



Neutral Citation Number: [2022] EWHC 2695 (Ch)

**Claim Number: IL-2020-000063**

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL

**25<sup>th</sup> October 2022**

**Before :**

**MR JUSTICE EDWIN JOHNSON**

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**Between :**

**ANNA PASTERNAK**

**Claimant**

**and**

**LARA PRESCOTT**

**Defendant**

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**Nicholas Caddick KC and Jamie Muir Wood** (instructed by Briffa Legal Limited) for the  
Claimant

**Andrew Lykiardopoulos KC and Henry Edwards** (instructed by Carpmaels & Ransford  
LLP) for the Defendant

Hearing dates: 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, and 19<sup>th</sup> July 2022  
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**JUDGMENT**

Remote hand-down: This judgment was handed down remotely at 10.30am on 25<sup>th</sup> October 2022 by circulation to the parties and their representatives by email and by release to The National Archives.

## Mr Justice Edwin Johnson:

### The structure of this judgment

1. This judgment is, necessarily, a lengthy judgment. For ease of reference, I provide the following guide to the different sections of the judgment.

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### Introduction

2. The Claimant, Anna Pasternak, is the author of the book Lara: The Untold Love Story That Inspired Doctor Zhivago (“**Lara**”). It was published in the United Kingdom on 25<sup>th</sup> August 2016. Lara is a non-fictional, historical work. It tells

the story of the love affair of Boris Pasternak, poet and author of the world famous novel Doctor Zhivago, and the woman variously described as his lover, mistress and muse, Olga Ivinskaya. The Claimant is the great niece of Boris Pasternak. As the author of Lara, the Claimant is the owner of the copyright subsisting therein.

3. The Claimant also owns the copyright subsisting in the English translation of certain parts of a work entitled *Légendes de la rue Potapov*. The translation, from French to English, was the work of Marlene Hervey, who was commissioned to make the translation by the Claimant. *Légendes de la Rue Potapov* is the title of the French translation of a book written in Russian by Irina Kosovoi (nee Emelianova), daughter of Olga Ivinskaya. The actual Russian title, transliterated from the Cyrillic script, is *Legendy Potapovskogo pereulka*. No English edition of this book exists. It is convenient to refer to the English translation, in which the Claimant owns (by assignment) the subsisting copyright, as “**the Legendes Translation**”, while referring to the book itself as “**Legendes**”.
4. The Defendant, Lara Prescott, is the author of the book *The Secrets We Kept* (“**TSWK**”). It was published in the United States on 3<sup>rd</sup> September 2019 and in the United Kingdom on 5<sup>th</sup> September 2019. TSWK is a work of historical fiction. It is a fictionalised account of a CIA operation in the late 1950s, during the Cold War, to infiltrate copies of Doctor Zhivago into the Soviet Union as a propaganda weapon. The story is told in alternating parts, described as West and East, which effectively divide the story into two narrative threads. In the West chapters, the story is primarily told by and from the perspectives of a group of female typists and spies working for the CIA. In the East chapters, the story is primarily told by and from the perspective of Olga Ivinskaya.
5. The Claimant’s case is that 7 of the 11 chapters in the East section of TSWK infringe the copyright subsisting in 7 of the 12 chapters of Lara. The essential complaint is that the Defendant has copied, from the relevant chapters in Lara, a substantial part of the selection, structure and arrangement of facts and incidents which the Claimant is said to have created when she wrote Lara. The Claimant’s case is also that the Defendant has infringed the copyright in the Legendes Translation, in this case by the simple (language) copying, from Lara, of an extract from the Legendes Translation which is quoted in Lara.
6. The Defendant denies that she has, in TSWK, infringed the copyright in either Lara or the Legendes Translation. The Defendant also counterclaims for a declaration of non-infringement and an order for dissemination and publication of the judgment on this trial. If, contrary to her case, the Claimant fails in her claims, the Claimant accepts that the relief which is counterclaimed should be granted.
7. The Claimant commenced these proceedings by claim form issued on 29<sup>th</sup> May 2020. By an order made at the case and costs management conference in the proceedings, on 30<sup>th</sup> June 2021, Master Kaye directed a split trial of the

proceedings, to determine liability and quantum. This is the first part of the split trial and, as such, is concerned with questions of liability. If the Claimant succeeds in establishing a liability on the part of the Defendant for infringement of copyright, the determination of the quantum of the damages claimed by the Claimant will be for a separate trial. Also for separate determination, in the event that the Claimant is successful, will be the questions of what other relief should be granted.

8. The trial took place with the parties and their representatives present in court. The Claimant and the Defendant gave their evidence in court, as did the Claimant's only other witness, her husband Andrew Wallas. The Defendant had five witnesses to call, in addition to her own evidence. With my permission, granted at the pre-trial review on 8<sup>th</sup> June 2022, these five witnesses were permitted to give their evidence remotely, by video link from the USA. In the event these witnesses were not required by the Claimant for cross examination. As such, their witness statements stood as their evidence, without challenge and without the need for any of these witnesses to be called.
9. At the trial the Claimant was represented by Nicholas Caddick KC and Jamie Muir Wood, counsel. The Defendant was represented by Andrew Lykiardopoulos KC and Henry Edwards, counsel. I am most grateful to counsel for their assistance, by their written and oral submissions, in this trial. I am also most grateful to counsel and those instructing them for their work in the management and presentation of the documents used in this trial.
10. This is my reserved judgment on this trial; that is to say the first part of the split trial directed by Master Kaye.

#### The conventions of this judgment

11. In making reference to Boris Pasternak in this judgment, it is convenient to follow the lead of the parties, and for that matter the Claimant and the Defendant in their respective books, and to refer to Boris Pasternak as "**Boris**". It is convenient to adopt the same course with Olga Ivinskaya, and refer to her as "**Olga**". It will be understood by all that I intend no disrespect to the memory of either of these individuals by taking this course. Equally, I intend no disrespect to any other persons in respect of whom I adopt the same course in this judgment.
12. As I have noted above, the Claimant's case falls into two parts. The principal claim is that the Defendant has copied, from the relevant chapters in Lara, a substantial part of the selection, structure and arrangement of facts and incidents which the Claimant is said to have created when she wrote Lara. I will refer to this claim as "**the Selection Claim**". The further claim is that the Defendant has infringed the copyright in the Legendes Translation, by copying an extract from the Legendes Translation. I will refer to this claim as "**the Translation Claim**".
13. In discussing the Selection Claim it is convenient to use the word "**selection**" to include structure and arrangement, so that reference to a selection of facts and

incidents means the selection, structure and arrangement of those facts and incidents. I also include, in my references to selection in this judgment, the forms of expression of facts and incidents which the Claimant is said to have created. I include references to forms of expression because the alleged copying of such forms of expression is included in the pleaded summary of the Selection Claim in paragraphs 8 and 9 of the Re-Amended Particulars of Claim. It is also convenient to refer to the facts and incidents which are said to have been the subject of this selection as “events”. Again, I use the word events in a very broad sense, to encompass the facts and incidents and any other materials which are said to have been the subject of the Claimant’s selection.

14. Other definitions are as established in the course of this judgment. I have added italics to quotations.
15. Where in this judgment I make specific reference to the particular evidence of a particular witness on a matter of fact, I am accepting that evidence (whether I spell this out or not), unless I state to the contrary.

#### Relevant background – Boris Pasternak and Olga Ivinskