that Ms Kogan knew at the time of preparing her written evidence and at the time of her cross-examination that she had not written any significant amount of the words into Final Draft. There is further support for this conclusion below where I deal with the "*soft palette*" issue.
178. Mr Martin gave evidence, which again I accept, that he worked long hours on the screenplay in his study and that for a lot of the time Ms Kogan was not present. Quite apart from anything else his job was as a screenwriter so he could be expected to be on it full-time, while she had her other projects as a singer to see to, including her singing teaching.
179. But on the other hand, the Couple were living together and given the amount of time and discussion that they had already put into FFJ I consider it very probable, and find, that they carried on talking about it. In his statement Mr Martin says that although he never sat and worked together with Ms Kogan he did, more often than not, print out whatever he produced each day and give her the pages for her comment. He said that her encouragement was very welcome, and I think it more likely than not, and find, that the Couple's interaction followed the pattern that one can see from the Skype and email discussions in late March and early April 2012 so far as characterisation and plot events was concerned, but did not extend to the words being typed.
180. In fact, as I have already mentioned, it is not disputed that Ms Kogan had at least some input at this stage, because Mr Martin accepts that she provided musical terminology for use in the Rehearsal Scene in particular. The input that it is accepted she had at this stage was set out by Mr Martin in paragraph 132 of his first statement, quoted above.
181. Mr Martin also acknowledged certain contributions by Ms Kogan in paragraph 136 of his statement: some musical terminology and the provision of biographical material about McMoon. The paragraph also acknowledges her having provided thoughts about the likeability of the main characters.
182. On 12 or 13 March (Mr Martin says 12, Ms Kogan says 13, it does not matter), the Lewins came to supper with the Couple. There is a dispute about what happened. Ms Kogan claimed that it became obvious that the Lewins had not been told by Mr Martin that the idea of a film about Florence was her idea, and that she and Mr Martin argued about it. I have not found it possible to resolve what happened and neither Mr Martin nor Ms Kogan seemed to me to be entirely

consistent about it in their oral evidence. Since I have much clearer and more tangible materials to go on in relation to their respective statements about authorship at the time, I do not think it is useful or necessary to make what would be a rather flimsy conclusion about this incident.

183. The First Draft Screenplay was completed at the beginning of April and in her diary entry for 3 April Ms Kogan wrote “*N finishes Flo*” (underlining in the original). I return to this below.
184. Mr Martin sent the First Draft Screenplay to the Lewins on 4 April. On 27 April Ms Levine emailed to say that they both thought the First Draft Screenplay was “*greatly improved*”.
185. Mr Martin said that on a telephone call about this time Ms Levine asked if Mr Martin would allow Mr Lewin to take a shared writing credit on the script; Mr Martin was not receptive to this but the discussion continued.
186. On 30 April Mr Martin registered the First Draft Screenplay with the Writers Guild of America (“WGA”), naming him as the sole writer. It is common ground that Ms Kogan was aware of this. Mr Martin also sent a copy of the registration to Ms Levine. He accepted that during this time Ms Kogan would listen in on the phone to his discussions with the Lewins, but he says Ms Kogan did not participate. I accept this.

### Summer 2013

187. Mr Martin continued work on the script into the early summer. He began by making manuscript notes on a copy of the First Draft Screenplay. There is one short manuscript note from Ms Kogan with the name of an opera on the front page. He then used this annotated document to write a “*2nd draft rewrite plan*” which he says that he completed on 14 May. He sent it to a friend on 20 May. By this time, as I have mentioned above, the Couple had moved flats and Mr Martin had less room. He accepted that “*from time to time*” Ms Kogan would read the screen looking over his shoulder in his small study, but that any talking they did in relation to FFJ took place in other rooms.
188. There are relatively few documents from this period; in the middle of June, when Ms Kogan was away visiting family, the Couple exchanged emails about some specific points of the dialogue. The comments made by Ms Kogan in them are simply to the effect of telling Mr Martin that what he had written was good. This does not assist either side’s case very much, however. It is consistent with Mr Martin’s case that he wrote everything, on the one hand, but on the other hand it does not prove that Ms Kogan did not provide important input at other times, and furthermore the documents suggest that she was doing a quite detailed review of the screenplay, not just a scan for typographical errors.
189. Mr Martin emailed the second draft screenplay (the “*Second Draft Screenplay*”) to Ms Kogan on 21 June 2013. She replied from Holland on 23 June that “*You are absolutely right in thinking that no matter what happens, you have done it – you have accomplished the great task of creating something truly important. And you have done it more than once which few can claim. I am incredibly proud of*

*you. All the more so because you have written Florence under so much pressure, in such difficult circumstances...Making something from nothing but your own talent is a value in itself. To create in a near vacuum is a real thing."*

190. Mr Martin sent a version of the Second Draft Screenplay which had been proofread by Ms Kogan to the Lewins on 21 June 2013 and received a reply a few days later which he sent to Ms Kogan.
191. On 30 June Mr Martin received a message from the Lewins. It was terse and did not provide any detailed feedback. This clearly angered Mr Martin and he wrote to Ms Kogan expressing his frustration. She advised him not to make negative comments in reply; he asked if she could draft an email in response and she did so. He accepted that this was a sort of support and help that she provided from time to time, and while this kind of incident helps to understand the Couple's relationship it is clearly not in itself any sort of input to the copyright work of the screenplay in any relevant sense.
192. On 1 July, in the context of the issue with the Lewins, Ms Kogan wrote to Mr Martin in the following terms "*you did absolutely the right thing by writing your own second version for Flo ... you needed to know what was yours ... ultimately what winds up in the script is your decision.*".
193. On 11 July 2013 Mr Martin registered the Second Draft Screenplay with the WGA and again Julia was aware of this and did not reject.
194. From about 17 to 29 July 2013 Mr Martin again visited California and stayed with the Lewins. Ms Kogan did not go. She attributes this to lack of money but there is no convincing evidence of a sentiment at the time that, had there only been enough money, she would have gone.
195. On 22 July Mr Martin messaged Ms Kogan on Skype concerning the role of Lily Pons in the plot. In addition, he reported that he and the Lewins had agreed that Florence should be at the centre of things rather than to tell the story from McMoon's point of view. This was an important change to the structure of the screenplay. Immediately after he sent those messages, there were 2 Skype calls totalling just over an hour between the Couple.
196. On 26 July Mr Martin emailed to Ms Kogan a reworked story outline and asked "*can you look at it now I'll be discussing it with Ben later today*".
197. Ms Kogan replied in encouraging terms later the same day in a short email in which she said "*We all think it's terrific and you are our little family genius... it works very well, this version. Gabby [who was Mr Martin's ex-wife, as I have mentioned above] loves the Sinatra bit!*"
198. Although the email of encouragement is brief and is not itself evidence of authorial work or substantive input by Ms Kogan, the fact that Mr Martin asked her to look at the outline swiftly before he met with Mr Lewin is suggestive that he wanted comments on substance and not just some brief words of support.

199. The subsequent numerous Skype calls the next day, 27 July, provide some support for Ms Kogan's evidence that she was contributing during this period, in that they show sustained discussions at an important juncture. But they do not capture what was said.
200. The Couple's Skype messages that day also touched on the question of what credit Mr Martin might get for any film that resulted from the screenplay. Neither Mr Martin nor Ms Kogan had had a feature film made before and they were unsure of industry practice. In particular it appears that Mr Martin was concerned that if the film was made the director that was appointed might bring in their own writers, diminishing or removing his own credit. Ms Kogan said "*you must protect your position as the writer*". This was said in relation to Mr Martin's position vis a vis the rest of the world at a time when he was in Los Angeles confronting the issue of credit. In that context I do not think it can be taken to reflect Ms Kogan accepting that she was not a contributor.
201. Mr Martin flew back to London with quite extensive suggestions that had been provided by the Lewins, and he explained in his witness statement that he started work on them on his return. In particular, he set about removing McMoon's status as the lead character. He started on the third draft of the screenplay (the "***Third Draft Screenplay***") on about 4 August 2013. He explained that this was a lengthy process and took until 10 October (a version of 8 October also exists). It is after this that it is accepted by Ms Kogan that her input became minor.
202. During the period from April to August, Ms Kogan's son Sam came to stay with the Couple on two occasions. I take these slightly out of chronological order because they go together. A witness statement was submitted from Sam on behalf of Ms Kogan, and it was responded to by Mr Martin in his second statement. Sam Kogan was not one of the witnesses whose cross-examination was directed so he did not attend the trial and in those circumstances I think I must assess his evidence as best I can from the documents, in the context of all the other facts. I take these visits in reverse order. Mr Martin makes a very convincing case in his second statement that during the August visit he was not working on FFJ at all, with or without Ms Kogan. As to the visit in April the position is less clear cut. Sam's evidence is that the Couple were working on the screenplay all the time and that this reduced the amount of time he was able to spend with his mother. He says that the Couple were working on the screenplay on "*their laptop*". Mr Martin responds to this by saying that he was working on the screenplay during some of this visit, in particular up until the 4 April, but that Sam is mistaken as to the amount of time that he spent with his mother; Mr Martin gives details of other things that were going on. Mr Martin also explained that Sam must be mistaken about the use of the laptop since the Couple did not share one. I have mentioned above that Mr Martin mainly used a Dell desktop computer. Nonetheless Sam's evidence is consistent with, and supports to some extent, the account of Ms Kogan in that the Couple exchanged thoughts and discussed the screenplay for extensive periods of time during that spring. In saying this, I bear in mind that Sam has every reason to support his mother (I do not suggest or consider there to have been any deliberate exaggeration), and his recollection as to the August visit seems quite clearly to be incorrect.

203. Sam Kogan's evidence, and that of Ms Kogan, is supported by a witness statement of Ms Serafiina Sainio, a pupil of Ms Kogan's, who says that in the summer of 2013, while visiting the flat, she met Mr Martin who referred to the Couple working on a screenplay about Florence and used the words "we" and "our" in relation to the work. Like Mr Kogan, Ms Sainio was not cross-examined, and her contact with Mr Martin was very brief, and I take this into account.

#### October to December 2013

204. On 23 October Mr Martin registered the Third Draft Screenplay with the WGA in his sole name.
205. Starting on about 24 October Mr Martin started to try to get interest in the script. He asked Charles Walker to send it to various UK companies. The Couple together drafted an email to be sent to various directors. It seems probable that Ms Kogan was mainly responsible for the drafting of these. All of them, as Ms Kogan was aware, named only Mr Martin as the author of the script.
206. Prior to this, Charles Walker had been trying to make an option agreement with the Lewin's company, which was called Such Much Films, for the script, but there were sticking points over who would have control and over a desire on Mr Lewin's part to rewrite the script.
207. On 4 December the Third Draft Screenplay was sent to Mr Kuhn and he expressed interest.
208. On 18 December, Mr Martin sent an email to the Lewins, again drafted by Ms Kogan, ending any working relationship with them.

#### **2014**

#### January to mid-April

209. At the start of 2014, interest in FFJ increased and there were encouraging signs that it could be made into a film with the Film Companies and with the possible involvement of Meryl Streep. However, Mr Martin had an increasing concern that the Lewins might assert some ownership in the script. I understood from Mr Kuhn's oral evidence that he came to learn of this and expressed strong concerns, but in any event Mr Martin, with the involvement of Charles Walker, and keeping Ms Kogan informed, made a deal with the Lewins for them to have a 15% share in any proceeds in exchange for surrendering any interest that they might have. This was a pragmatic decision and I do not think it can be treated as a real assessment of the extent of the creative contribution by the Lewins, though I think it is clear that their contribution was non-trivial, for example in moving the whole screenplay away from being from McMoon's perspective.
210. Mr Martin's option agreement with the Film Companies was made on or around 5 March 2014 (there is some doubt about the precise date) and his deal with the Lewins was formalised on 6 March. Ms Kogan did not assert any rights at this time, but she did know everything material that was going on.

211. Ms Kogan alleges that a couple of weeks earlier on 17 February 2014, when the Couple were making a train journey to an interview, Mr Martin said to her “*so... how much of this film do you think you own?*”. She said in her written evidence that she was unprepared for the question. She further said that Mr Martin wanted clarity and said “*I think 15%. You should get at least as much as Ben Lewin.*” Ms Kogan said that she did not know how to react, but that she did not regard her percentage contribution as anything like the same as Ben Lewin, whose contributions could be counted in “*weeks, not years, of work.*”
212. Mr Martin denies that this conversation happened at all. I do not think that this difference as to what happened can be attributed to a difference merely in recollection or perspective, in contrast to many of the other factual disputes in this case. On this incident, as I think the parties agreed, the only possible conclusion is that one of the principals must be deliberately not telling the truth. I find that Mr Martin is to be believed and that Ms Kogan has made up this incident. The main reason is that, in April 2014 when the Couple tried couples counselling (to which I refer below), Ms Kogan is agreed to have mentioned 15%. Mr Martin immediately reacted by telling his friend Barry Simner. But there is no sign that he did the same thing in February. It is also hard to see what Mr Martin’s motivation can have been to mention it in February; I do not find Ms Kogan’s supposition that he did it because he was thinking of distancing himself from her then to be convincing. Further, I assess this in the context of other aspects of Ms Kogan’s evidence where I think she was not telling the truth, in particular her account that she actually typed a lot of the screenplay and the “*soft palette*” incident, and that tends to build a pattern of fabrication or exaggeration on her part where she has found it desirable to bolster her case. I have considered what motivation Ms Kogan can have had to make this incident up, since it would give me pause if I could think of none. Since she denied making it up there was no point asking about her motivation, but I think a possible reason is that she thought when preparing her position for the pre-action correspondence that it would be better for her if Mr Martin had made a proposal, and had done so at an early stage.
213. By about this time the Couple’s personal relationship was in difficulties. Ms Kogan moved out of their flat on 3 March 2014. Their relationship was not hostile however, and Mr Martin set about attempting to find a role for Ms Kogan in the Film as musical consultant. He made a request on her behalf to Mr Kuhn.
214. The Couple remained in reasonably friendly contact and on 8 April they went to couples therapy, initially instigated by Mr Martin, with a mutual friend as counsellor. In the evening of that day Mr Martin wrote to Mr Simner to say that after the session Ms Kogan had requested a 15% interest in the script. Mr Martin described himself as feeling hurt. He was also upset that Ms Kogan had been in close communication with her ex, to whom she was still married. The following day Ms Kogan wrote to Mr Martin repeating an assertion that she should have 15% of FFJ and *Hold Me Close* and 7.5% of *Sumner Jackson*.
215. In this email Ms Kogan asserted “*I brought Florence to you and helped you develop it.*” She went on to say that she would not take credit for Mr Martin’s work. She expressed the hope that he would do all he could for her and save her career.

Mid-April to October

216. The next part of the chronology is a time when the Couple's relationship and feelings were particularly complex. Mr Martin was enthused by progress with FFJ, but at the same time he was anxious because, as he explained in his written evidence, once a script has been optioned it is owned by the production company and the producer, director and others all get involved in script development. He was concerned therefore that he might be, relatively speaking, sidelined. This had been foreshadowed in his Skype conversation with Ms Kogan during the second visit that he made to the Lewins.
217. In addition, Mr Martin was starting to develop his relationship with the director Mr Frears, and one of the producers, Cameron McCracken (and there was also further development of his relationship with Mr Kuhn). It is very clear from the documents that he was concerned to develop these relationships and keep the fullest possible control over the script. No doubt one of the things motivating him was that in due course he might get a full writer's credit for the Film. So, for example, he reacted with concern when Ms Kogan sought to engage directly with Mr Frears. For example, there were emails of 14 April 2014 about Mr Frears' being invited to a concert given by Ms Kogan. Eventually, Mr Martin demanded that Ms Kogan should only contact Mr Kuhn through him, and she agreed.
218. Ms Kogan, for her part, was concerned to obtain the greatest possible role in the Film, whether as a participant or a consultant.
219. Both Mr Martin's and Ms Kogan's attitude in this respect are quite understandable. Being involved in a feature film that was going into production for commercial release with major stars in the leading roles was an achievement far beyond anything that had happened to either of them before, and participation and credit would obviously be very important to boost their future careers.
220. Mr Martin's attitude to Ms Kogan was for all these reasons very controlling, in a somewhat similar way to the control that he had wanted to exercise with the process of actually writing scripts, and is reminiscent of his angry rejection of Ms Kogan's earlier proposal that they should be co-writers.
221. However, the Couple's relationship was not fundamentally hostile and Mr Martin did continue to try to arrange participation in the film for Ms Kogan. It appears they had some kind of working relationship and on 24 April 2014 for example, by text message, Mr Martin said to Ms Kogan "*Call me later. Perhaps we could work together tonight or tomorrow? X*". There is nothing to indicate that this was specifically about FFJ and Mr Martin said in his oral evidence that it was not, but it illustrates a willingness for them to work together on what I think must have been some development of some script, and that Mr Martin actively sought this cooperation.
222. The Couple patched things up in May and went on holiday together, although they remained living apart.



223. On 22 June, Ms Kogan emailed her friend Miriam Escofet to say that Nick was doing well and “*the film he wrote about Florence Foster Jenkins will be directed by Stephen Frears*”.
224. In early July, the Couple had a discussion about possible music choices for the film. Mr Martin sought Ms Kogan’s opinion by an email of 3 July, and she said that she would think about it and offered to “*pin down*” how to imitate Florence for the pieces in question. She expressed the opinion that for Florence they should stick to pieces that she actually recorded, since they were so infamous. She referred to the humorous aspect of how bad Florence's singing was.
225. At the same time, Mr Martin told Ms Kogan that he wanted to propose her to Mr Kuhn as the vocal coach for Meryl Streep; it was this opportunity that he took to propose the undertaking that Ms Kogan would only deal with Mr Kuhn through him.
226. At exactly the same time, in an exchange which I find important and enlightening, Ms Martin corresponded with Mr Simner about how he should engage with Mr Kuhn about Ms Kogan’s role. He asked Mr Simner by email about the text of a draft note to Mr Kuhn (which was never in fact sent). It said as follows:

*“Julia is going to look at the music and come up with some alternative ideas.*

*With regard to vocal coaching for MS, could I propose Julia as a candidate?*

*She teaches everyday at a high level and specialises in helping opera singers who are in trouble - both ENO types and West End show singers. She has been intimately involved in helping develop the character of Florence and her analysis of the recordings has played a big role in this. She took Florence's voice apart piece by piece and understands why it is so funny- and so tragic. We reached the conclusion that Florence's voice is special because it so honestly exposes the deep flaws in her character. This was the foundation upon which I wrote.*

*This is all rather tricky stuff and I am extremely anxious that MS might just appoint a favourite - who gets it all wrong. If the singing isn't funny and touching, the film won't be funny and touching. Julia understands this.”*

227. Mr Simner replied to say that Mr Martin should ask himself what Ms Kogan would think of it, and said that he, Mr Simner, thought that Julia would have to say it was generous and fair, and that it acknowledged her input and would put her in a strong position vis a vis a proper role in the production.
228. Mr Martin came back to say that he was in two minds about sending the note and needed to have a chat with Julia about “*boundaries*” first because, consistently with what I have said about his anxieties, he worried that once “*she's on the inside she'll start crashing about*”. As I have explained, this discussion did take place.
229. Mr Simner replied that Mr Martin should have such a discussion “*to protect yourself as well as your financial stake in this.*” Mr Martin replied that he would not let Ms Kogan see the letter he sent to Mr Kuhn “*blowing her trumpet, as she*

*might use it against me in the future to extract cash.*” Clearly, at this time trust was diminishing.

230. Mr Martin in his oral evidence said the content of his draft note to Mr Kuhn was not correct. I reject this. I think it was correct, and if anything it may have understated Ms Kogan’s abilities, input and potential because Mr Martin did not want her to be put in an advantageous position as against him in the future. The note illustrates very clearly an acknowledgment by Mr Martin that Ms Kogan had been intimately involved in developing the character of Florence and understood why Florence’s voice was so funny and so tragic. It vividly demonstrates, in my view, the way that Florence’s voice, her character and her musical shortcomings contributed to the drama of the script.
231. Consistently with her acceptance that her involvement after the Third Draft Screenplay was limited, there is little sign of Ms Kogan having input to the development of FFJ during this period. One exception is that in mid-August the Couple had an interchange in which he asked her to proofread a rewrite plan before showing it to Mr Frears, and they both discussed the way in which Florence’s syphilis could have affected her sex life with Bayfield.
232. In mid-October there was a series of email exchanges about the music for a scene in FFJ (the audition scene) between Mr Martin and Mr Kuhn. It was felt necessary to change from the originally-intended song *Babes in Toyland* because that was not written until too late.
233. Other suggestions were made including, in particular, pieces from Sain-Saëns’ *Carnival of the Animals*. After some discussion Ms Kogan wrote to Mr Kuhn and Mr Martin suggesting that *The Swan* was a more suitable piece than *The Elephant* because the choice was one between humour and tenderness. She suggested that Florence’s reaction to the music in the script would suggest tenderness. Mr Martin replied “*yes, I think we should go for tenderness. I like the elephant but I don’t see Florence as having a sense of humour!*”. This is a relatively small part of the picture, but in my view it emphasises and illustrates Ms Kogan’s input in synthesising the music in the film with the character of Florence.
234. The next day, Mr Simner sent Mr Martin a storyline for an idea called “*The Butcher of Hay*” asking for feedback and Mr Martin responded with “*Okay. Why not send it to Julia too. She’s good at story.*” This provides some support for Ms Kogan having provided good help with “*story*” as experienced by Mr Martin during the time that they had worked together, and of course one of the main things that have been developed during their relationship was FFJ.
235. On 21 October, Ms Kogan met Mr Frears for the first time. Later that day Mr Frears sent an email to Mr Martin about the montage scene in FFJ commenting “*I’m not nearly clever enough to do this but you are. Or your lady is. The whole scene needs a climax.*”
236. At almost the same time, just after the meeting, Ms Kogan ended the romantic relationship between the Couple, this time for good. However, they remained in contact and the next day the discussion continued about the montage. Mr Frears directly sought Ms Kogan’s views. Mr Martin said that it was great that Mr Frears

had taken on board what she said. Mr Frears also asked whether when McMoon is questioning Bayfield about Florence (he probably had in mind the Scene in the Lift) he should make suggestions about the way that she was producing the sound from her diaphragm. Mr Martin asked Ms Kogan to give him some “*technical lingo*” and she did so in an email of the afternoon of 22 October, suggesting some of the dialogue which unquestionably found its way into the lift scene. Mr Martin passed this straight on to Mr Frears.

237. This again is a relatively minor part of the story in terms of the amount of the screenplay it affects, but illustrates to my mind the kind of contribution that Ms Kogan made in terms of development of both plot and character by reference to the music. I also find it telling that Mr Martin, when faced with the need to develop the screenplay in these respects, immediately asked Ms Kogan for help, because, I find, he felt unable to do that sort of thing himself. These events happened after the Third Draft Screenplay when it is agreed that Ms Kogan's input was minor, but they shine a light on how the Couple are likely to have worked together at the earlier stages and in particular how they may have worked together when they were physically together and there is no useful documentary record.
238. At the end of October Ms Kogan prepared some vocal notes for FFJ to explain in technical detail why it might be that Florence's technique led to her terrible performances, and she sent this to Mr Martin on the 29 October. Towards the end of that day he wrote back to her saying “*Worth tying it all in with the script. Reference the squilo, sub glottal pressure, unphonating cords, voice in the mask etc with a scene reference so he can look it up. Say you got me to write this in. This further ties you to the script.*”
239. Then, on 2 November, Mr Frears wrote to Julia saying that it had been nice to meet her and “*my guess is we owe you a lot.*”
240. On 4 November, Mr Martin complimented Ms Kogan on the vocal notes saying that the most important part, “*the killer*”, was the references by scene to the script which the notes now contained. Mr Frears again complimented the notes.
241. A further email discussion took place involving Mr Martin, Ms Kogan and Mr Frears on 10 and 11 November, concerning the relative merits for the plot and characterization of the film of the Bell Song and the Queen of the Night aria (from the Magic Flute). One again gets the impression that Mr Frears valued her input, and again the sense is very much that Ms Kogan had and used an ability to exploit musicality as part of the plot and the characterization. Further similar discussions continued for the next few days.
242. Ms Kogan suggested in her written evidence that she thought that Mr Frears suspected that she had been involved more deeply in the writing than Mr Martin had previously allowed him to understand. I suspect that this is true, but it is for me to decide what her input in fact was.
243. The Couple met in person on 21 October, and this would be their last face-to-face meeting until the Case Management Conference in 2016.

**2015**

244. The Couple managed to maintain professional communications into early 2015. A key topic of discussion was what role and what credit Ms Kogan might be able to get. Mr Martin remained uncomfortable about Ms Kogan being in direct contact with Mr Frears in case it caused problems. In particular, an issue blew up when Ms Kogan wanted to send some photographs of herself in 1940s makeup to Mr Frears to try to salvage her severely fading chances of playing Lily Pons. On 7 March 2015 she sent to Mr Martin a letter which she wanted to send to Mr Frears and which contained a disingenuous PS to the effect that Mr Martin was unaware of the message. Mr Martin did not respond well, and in any event he told Ms Kogan that she would very probably not be cast as Lily Pons; he said that he was sorry and the situation and the business were awful but that he had done his best.
245. Ms Kogan sent the email to Mr Frears on 8 March.
246. On 9 March Mr Martin confirmed that Ms Kogan would not be cast as Lily Pons and that sending the pictures to Mr Frears would not change his mind (though in fact, unbeknownst to Mr Martin, they had already been sent).
247. Also on 9 March Ms Kogan wrote a long email to Mr Martin, she being very unhappy about the loss of the role. I will not attempt to summarise it all. She said that she had pitched to him the FFJ story, and should have asked for a clear agreement at that stage. She asked what the financial arrangements were between them, said his plan had been to put her on the payroll of the Second Claimant (which certainly had been raised as a possibility) and made the assertion that 15% was what he had suggested as her share of his earnings on the Film, the same as Mr Lewin. I have addressed this above and concluded that he had made no such assertion.
248. She went on to say that she hoped he would choose to share the producer's profit with her, and that this was "*a moral question*". She did not cast matters in an especially legal way or by reference to legal rights although she clearly had commercial and financial matters in mind. It must be recalled that at this stage she had not taken legal advice. She also raised the question of what credit she might have, saying that she would like to speak to Mr Kuhn about that "*eventually*" and that she would seek independent advice on what sort of credit would be appropriate. She meant advice from people in the industry rather than legal advice.
249. Mr Martin decided not to speak to Ms Kogan any more after this.
250. In fact, it was not long until Ms Kogan had a discussion with Mr Kuhn. They spoke on the next day, 10 March, by telephone. After the discussion on 10 March, Mr Kuhn sent an email to Mr Frears and Mr Martin to say that he had spoken to Ms Kogan to say the casting for Lily Pons had been decided and she must move on. He said that Ms Kogan had said she understood and asked if at a convenient time she could talk to him about her credit, to which he had said that it would be appropriate once the Film reached post-production.

251. Ms Kogan sent an email to Mr Kuhn later that day. She said that she appreciated his efforts and hoped that things might change and another opportunity open up for her. She said that she would contact him in August (when the Film reached post production) to discuss the issue of a screen credit and participation in the soundtrack recording. In the last paragraph of the email she identified that she had had in mind the *Souvenir* play when she and Mr Martin first discussed the possibility of a film about Florence. She pointed out that her friend who had been working on *Souvenir* had never sent her the script. This was very important to Mr Kuhn, as he explained in his oral evidence, because he wanted to be very sure that there was no risk that FFJ plagiarised anybody else's work. I accept this evidence. A few lines into the last paragraph Ms Kogan wrote "*as Nick and I developed the screenplay*". In her oral evidence she accepted that she had not mentioned this during the face to face meeting. I accept the gist of Mr Kuhn's evidence that this did not register with him at the time because he was far more concerned about being safe from any risk of infringing somebody else's copyright. In any event, I find that it was far too slight a matter to put Mr Kuhn or the Film Companies on notice of any claim by Ms Kogan.
252. I should also mention, although I am taking this out of chronological order, that Ms Kogan and Mr Kuhn had met on a few previous occasions through Mr Martin, including at a performance she gave and at a café in Marylebone High Street when she and Mr Martin were on their way to meet Mr Frears in October 2014. It is accepted that Ms Kogan made no mention on any of those occasions to having been an author of FFJ.
253. Ms Kogan sent Mr Martin another email on 16 March remonstrating with him for his silence, raising again the question of what credit she might receive and again asserting her claim to 15%, although she said she thought that both of them knew that her input was greater than that percentage suggests. At this stage, trust was truly gone and it was only a short while later that lawyers acting for Ms Kogan sent the initial letter before action on 24 April 2015, she having first met with them on 7 April 2015. Following circulation of this judgment in draft and in connection with this paragraph and paragraph 406 below, Counsel for Ms Kogan drew my attention to an email of 2 March 2015 from Ms Kogan to Mr Martin. This had said that Ms Kogan knew that Mr Martin would share "some part" of his money from the Film, that the Couple ought to "think about the credit aspect of it" and that it was important for Ms Kogan that her contribution was not merely musical. The email did not attract any significant attention in the witness statements or oral evidence so far as I can tell, although it was mentioned in Ms Kogan's closing reply submissions. I am not entirely clear for what reason it is relied on at this rather late stage but in the event it is said to reflect that trust between the Couple broke down earlier than I have found (16 March) I reject that. The Couple were still talking and Ms Kogan was expressing a desire to go on doing go, and some faith in Mr Martin.
254. Ms Kogan continued briefly to correspond with Mr Kuhn about Meryl Streep and whether she might want a vocal coach for the Film, but that came to nothing.
255. Principal photography for the film began on 15 May 2015 and ended on the 17 July 2015. Mr Martin attended the set nearly every day and there were further frequent revisions to the script.

## THE PARTIES' STATEMENTS ABOUT AUTHORSHIP

256. Each of Mr Martin and Ms Kogan relies on contemporaneous statements by the other said to be as to authorship. Mr Martin asserts that he was the sole author so he relies on statements which he says are to that effect. Ms Kogan says she was a part author and relies on statements which she says were to that effect. Each also relies on their own statements.
257. All these statements need to be seen in their complete context. Not least, they need to be seen in the context of the Couple's personal relationship and what they were doing at the time of the statement in question. For example, I have found that Mr Martin did the actual writing (in the narrow sense) of the drafts of the script and statements made at the time about "*writing*" need to be seen in that light.
258. I have not tried to list every single statement below and have focused on what seem to me to be the main ones and the ones relied on most heavily.
259. Overall, I did not find the statements very helpful because I have found it possible from the parties' written and oral evidence to me, the other contemporary documents, and the undisputed facts, to work out with a good degree of confidence what sort of thing was actually contributed by each. The statements are merely soundbites which are highly coloured by context and emotion. I have to take them into account as a part of the whole picture, but I have found them quite minor in the scheme of things.

### Statements by Ms Kogan

260. Mr Martin relies in particular on the following statements by Ms Kogan:
- i) Ms Kogan's email of 29 March 2012, "*the screenplay which you will write*".
  - ii) Ms Kogan's email of 31 March 2012, "*Of course, please ignore whatever you please of what I say, this is totally your baby.*".
  - iii) Ms Kogan's email of 7 January 2013 to Chris Swann, describing the treatment as "*Nicholas' Florence Foster Jenkins write up*".
  - iv) Mr Martin's email of 2 February 2013, "*Everyone is happy for me to start writing Florence*", said in the context of his discussions with the Lewins, and his email of 9 February 2013 "*I have set forth on the journey; a page of the script on the screen.*"
  - v) Ms Kogan's diary entry of 3 April 2013, "*N finishes Flo*".
  - vi) Ms Kogan's email of 23 June 2013, quoted above.
  - vii) Ms Kogan's statement of 27 June 2013 in the context of the concern over the Lewins' potential claim, "*You must protect your position as the writer*".

- viii) Ms Kogan's email of 26 July 2013, again in the context of dealings with the Lewins, "*We all think it's terrific and all agree you are our little family genius*".
- ix) Ms Kogan's email to her friend Miriam Escofet of 22 June 2014 "*Nick is great ... the film he wrote about Florence Foster Jenkins will be directed by Stephen Frears, with Meryl Streep and Hugh Grant in the leading roles.*"
- x) Absence of any countervailing statement by Ms Kogan when Mr Martin put his own name alone on the registrations with the WGA.
- xi) In a negative sense, her failure to mention FFJ specifically in her personal injury witness statement of 12 August 2015.

### **Statements by Mr Martin**

261. Ms Kogan relies on the following statements:

- i) The "*special collaborator*" email of 28 March 2012.
- ii) Various emails where Mr Martin said he was incorporating her comments, such as 29 March 2012 "*putting in the changes we discussed.*"
- iii) The email to Mr Simner of 3 July 2014.
- iv) Mr Martin's reference to Ms Kogan being "*good at story*" in an email to Mr Simner of 14 October 2014.

### **Analysis of the parties' statements**

262. I have already said that the context of these statements is very important. The parties were in a romantic relationship which was developing well to start with and (much) less well later on. Early statements in particular must be viewed against the fact that they were clearly trying to establish a loving relationship and each wanted to be kind and complimentary to the other. The "*special collaborator*" email has to be seen in that light, but on my findings of what Ms Kogan had already done she was a collaborator, and she was "*special*" not just in the romantic sense but because she provided much more substantive input than Mr Martin's habitual "*sounding boards*".
263. Statements that Mr Martin was "*the writer*" may just reflect that he was the actual writer, in the narrower sense of choosing the words in sequence as he typed in Final Draft.
264. In addition it is common ground that Mr Martin had the final say, so statements to that effect do not add anything.
265. A point that affects all of Ms Kogan's statements is Mr Martin's attitude to her expressed desire to participate in the process of screenwriting, in the sense of actually choosing or creating the words of the script. I find that Mr Martin reacted angrily and with hostility to the request by Ms Kogan in mid-2012 that they should attempt the joint writing of screenplays, and it seems likely that this

attitude was in the air throughout, if less openly expressed, given his previous bad experience of true joint writing early in his career. I also find that this strongly affected the way in which she described matters thereafter. It provides a substantial reason why she would refer to him as the creator or writer without asserting her own input; she did not want to make him angry again in the same way as she had before.

266. It was pointed out to her in cross-examination that she was able to assert herself on other matters, such as whether Mr Martin was drinking too much. She said, and I accept, that she backed off on that occasion as well. But in any case, in a complicated romantic relationship under stress such as theirs, it would not be unusual for some topics to be discussed without inhibition and others to be approached only with great caution, if at all.
267. I also find that Mr Martin's anxiety and touchiness in this respect were at their greatest in relation to the specific process of actually writing screenplays. One can see his anxiety again later on in relation to keeping Ms Kogan at a distance from the Film's production.
268. Further, even the allegedly stronger statements lose their force when scrutinised. Take, for example, Ms Kogan's diary entry "*N finishes Flo*", particularly heavily relied on by Mr Martin because it is a statement personal to Ms Kogan and not amenable to the explanation that Ms Kogan was avoiding public expressions that would upset Mr Martin. This came at a time when Mr Martin had indeed just achieved a milestone of writing (in the narrow sense) because he had finished the First Draft Screenplay, and no doubt that was notable and possibly the occasion of some personal relief that a difficult and time consuming task was done. The statement may have been intended to go no further than recognising that, and it cannot possibly be interpreted as "*N finishes Flo, to which I contributed nothing*", since it is accepted that Ms Kogan did make contributions.
269. Ms Kogan's personal injury witness statement bears individual comment; I accept her explanation that the context was that FFJ had not yet come to fruition. All that the statement says is that "*For example*" she "*had initiated film and television series projects with my former partner Nicholas Martin.*" None is individually named, and there is no suggestion that she either had or had not worked on FFJ. The reference to those projects is merely the basis for a general statement later on that that kind of work had been set back.
270. The witness statement remains relevant for what it says about Ms Kogan's hand injury, however.
271. All that said, some of the statements have impact, and I have in mind the slightly more detailed ones, such as Ms Kogan's email to Miriam Escofet and Mr Martin's to Mr Simner. But none is anything like a killer blow and they point both ways; there is not a consistent pattern in either side's favour.
272. Overall, I do not consider that any of the statements of the Couple is inconsistent with my findings as to what actually happened, and indeed they broadly support my view that Ms Kogan contributed as a collaborator in terms of characterisation, musicality, choice of historical incident and musical terminology, especially



earlier on, and Mr Martin was a participant in those respects but took over almost entirely in the actual writing and had the final say.

## **ASSESSMENT OF THE WITNESSES**

273. It is common, perhaps usual, to make general observations about witnesses early in a judgment, and return to specific incidents to qualify or colour or elaborate the general. In this case I have found general matters such as demeanour less important than the witnesses' concrete evidence on the events to which the proceedings relate. So my assessment of them appears here.
274. In the course of my chronological review I have found that Ms Kogan has been deliberately untruthful about whether she actually wrote the words of the screenplay in Final Draft, and about the alleged conversation on the train in February 2014. Below, I assess her evidence as a whole against this background, and with regard to the undisputed facts, and the contemporaneous documents. Other criticisms were made of her evidence, and while it might be said that they are more minor, I consider I should make findings on certain of them, to put them in the overall assessment and because some tend to fortify the findings I have already stated. I have not tried to deal with every single criticism made in the submissions of Mr Martin or the Film Companies.

### **Other criticisms of Ms Kogan's evidence**

#### "Working Method" time period

275. Ms Kogan described her ways of working with Mr Martin in detail – the constant interchange of ideas and so forth. At various times in this litigation she has given different accounts of the period over which her contribution extended. At trial this was particularly marked, because she asserted that the method that the Couple used prior to March 2014 continued after she moved out, and right up until March 2015. This was obviously incorrect since she and Mr Martin did not even see each other after October 2014, and of course it is now accepted that her input after the Third Draft Screenplay was minor. This was not deliberate untruthfulness, in my view, but thoughtless and extravagant exaggeration and improvisation under pressure.
276. In a similar but much less marked way, Ms Kogan has described the proportion of the screenplay contributed by her in very different degrees, sometimes asserting 50:50 and at other times agreeing that she was the more minor partner.

#### "Allegretto", "Problematico"

277. In the Rehearsal Scene with Carlo Edwards, Florence says to McMoon "*a little more allegretto*". This was claimed by Ms Kogan as one of the pieces of musical jargon that she contributed. When she came to give oral evidence and was about to be asked about it, she said quite spontaneously that she had a doubt after the first trial about whether she was right on the point, and she essentially retracted it. This was far too casual given the importance she attached to the contribution of musical jargon in her case.

278. “*Problematico*” did not appear in the script until September 2014 by which time Ms Kogan’s involvement was much reduced. Nonetheless she claimed she had typed it, and had to retract that. This has a similar impact to “*allegretto*”. It is not good enough for her to say that it was an error of recollection, since she made a positive point of it.

“Soft Palette”

279. In paragraph 87 of Annex A, Ms Kogan said that the reference to “*soft palette*” was an erroneous rendering of “*soft palate*”, which had been made by her, a fluent French-speaker. This was relied on by her as an indication that she had, herself, personally typed the words into the screenplay. This was during the Final Draft stage of the process.

280. Moreover, she said in her oral evidence that this was something she specifically remembered doing “*sitting on the floor with the laptop*”.

281. However, the account fell apart under cross-examination, not least because the French for soft palate is the masculine “*le palais mou*”.

282. This was another instance of Ms Kogan consciously making something up to help her case. It is a further reason to reject her account about typing any of the screenplay herself.

Scenes in and features in the script only after version 3

283. A number of points were made about scenes or features that were only in versions of the script after the Third Draft Screenplay but which Ms Kogan said she had written herself. Examples were the potato salad in the bath tended by Kitty, and the scene in the hallway of Florence’s apartment where she invites Bayfield into her bedroom after he has asked Kitty to fetch a blanket for McMoon. I was much less impressed with these criticisms since related material did appear in the Third Draft Screenplay earlier and in any event these were only points that could go to Ms Kogan’s recollection and not her veracity.

**Overall assessment of Ms Kogan’s evidence**

284. Mr Richards, for Mr Martin, took a refreshingly and commendably realistic approach to his comments on Ms Kogan. It would have been all too easy, yet unhelpful for me, to say that because she had been untruthful on some things she was always that way, and that her evidence as a whole should be rejected. Instead, he submitted as follows (closing, paragraph 9):

*“Ms Kogan had a complex relationship with the truth. Her evidence on many key points of factual dispute was demonstrably wrong; she was willing to give, and then confirm, evidence that (as she must have realised with a moment’s thought) was obviously untrue. ... Yet it would be wrong to characterise her evidence as generally dishonest. At the heart of her claim to have cowritten the Screenplay is a passionate and genuine belief that she somehow has a claim over the*

*Florence concept, and around that belief she has constructed a largely false narrative of how the Screenplay came to be written.”*

285. I am sorry to say that the first part of the submission understates what Ms Kogan did in her evidence. I see no way to avoid the conclusion that she knew, and was conscious, that aspects of her evidence were untrue and she invented them. I agree though that she did this because she was driven by a genuine belief that she had a claim over the screenplay which had been denied her. This was accentuated by a powerful sense that she had had almost in her grasp, then lost, a golden opportunity for her creative career to take off which was unlikely ever to come again. Further, all this took place against the background of the breakup of a tempestuous relationship at a vulnerable time in her life when she was recovering from a bad injury and was in financial trouble. I am sure she also had strong emotions about the deployment against her of statements said to show that Mr Martin was the sole author and which she felt (rightly, as I hold) were in fact statements of emotional support for him.
286. By contrast I think that the second part of the submission, that Ms Kogan constructed a “*largely false narrative*” of how the screenplay came to be written, overstates what she did and blurs the very different periods of the history.
287. For the period up until the end of the Fifth Treatment and the point at which Mr Martin began actually to write the screenplay on Final Draft, I find Ms Kogan’s account is generally accurate and I will state my individual findings about it below. Her account of the period when the screenplay was being written by Mr Martin on Final Draft is, on the other hand, very unreliable and her contribution was very heavily overstated by her. While I conclude that she probably contributed in a similar general manner as in the initial stages in terms of character and the significance of music, much was already in place and the amount of her contribution dropped off greatly, all the more so after she moved out. Thereafter, her contributions were those that can be concretely seen in the documents referred to above, but including the important phase when she was in contact with Mr Frears (important because it illustrates the sort of thing she contributed, the amount being quite small).
288. I do not base my assessment of Ms Kogan’s evidence on her demeanour in the witness box much at all. That is not to say she was a good witness; she was not. She was argumentative and paid no attention to requests from Counsel or from me to keep her answers to the point. She made prepared speeches. This wasted valuable time and was frustrating for all, as I believe was apparent to her. But I do not think I should let frustration lead me to give her evidence less credit. My findings about the reliability of her evidence are based on objective matters such as the known facts and the documentary record.

### **Overall assessment of Mr Martin’s evidence**

289. It was submitted for Ms Kogan that:

*“Mr Martin was not a credible witness. He was combative, unhelpful and deliberately evaded answering questions, refusing to make fair or reasonable concessions where appropriate. It was clear from Mr*

*Martin's evidence that he has a very poor recollection of what in fact occurred and his memory of material events was plainly selective."*

290. I agree that Mr Martin was combative, unhelpful and avoided answering questions. He failed, despite being asked by Counsel and by me, to shorten his answers to make them more focused and to use the limited time at trial effectively. In this, he was no different from Ms Kogan and I do not find it helpful in assessing his reliability, for the same reasons.
291. I also find that his evidence was shaped very heavily by similar emotional factors that motivated Ms Kogan and to which I have referred above: the failing relationship, and the pressure of money in particular. Unlike Ms Kogan, he emerged from the eventual making of the Film with success, and was the named and credited sole writer of a commercially released film with stars and a director who were household names, and with whom he had close contact. At the time, though, this was touch and go, as events with the Lewins showed, and he was terribly nervous that things would go wrong with a unique opportunity to transform his fortunes. This litigation posed a risk to what he had achieved, the centrepiece of which was his sole writer's credit.
292. I do not believe that Mr Martin gave any evidence which he was conscious was not true. I acquit him of any dishonesty. I am not sure if the reference in Ms Kogan's closing written submissions to his not being "*credible*" was an allegation of this kind, but if it was then I reject it. Despite my indication at the start of the trial that allegations of deliberate untruthfulness must be put, the only time this was done with him was at the very end of his evidence in relation to the alleged conversation about his offering 15% on the train journey. I have found that he was truthful about the incident.
293. On the other hand, however, Mr Martin was subject to powerful factors which might lead him to misremember, or reconstruct matters wrongly, or with a strong dose of wishful thinking. In addition to the emotional matters to which I have referred above, and related to them, he had an extremely possessive attitude to the creative process of making a screenplay. He had worked alone on almost every previous occasion in his professional career (the lone exception being an unhappy attempt at collaboration early on, on a play called *Shifting*), he angrily rejected Ms Kogan's overture to write together, and he was highly controlling of her access to the production team. To him, creating a screenplay meant actually and only *writing*, in the manner of working I described above (the story board, then treatments, then the writing on Final Draft) and as a result he seriously undervalued, and cannot now bring himself to give credit for, Ms Kogan's more character-based skills, let alone the musical aspects of her input. He has been unable to face the proposition that even if he did all the writing, in the sense he understood it, Ms Kogan's work was significant and vital.

## CONCLUSIONS ON THE BEST 6

294. I will now summarise my conclusions on the best 6 in the light of my review of the chronology above and my assessment of the witnesses. This is a summary of, and not a replacement for, that exercise.

### **The Rehearsal Scene**

295. As I have explained in more detail above, this is one of the most important scenes because it is where McMoon (and the viewer) finds out what a terrible singer Florence is. It is also very comic. I do not think its importance was really in dispute.
296. It is accepted for Mr Martin that Ms Kogan contributed some technical terms, and this founded his position, and submissions on his part, that she *merely* did that, and all he did was to choose the words and plug them in. I reject that. The words are integral to the effect of the scene, and there is clear evidence of the Couple working together on shaping double entendres of the kind used to generate humour. I find that they did so for this scene: Ms Kogan contributed just as much as Mr Martin.

### **The Scene in the Lift and the Further Rehearsal Scenes**

297. Much the same applies to these scenes as to the first Rehearsal Scene. Differences are that these scenes are of less overall dramatic importance and that what happened is better evidenced because the interplay was more by email and less in person. It can also be seen from the emails that the words chosen were very tightly tied to the screenplay's scenes as they then stood: that is why Mr Martin thought they were so likely to be accepted by Mr Frears ("*the killer*").

### **Lily Pons and the Bell Song**

298. I find that it was Ms Kogan's idea to use Lily Pons performing the Bell Song. Mr Martin points out that the bare combination of singer and song could be found in the Collup documentary, but that does not mean that he identified it, from there or from anywhere else. No doubt, also, the number of Lily Pons performances that could be chosen was small because of the desire to choose songs also performed by Florence. However, the deployment to give a contrast between Lily Pons and Florence, and between Florence's ambitions and her real aptitude, had a deep significance to characterisation and plot, and to the funny and sad character of the screenplay as a whole and Ms Kogan was critical there.
299. Ms Kogan's input in this respect was at an early stage and then again later when she defended the choice against the suggestion by Stephen Frears to use the Queen of the Night instead.
300. I reject any suggestion that Mr Martin just asked for the names of some suitable performances and then picked one.

### **The McMoon audition**

301. In a dramatic sense this is a pivotal scene in the Film. It introduces McMoon and forms the relationship between him and Florence. It is another occasion when musicality is central. It is because Florence values "*loveliness*" (suggested by Ms Kogan and accepted by Mr Martin to be significant) and McMoon chooses to play The Swan by Saint-Saëns that McMoon gets the job, and the basis for their

relationship is laid. Ms Kogan was key to this and steered the choice away from The Elephant.

302. It may be debated whether it is luck or intuition that McMoon plays the piece, but this is in itself part of the drama.

### **Melotone (Homophone)**

303. Care is needed here because this aspect of the screenplay moved on after Ms Kogan's input, as was correctly submitted by Mr Martin. Hence the "*false friends*" idea did not appear in later versions. Nonetheless, Ms Kogan's input was not insignificant in moving the screenplay away from Florence being offered a contract, and to paying herself to have records produced to give to Verdi club members for Christmas.

### **The "*tip of the iceberg*" argument and assessment of significance of the best 6**

304. Ms Kogan argued that the best 6 were the "*tip of the iceberg*". If that was intended to suggest that they showed only 10% or some other very small proportion of what she did then I reject it. If it was intended merely to mean non-quantitatively that the best 6 were visible and other contributions not (or less so) then I accept it.
305. Ms Kogan has thus overall succeeded on the best 6 and this gives a good indication of the nature and scale of her contribution. The evidence addressed in my chronological treatment above leads me to conclude that there were few if any other scenes where her contribution was as significant as with the best 6.

### **Characterisation overall**

306. However, focus on the best 6 can tend to narrow and atomise the analysis. I think it is also important to consider the characterisation more broadly.
307. Music is central to the whole Film, and it is key to the understanding of two of the main characters (Florence and McMoon) and the utilisation of a third significant but more minor one (Lily Pons). Florence is a sad character to the outside observer because her ambitions are so ridiculous and her delusion so great. But she is to an extent happy within herself because she loves music and her own participation. These matters are all highlighted by the contrast between Lily Pons and Florence, and McMoon learns them as the Film progresses. They all depend on music and its performance and therefore all depended on the input of Ms Kogan to the creative process.
308. For similar reasons, Carlo Edwards' character owes much to Ms Kogan.
309. Bayfield is not a musician (though he is a performer) but he is integral to the maintenance of Florence's delusion, and the Scene in the Lift and the Melotone (Homophone) episode are parts of that. One also sees Ms Kogan contributing to the development of his character in the early Skype exchanges where the Couple debate whether and to what extent he is a villain exploiting Florence. Through the film, the viewer's understanding of his relationship to Florence develops and

a key part of that, to which Ms Kogan contributed, is the revelation that Florence has syphilis.

310. In short, Ms Kogan's input was of great importance to all the central characters. One cannot easily reflect this kind of contribution by pointing to specific dialogue or scenes because it suffuses the whole screenplay. That is another reason why the best 6 are useful but not decisive or limiting.

## **DECISIONS ON THE FACTS AND ORDERED ISSUES**

311. I will express my decisions by reference to the issues specified in the directions Order, in the light of the Court of Appeal's judgment on the applicable legal principles.

### **Issues 1 and 2 – was there a collaboration and what was its nature?**

312. I have found above as matters of fact that Ms Kogan had the original idea of a screenplay about Florence. The Couple then set about the creation of such a screenplay, initially by mapping out the characters, feeling, main events and key musical content in the period up to April 2012, and in particular resulting in the first five draft treatments.
313. The Couple did not ever have a formal planning meeting to allocate tasks but it was understood that Mr Martin would "hold the pen" and have the final say, while by their conduct, in discussions which were close and iterative and so went far beyond a mere "sounding board" relationship, they started out on, and maintained, a pattern of behaviour in contributing possibilities for such characters, feeling, main events and musical content. They knew and recognised that they were on the path towards a screenplay. This amounted to a common design as to general outline and a sharing of labour. I very much doubt if they would have agreed at the time in terms that their intention was to create a work of joint authorship as such, not least given Mr Martin's attitude to what he thinks of as "writing", but the Court of Appeal made clear in point 9 of its statement of principles at [53] that that is not a separate requirement.
314. During the period when the screenplay itself was being written on Final Draft by Mr Martin, Ms Kogan's input was of a similar kind but much less in quantity. She provided comments and input, often at Mr Martin's request, that went well beyond mere editing.
315. During the period when the film was in early production and Mr Frears was involved, Ms Kogan's input was in relation to musical feeling and content, similar to the ideas she contributed initially, but of much more limited scope, and she provided this input in response to specific requests by or through Mr Martin in relation to certain individual aspects of the intended musical content and context.

**Issue 3 – what was the nature of Ms Kogan’s contribution?**

316. Ms Kogan had the initial idea. This is almost the only thing that she contributed alone (there were also a few words of dialogue in the nature of technical musical terms).
317. Ms Kogan had a feeling for the musicality of the screenplay and its interaction with the characters and their development. She had an understanding of musical tuition and the feel of the world of opera and 1940s New York. She made plot and character suggestions based on this. She made some suggestions for dialogue which were worked up with Mr Martin into important scenes.
318. The nature of her contribution can be further and more fully appreciated from my findings about the “6 best”. Those illustrate but do not limit her contribution. I also refer to what I have said about overall characterisation.

**Issue 4 – was Ms Kogan’s contribution authorial?**

319. Mr Martin accepted that if the facts were as alleged by Ms Kogan in relation to the “6 best” then her contribution was authorial. This acceptance was proper and pragmatic but in its absence I would certainly in any event have held that the contribution was authorial because it resided in the “*creation, selection and gathering together of detailed concepts and emotions which the words have fixed in writing*”, to quote the Court of Appeal at [41].
320. The mere idea to make a screenplay about Florence would not have been authorial on its own.
321. The Film Companies did submit that Ms Kogan’s contribution was not authorial, and I return to this at the end of the judgment.

**Issue 5 – was Ms Kogan’s contribution an expression of her own intellectual creation?**

322. Mr Martin did not really make a separate submission on this, but it follows from my findings above that Ms Kogan’s expression was such. Her contributions were far from mechanical or constrained and were highly creative and imaginative. The fact that Mr Martin had the final decision does not mean that her contribution was not an expression of Ms Kogan’s own intellectual creation.

**Issue 6 – was Ms Kogan’s contribution distinct?**

323. Again, Mr Martin made no separate argument on this, and rightly so. The characterisation and musicality run right through the whole film. In relation to the dialogue of the Rehearsal Scene and the Scene in the Lift it is impossible to say which of the Couple contributed what (apart from the odd technical word that came from Ms Kogan). Trying to separate them would be like trying to unmix purple paint into red and blue.



**Issue 7 – relative amounts of the contributions**

324. This requires a good deal more to be said than in relation to issues 1 to 6 because I have to go well beyond merely summarising what I have already said.

Legal principles

325. It was submitted for Ms Kogan in closing written submissions that in the absence of agreement there is a presumption that joint authors hold copyright as equal tenants in common. Reference was made to *Laddie, Prescott & Vitoria, Modern Law of Copyright*, 5th Ed. at 11.57. At the same time, Ms Kogan's written submissions went on to say that "*However, there may, of course, be circumstances where their shares are not equal*", and this is indeed what the authors of *Laddie* go on to say.

326. Ms Kogan also relied on the decision of HHJ Birss QC (as he then was) in *Slater v. Wimmer* [2012] EWPC 7 at [89]-[90] to similar effect, although I note there that the Judge simply said that he was aware of no reason why the parties should be anything other than tenants in common with equal shares.

327. A further submission on behalf of Ms Kogan was that because the Couple's respective contributions were not distinct then I must find that the respective shares were 50:50. I found this confusing because lack of distinctness is a requirement for joint authorship to arise in the first place, and if in itself it compelled a finding of equal shares that would refute Ms Kogan's apparent concession that shares may not be equal.

328. Furthermore, in *Fisher v. Brooker* at first instance, [2007] FSR 12, Blackburne J held that there was a 60:40 split, and it was not argued for Ms Kogan that he was not entitled to do so (while noting that his decision on the point was reversed by the Court of Appeal and reinstated by the Supreme Court). It was submitted for Ms Kogan that Mr Fisher was relying on "a highly specific part of the song ... namely an organ solo", but as I have already said, the very fact of joint authorship means that one is dealing with a contribution that is not distinct.

329. In any event, I found all of this citation of earlier authority rather beside the point given the Court of Appeal's statement in the present case at point 11 in [53], quoted above, that "*It follows that respective shares of joint authors are not required to be equal, but can reflect, pro rata, the relative amounts of their contributions.*"

330. The conclusions I reach are that:

- i) There is a presumption in favour of equal shares as between joint authors.
- ii) Joint authors may provide otherwise by agreement (not relevant here).
- iii) There may be circumstances where the Court is not able to reach any different conclusion than equal shares.
- iv) But if circumstances justify a different result than equal shares the Court may so decide, assigning shares pro rata to their individual contributions.

- v) The decision is a highly subjective one and may be approached on a broad-brush basis (as Blackburne J did).

The parties' contentions

331. Ms Kogan argued for 50:50 on the basis identified above. She also made the essentially negative argument that the 15% agreed by Mr Martin with the Lewins was not the right measure. She did not provide any structured analysis of how to assess her share if it was less than 50%.
332. Mr Martin:
- i) Pointed to the fact that (it was said) he had provided the lion's share of the creative input in specified ways (closing written submissions at 121.1), such as storyboarding, writing dialogue.
  - ii) Placed little emphasis on his having the final say and said amount of contribution was more important.
  - iii) Submitted that the 15% agreed with the Lewins was of no assistance.
  - iv) Said Ms Kogan's email of 9 April 2014 where she asked for 15% was based on the Lewin transaction and not her contribution and so was also of no assistance.
  - v) Pointed to Ms Kogan's failure to articulate the relative proportion of her contribution.
333. I agree that having the final say attracts relatively little weight in itself; if the party with the final say accepts that which the other contributor proposes, it becomes part of the joint work and all the party with the final say contributes then is the decision to accept it. But the decision to include or exclude is a creative one which can attract *some* weight in assigning shares, as the Court of Appeal made clear in point 10 at [53].
334. The Film Companies argued for less than 15%, on the basis that Ms Kogan's contribution, if not nil, was small. They placed some reliance on Ms Kogan's email of 9 April 2014 where she asked for 15%, while arguing that it took into account contributions which were not relevant to co-authorship and so overstated her true contribution.

Assessment

335. The parties' submissions on this issue were very much in outline and to varying degrees confined to the negative (that the Lewins' 15% was irrelevant, in particular) rather than giving me with detailed positive contentions as to how to proceed. Mr Martin did provide a checklist of what he said he had done and addressed the relevance of having the final say.
336. In saying this, I take account of the fact that the parties were all making submissions in relation to a situation which they said did not arise: Ms Kogan because she advanced her 50:50 presumption argument and Mr Martin and the

Film Companies because their primary case was that Ms Kogan was not a joint author at all.

337. Moreover, my task has been made that much harder by Ms Kogan's assertion, which I have held to be untrue, that she actually wrote a lot of the text of the screenplay on Final Draft, and her lack of a realistic assessment of what she did do in that period.
338. Despite these difficulties I consider that I am able to assess the relative contributions adequately to make a decision, and I find that the circumstances clearly justify an allocation different than 50:50; indeed a 50:50 decision would be an obvious injustice given how much greater was the work of Mr Martin.
339. The oral evidence and argument before me was taken up very largely with those areas where it was disputed what Ms Kogan had done. She has won a number of the arguments that took up the time in Court. However, I must not confuse the time taken in Court, or the vehemence of the oral evidence, with the significance of the points in terms of their impact on contribution to the work of joint authorship. For example, the fact that Ms Kogan had the initial idea took a deal of time but is, I find, of rather small importance in terms of amount of contribution.
340. Even more importantly, I must not allow the strong feelings of the parties on the disputed points, and the resulting vividness of them for me, to make me forget or undervalue the undisputed points. For example, it is not disputed that Mr Martin did all the work on the scene cards, but this was mentioned very little in the oral evidence, and not with any drama.
341. Before coming to how I assess the parties' contribution, it is right to deal with the 15% figures that form part of the chronology.
342. In agreement with all the parties, I think that the 15% that formed part of Mr Martin's deal with the Lewins is irrelevant. It was not an assessment of their creative contribution but a recognition of their practical power at a key point in time to obstruct Mr Martin's deal with the Film Companies.
343. As to Ms Kogan's demand for 15% in her April 2014 email, that is unreliable since I do not know the basis for it, because I do not know what relation it has to the Lewins' 15%, and because even if it somehow reflected creative contribution it also reflected emotional issues. Even allowing for all that I think it can reasonably be regarded as a very broad, realistic acceptance that she was the minority contributor, but I would find that in any event.
344. Having said that the 15% figures are irrelevant, I think I must go further and remind myself of the risk of what psychologists call "anchoring", or giving too much weight to a single, initial data point and allowing it to form the basis for all later analysis. I must not, even subconsciously, start from 15% and adjust from there, or derive some other figure and then test or modify it with regard to 15%. I would need to have this firmly in mind even if the 15% were an indicator of some real objectivity or validity; all the more so given that it is not. I recognise that given that I find, as I explain below, that Ms Kogan's contribution was less

than half of the early (treatment) stage and Mr Martin did virtually all the work in the actual screenplay writing on Final Draft, I am inevitably going to end up not too far from 15%. But I have to ensure that the final result is not *because of* the 15%.

345. Approaching this in a broad brush way and recognising that it is a matter of both qualitative and quantitative assessment, my reasoning is as follows.
346. I find it useful to divide the history into:
- i) The period of the initial development of the treatments, up to the Final Treatment in February 2013.
  - ii) The period from then on, which includes most importantly the period when Mr Martin actually wrote the screenplay on Final Draft.
347. This is for convenience of analysis and not an indication that there was an absolutely bright dividing line around the periods (for example, the characters and musicality spanned all time periods and continued to develop throughout).
348. I have identified above the nature of what Ms Kogan contributed in the first period (characterisation, feel, musicality, etc). However, Mr Martin also contributed in those respects, and on those sub-elements of the work during that period I find that they did indeed contribute about half each. During the first period Mr Martin alone, on his unchallenged evidence, undertook the scene card work, and had regard to the structure of the story in terms of its being translated into a screenplay; he alone had to have regard to the three-act structure, for example. It also must be borne very much in mind that apart from Ms Kogan's correcting typos he actually wrote the treatments, and in relation to the work with the Lewins, Ms Kogan did very little.
349. So overall for the first period Ms Kogan's input was highly significant but well under half.
350. For the second period, I have found that Ms Kogan continued to make similar contributions of a similar kind as she had earlier, but to a much lower degree. This is also the period in respect of which Ms Kogan's evidence is the most unreliable and I approach assertions about her contribution during that period with corresponding scepticism.
351. During this second period, Mr Martin was, on his evidence, working long hours on the actual screenplay. The various drafts are much longer documents than the treatments and I find it entirely credible that they took him a long time to write, with much care and attention. They include some important dialogue to which, on my findings above, Ms Kogan made material contributions (e.g. the double entendres in the Rehearsal Scene), but much more to which she did not. In addition and as with the treatments, it was Mr Martin who had to ensure that the screenplay would be practical for the making of a film in terms of length, settings, number of actors and so on. This work, and essentially all the actual writing, came from him. There has been a sense about Ms Kogan's case that this work

was less important or less creative than the characterisation or musicality, and I reject it. This was all highly creative, difficult and intricate work.

352. Overall, I find that the effort and work, taking into account both the qualitative and quantitative, that went into this second period was considerably greater than the first, and was undertaken much more by Mr Martin than Ms Kogan. I note that Mr Martin said in his witness statement at paragraph 123 that at least 50% of the story and the structure was in place at the end of the first period, but that is an assessment of just those aspects of the overall project and does not include, for example, the dialogue.
353. The overall amount of time spent by Ms Kogan and Mr Martin respectively must also be a factor, though not by any means a conclusive one. As to that, Ms Kogan was, through no fault of her own, limited in what she could do because of her car accident, had much else on her plate such as teaching singing, and was away a lot of the time; while she was away she was able to contribute by Skype and email but plainly that is not the same as being at the coal face. Mr Martin by contrast, while he had other projects, was able to work all the time, was a dedicated screen writer, and spent days flat out on the screenplay. Furthermore, it can be seen that when Mr Martin was working with the Lewins during this period, Ms Kogan's input was small.
354. In my overall assessment taking the above matters into account I find that Ms Kogan's contribution was 20%.
355. I really do not think one can arrive at the result by way of a calculation but putting very rough numbers to it purely as a cross-check, I would say that:
- i) The first period represented about one third of the overall creation, with Ms Kogan contributing about one third of it, perhaps slightly more.
  - ii) The second period represented about two thirds of the overall creation, with Ms Kogan's contributing only about one tenth.
  - iii) This adds up to a little under 20% contributed by Ms Kogan, but as I say I think the one third contribution from Ms Kogan in respect of the period may be on the low side.
356. I stress that this is a cross-check and not the main way I have arrived at the result, but I think it is worth doing because if it had produced a result very different from 20% I would have wanted to reflect further on my initial, overall assessment. Also, one can see that if, for example, Ms Kogan's contribution to the first period was close to half, the total would still only be a little bit more than 20%. In other words, my assessment is not very sensitive to that, and depends much more on my assessment that her contribution during the second period was small, a finding on which, relatively speaking, a very concrete assessment can be made because it is plain as to the very extensive work in which she played no part.
357. Furthermore, this cross-check increases my confidence that I have not been inappropriately influenced by the 15% figures.

## **RELIEF**

358. I have identified above the terms in which the Court of Appeal remitted the proceedings, and the issues identified by the Order of Birss J.
359. Ms Kogan's position as to the relief she seeks changed several times before me, and this has made my task unnecessarily more difficult. For example, despite the Court of Appeal recording at [143] that no injunction was sought and that the only credit sought was on IMDb, Ms Kogan reinstated and then dropped a claim for a credit on all physical copies of the Film, and she made and then dropped an assertion that there might be an order for her to have a portion of all the profits of the Film Companies from the Film.
360. In addition, the opening written skeleton on her behalf contained no detailed argument but said that the comments of the Defendants to the Counterclaim were awaited. Further rounds of submissions were necessary as a result.
361. As matters eventually stood, I understood that Ms Kogan sought:
- i) Declarations that she is the joint author of the Screenplay and that the Claimants and the Film Companies have infringed her copyright and moral rights in the Screenplay;
  - ii) An order that Ms Kogan be identified as a joint author of the Screenplay on IMDb. It is accepted that the Film Companies can have this done if I so order, because as the primary commercial producer IMDb will follow their request;
  - iii) An inquiry as to damages for infringement of copyright and moral rights by the Claimants and the Film Companies; and
  - iv) An order that the judgment be publicised. In my experience this is normally addressed at the hearing to settle the form of order and I intend to follow that practice in this case. So I need say no more about it in this judgment.
362. Issue was taken by the Film Companies with the fact that Ms Kogan had not pleaded a claim to damages for breach of her moral rights. I will deal with this along with the more complex pleading points raised in relation to estoppel/acquiescence and lack of consent.

## **Estoppel/acquiescence and lack of consent**

363. Before I deal with the substance of this, I have to address some pleading issues.

### Pleading points

364. The Film Companies pleaded a positive defence of estoppel or acquiescence. In the light of the way matters were argued it is not necessary to treat acquiescence separately for them. There is no dispute that their pleading was adequate to run the points they wanted, and clearly the Court of Appeal envisaged that they would.

365. However, Ms Kogan raised a pleading point against Mr Martin and the Second Claimant. She said they had not adequately pleaded that she consented to their acts, or acquiesced.
366. The Claimants do not run estoppel, but it was submitted that it was open to them to join in the Film Companies' defence of acquiescence, pleaded at paragraph 7c of the Film Companies' Defence (estoppel was at 7d), even without having mentioned acquiescence as such in their pleadings.
367. The Claimants fortified this by arguing that they had raised acquiescence by reference to the terms of the Film Companies' paragraph 7c in their skeleton for the first trial, which is true, at paragraph 112, although not very persuasive on its own as parties may often say things in skeletons that are not within the pleadings. Nonetheless, it had some force as showing that Ms Kogan was on notice that they wanted to run it.
368. The Claimants also argued that lack of consent was a necessary element of Ms Kogan's cause of action, so she had to prove it. They are right that she pleaded lack of consent in paragraph 60 of her counterclaim, and therefore it is, I consider, included within issue 8 for this trial as directed by Birss J.
369. Although Ms Kogan did not rely on this as such, I was concerned that the Court of Appeal had not mentioned such defences by the Claimants when they remitted the case. However, the fact that the Court of Appeal did not mention it arises from the context of what they were deciding and I do not think they had their attention directed to it one way or another. I do not consider that they were shutting out further case management decisions about the scope of the pleadings.
370. More substantively, Ms Kogan retorted that what she consented to the Film Companies doing is not the same as what she may have consented to Mr Martin doing, because their respective relationships and communications were very different. She also pointed out the strict pleading standard that applies in IPEC. There is some force in both these points.
371. However, I am faced with a situation where there is just no dispute that for a long time Ms Kogan not only did consent to what Mr Martin was doing but actively encouraged him. It would be an injustice and foolish to base this judgment on a fiction that his acts were always without consent.
372. What Ms Kogan submitted in her final round of submissions was as follows:
- “Once it transpired that Ms Kogan would not be receiving any benefits at all in respect of her contributions to the Screenplay, she had every right to assert her rights. In those circumstances, it would not be unconscionable for her to assert her rights now against Mr Martin who was fully aware of the position at all times.”*
373. This is realistic because it recognises that there was a tipping point. The real question is when that was, and I am able to decide that because Ms Kogan gave evidence of when it transpired that she would receive no credit. The Claimants do not allege that Ms Kogan was unable to withdraw her consent.

374. Having regard to the overriding objective to deal with the case before me justly, in particular given that it is clear she consented for a long time, that it is accepted that she could withdraw her consent, and making due allowance for the strict requirements for pleading in IPEC I consider that the Claimants are allowed to rely on consent, or rather to rely on Ms Kogan's having to prove its lack.
375. I was left unclear as to what, if anything, the Claimants said would be involved in their running acquiescence in addition to denying lack of consent. In the absence of the positive plea of estoppel involving detriment and reliance which they accept is not open to them, I do not see that acquiescence would add anything. It would just be bare acquiescence capable of withdrawal on notice.
376. I also allow Ms Kogan to seek damages for moral rights. Doing so adds no extra factual inquiry and is just. Its omission was no more than a slip.

The facts

377. The outline facts, not in dispute, are that:

- i) Mr Martin's name alone appears on all the WGA certificates and versions of the script.
- ii) Ms Kogan knew about the issue that had arisen with the Lewins and its resolution.
- iii) Ms Kogan knew about but did not object to:
  - a) Mr Martin presenting himself to those potentially interested in the screenplay, including the Film Companies, as its sole author;
  - b) the optioning of the screenplay; or
  - c) progress on the production of the Film prior to at least March 2015 (I deal with exactly when she did adequately object, which is disputed, below).
- iv) Ms Kogan knew that the Film Companies were unaware of any claim she might have until well after the screenplay was optioned and the option exercised.
- v) Ms Kogan knew about the importance of copyright clearance.
- vi) The Film Companies did invest large amounts of money in the Film prior to the earliest date at which Ms Kogan raised a claim (see below) to them and even prior to the time when she says she mentioned a claim, and she knew this.

378. As to the Film Companies' position, the evidence is, and I find that:

- i) The Film Companies would not have optioned the screenplay, or exercised the option, or invested money in the production, if Ms Kogan had said she had a potential claim to be a co-author, unless and until Ms Kogan's interest



had been addressed, probably in the same way that the Lewins' claim had been.

- ii) The result of the Film Companies' knowing of a claim at an early stage would have been either that Mr Martin and Ms Kogan agreed for her to have some share of Mr Martin's participation, or if they could not have agreed then the Film Companies would have walked away. The pressure on the Couple and the attraction of a Film being made would have been such that the former would have been much more likely.
- iii) By March 2015, and *a fortiori* later on, the Film Companies could not stop work on the Film without sacrificing a lot of money, and their decision to carry on was reasonable.

379. As to Ms Kogan's articulation of her claim to be an author:

- i) In the 10 March 2015 discussion, Mr Kuhn said he would discuss a credit for Ms Kogan at a suitable point in the future. He said in his witness statement, and maintained in oral evidence, that only a credit for advice on the music was discussed and I accept this (Ms Kogan's evidence and her position was rather unclear on this point but her final position was that she did not specify the type of credit in that discussion). Ms Kogan's email of later that day did not articulate a claim or put the Film Companies on notice of any assertion by her of authorship - I have discussed this above in the Chronology section.
- ii) The letter before action of 24 April 2015 was an adequate notice that she no longer consented to Mr Martin's exploitation and progression of the Screenplay and Film without payment to her or without giving a credit; it is agreed to have been sent to the Film Companies. It was adequate to put them on notice of her claim for the first time but they were in a much less good position than Mr Martin to assess it, and in my view all they could tell was that a claim was being made which was not very plausible in the light of the facts known to them.
- iii) The cost, trouble and uncertainty for the Film Companies of investigating Ms Kogan's claim was likely to be considerable (and foreseeably so) and would also have been avoided had Ms Kogan raised her claim earlier.

380. As to the conduct of the Film Companies, I further hold:

- i) They would have been prepared to give Ms Kogan an appropriate credit, including a shared credit for being an author, once the facts were clear and/or once Mr Martin agreed. I accept Mr Kuhn's evidence in this regard that only producers' credits were difficult to negotiate and settle, and I note that (as I have been allowed to know owing to a correction to Ms Kogan's written closing which was agreed between the parties) there were some without prejudice discussions on the issue. I also note again the Film Companies' ready acceptance that, provided a credit need only be given on IMDb, they do not oppose one being given to reflect my findings, and their generally responsible behaviour.

- ii) The Film Companies' initial pleading, that they thought Ms Kogan's claim was bad but that they would reassess the position as information became available, was reasonable.
- iii) By the time of receipt of the witness statements for trial (July 2017) the Film Companies had more information, allowing them to assess Ms Kogan's claim better, but her claim still looked dubious because of the overstatement it contained.

381. In written submissions following the trial before me I have been told the following about payments to Mr Martin by the Film Companies:

*"4. The payments made to Mr Martin by the Film Companies prior to release are as follows.*

*Writer Fee Payment Dates*

*25 March 2014 - £10,000 (option fee)*

*9 September 2014 - £10,000*

*1 October 2014 - £10,000*

*6 October 2014 - £5,000*

*20 October 2014 - £5,000*

*16 January 2015 - £35,000*

*13 May 2015 - £125,000 (commencement of principal photography)*

*Associate Producer Fee Payment Dates*

*21 May 2015 - £50,000 (commencement of principal photography)*

*5. Following release Mr Martin has received net profit payments totalling £34,110 and \$21,200.46, as per the most recent collection statements dating from August 2020.*

*6. There is likely to be little future income (i.e., Net Profits) payable to Mr Martin from the Film because:*

*6.1. The production managed to secure substantial minimum guarantees from distributors in advance of release, and the Film failed to perform in local territories so the chance of overages (payments where the minimum guarantees have been passed) is low.*

*6.2. There will be no income from UK distribution as the theatrical marketing costs have yet to be recovered*

*6.3. All outstanding tax credit revenues have been received."*

382. I was also told on behalf of Mr Martin that he has received a little over £12,000 collected by the ALCS in respect of overseas television transmissions.

### Legal Principles

383. There are two related matters I have to consider.

384. The first is the necessary ingredients for a defence of estoppel or acquiescence and their effect, if made out, on the relief I give.

385. The second is whether I should grant declarations about legal rights.

386. In relation to both, the parties directed me to *Fisher v. Brooker* [2009] UKHL 41. I think the principles as to the second are straightforward: if (as I have found) Ms Kogan is a co-author and therefore the owner of a legal right then I should not withhold a declaration to that effect on the basis that it might be used as the springboard for some other discretionary relief.

387. The more difficult argument is as to the first. It should be noted that the Court of Appeal in this case at 146(iv) directed that this retrial should be on the basis that a defence of acquiescence/estoppel succeeded to prevent Ms Kogan interfering with the public performance of the film, but that the film companies would not be prevented from arguing that the defence should prevent other monetary and non-monetary relief.

388. A strict reading of this could be that the Court of Appeal was making a finding that HHJ Hacon was positively correct to hold that there was an estoppel and that the only question was its scope. However, although referring to that paragraph, the Film Companies addressed the requirements for estoppel afresh and I consider they were right to do so, since it is necessary for me to consider the matter as a whole to address unconscionability and any impact on individual heads of relief.

389. Ms Kogan also addressed the matter in this way.

390. The parties agreed that the existence of an estoppel would require:

- i) Ms Kogan to know that the Film Companies believed they were free to commercialise the screenplay without interference from Ms Kogan;
- ii) For the Film Companies to rely on their belief; and
- iii) For the Film Companies to incur a detriment as a result.

391. It is also then necessary to consider unconscionability, but it cannot alone be a basis for finding an estoppel.

392. There was no dispute over i) or ii) and nor could there be in the light of the undisputed facts. I have found that iii) is also established on the facts. The argument therefore focused on unconscionability.

393. Mr Hill raised a nuance about i) because he said the Film Companies' case could be run either on the one hand as Ms Kogan allowing or encouraging Mr Martin

as a sort of unwitting agent to tell the Film Companies that he was the sole author, or, on the other as her merely standing by knowing that they thought that. I think Ms Kogan's participation in what Mr Martin was saying is relevant to unconscionability but not essential to the existence of an estoppel and in either case the requirements would be made out. Mr Hill's nuance is just a way of reflecting the difference between the acquiescence-based principle and the representation-based principle in proprietary estoppel (see Snell's Equity, 34<sup>th</sup> Ed. at 12-033 to 12-035, including the reference to the three main elements of proprietary estoppel as identified in *Thorner v. Major* [2009] UKHL 18).

394. At one stage Mr Hill seemed to suggest that the estoppel defence was all-or-nothing: that if the elements were made out then no relief could be granted. I think this is too rigid and dogmatic and no authority was provided.
395. I also note the following passage from the speech of Lord Walker in *Fisher v. Brooker* at [11]:

*“In para 81 of his judgment [2007] FSR 255 Blackburne J referred to the need, if the requirements for proprietary estoppel are made out, for any relief granted by the court to be proportionate to the degree of detriment suffered by the party (normally the defendant) asserting the estoppel. That balancing exercise may involve giving weight to any countervailing advantages that have been received by the defendant in the meantime. The clearest English authority for this is probably [Sledmore v Dalby \(1996\) 72 P & CR 196](#), where the defendant had already enjoyed nine years of rent-free residence and any equity that he might have claimed had already been satisfied: see the observations of Roch LJ, at p 204, and Hobhouse LJ, at p 209. This appeal would have been an even more striking example, if the requirements for an estoppel had been made out.”*

#### Discussion – the Film Companies' Defence

396. In the light of those principles I must consider if the three basic elements of a proprietary estoppel are made out (and I have said they are), and consider them in the context of unconscionability. I must then consider relief in the context of detriment to the party alleging the estoppel. Although not articulated in this way by the Court of Appeal in the present case, because there was no need for them to do so merely to remit the matter, this is consistent with their statement that estoppel must be considered in the context of individual heads of relief.
397. As to unconscionability:
- i) I consider it highly relevant that Ms Kogan knew about the Film Companies' belief as to their ability to commercialise the screenplay, and in a loose sense at least had fostered that belief by encouraging Mr Martin to try to get the screenplay commercialised in his own name alone.
  - ii) It is also highly relevant that if Ms Kogan had stated the true position before the Film Companies became committed then the Film Companies would have been able to go ahead with the Film at no greater expense than what they paid Mr Martin, as they had agreed an arm's length overall price with

him, and could and would have successfully insisted that Ms Kogan and Mr Martin should share it.

- iii) Alternatively, but much less likely, the Film Companies would have walked away with no exposure to Ms Kogan's claim.
  - iv) On the other hand, the Film Companies have accrued substantial benefit from the exploitation of the Film, including Ms Kogan's contribution.
  - v) The fact that the Film was released without a credit to Ms Kogan was her own fault by allowing a position to arise where her claim was late, unclear and confusing and apparently inconsistent with Mr Martin's sole authorship, which she had allowed the Film Companies to believe in.
  - vi) To the extent that the Film Companies have the benefit of an estoppel to prevent Ms Kogan obtaining financial relief from them for the past, it is relevant that she had, or might have had, an alternative remedy against Mr Martin.
  - vii) For such future payments as may be due to Mr Martin hereafter, the position is different because it would not worsen the position of the Film Companies to have to arrange payment to Ms Kogan of her share (and to pay Mr Martin correspondingly less), other than by creating what I am sure is a very modest administrative burden. This is probably only hypothetical given the information above about what the Film Companies are likely to pay Mr Martin in future and I will hear argument about it at the form of Order hearing.
  - viii) I can see no real downside to the Film Companies giving an appropriate credit on IMDb and they do not argue that there is one.
398. Having all this in mind, I conclude that Ms Kogan is estopped from seeking an injunction against the Film Companies (which she already conceded), or any restriction on the form in which they distribute the Film, or any financial relief against them, so long as they pay to her 20% of anything owing by them to Mr Martin for the future (subject to argument at the form of Order hearing). She is also estopped from withdrawing her consent to their commercialisation of the Film.
399. I make it clear that I am not making any finding that the Film Companies have infringed Ms Kogan's copyright or moral rights; they have had a substantive defence of estoppel provided they comply with the above.
400. My intention is that this puts the Film Companies in essentially the position they genuinely and reasonably thought they were, and on the faith of which they acted, subject to minor incursions for the future which impose little burden on them but will or may be very important for Ms Kogan, in particular the IMDb credit as a means for furthering her career.
401. Ms Kogan is also entitled to an appropriate declaration as to her authorship.

Discussion – consent

402. The Film Companies would also be entitled to rely on consent down to the letter before action, but it is not practically material because the defence of estoppel is more extensive and not subject to Ms Kogan's unilateral withdrawal, as consent would be.
403. On my findings in relation to the pleading points above, the Claimants are entitled to rely on consent by Ms Kogan down to the point when it became clear as between them that she would get no writer's credit. This was slightly earlier than the letter before action, because a complete breakdown had already occurred. My finding above is that all trust had gone on 16 March 2015 and that is the date that Ms Kogan withdrew her consent in relation to the Claimants.
404. On this basis Ms Kogan is entitled to an inquiry as to damages or an account of profits against Mr Martin (and the Second Claimant) for the period after she withdrew her consent. Mr Martin's (and the Second Claimant's) acts of dealing with the screenplay thereafter (making copies in the course of improving the screenplay for shooting and the like) are real and, on my findings, infringements.
405. Mr Martin has made clear that he will argue that the agreement with the Film Companies had already been made, in early 2014, when Ms Kogan had not withdrawn her consent and so Ms Kogan's recovery will be small. That is for another day and I express no view. I record that Ms Kogan has in no way accepted any of that and remains free to argue that his ability to conduct rewrites and to maximise his participation in the shoot, and so to ensure the greatest credit, were valuable benefits for which he must pay.

**Decision on issues 8 and 9**

406. The Claimants have infringed from 16 March 2015 but the Film Companies have not.
407. Ms Kogan is entitled to the relief indicated above. The Film Companies' defence of estoppel succeeds subject to their fulfilling very minor conditions.

**SUBMISSION BY THE FILM COMPANIES**

408. The Film Companies submitted that if I were to find in favour of Ms Kogan then I would be creating a new situation in which parties in creative industries, such as the Film Companies, would be unable safely to invest in screenplays or the like purportedly written by one individual, for fear of finding out later that they were actually works of joint authorship.
409. I reject this. I do not believe I am creating any new principle in relation to joint authorship. In the course of this judgment I have had to consider the legal principles applicable to assessing evidence and to quantifying the *shares* of joint authors when there are such, but the principles about whether there *are* joint authors in the first place are those identified by the Court of Appeal in the present case and my role is one of finding the facts and applying those principles to them.

410. In addition, parties in the position of the Film Companies investing in works such as screenplays are and always have been in the position that it might turn out that the purported author is not the only author, or has wrongly copied from someone else. Neither this judgment nor that of the Court of Appeal creates that risk for the first time. The risk is managed by dealing with authors with a good reputation, by making appropriate inquiries, by taking appropriate warranties and indemnities, and by acting responsibly if a problem arises.
411. Rather, the present case is one where the unusual fact pattern led Mr Martin to believe, and to tell the Film Companies (misguidedly but not dishonestly) that he was the only author, and Ms Kogan not to say that she was an author until it was too late.
412. The Film Companies elaborated their submission to say that a finding in favour of Ms Kogan could lead to any “mere” researcher or sounding board being a joint author, with similar consequences.
413. This is not the case, either. I entirely accept that an arm’s-length researcher who merely provided some technical jargon would not be a joint author, and that a person acting only as a sounding board who provided a critique, even a detailed one, would not be a joint author, either (so neither Mr Walker nor Mr Powell is a co-author of the Screenplay).
414. Again, the answer to the Film Companies’ position is in the facts of this case: Ms Kogan was not a mere researcher or sounding-board. She performed some functions of those roles, but in a very close and iterative way which meant that she was directly and inextricably involved with integrating the information and thoughts that she gave into the finished product, with the resulting development of character and plot that I have described.
415. It was on the basis that Ms Kogan provided only “research and expertise ..., criticism, proofing and encouragement” that the Film Companies submitted that her contribution was not authorial, and I reject the submission for the reasons just given: on the facts she did much more. I note again the indications of the Court of Appeal that *if* the facts were as Ms Kogan alleged then her contribution was authorial.
416. In sum, I understand the Film Companies’ concern lest some new principle arise from this decision. It was reasonable for them to air it, and doing so has not caused any significant additional costs or work. But it is misplaced. This is a decision on the facts.

## **CONCLUSIONS AND DISPOSITION**

417. My conclusions are:
- i) Ms Kogan was a joint author.
  - ii) Her contribution was 20%.

- iii) The Film Companies' defence of estoppel in substance succeeds, on certain very minor conditions.
  - iv) Ms Kogan consented to dealings with the Screenplay but withdrew her consent in 2015.
  - v) Mr Martin and the Second Claimant infringed after Ms Kogan withdrew consent from them on 16 March 2015.
418. I will hear argument as to the form of Order. I will adjourn consideration of those matters and of any application for permission to appeal to a later hearing, and time for any Appellant's Notice shall not run in the meantime. I ask the parties to submit an agreed order accordingly.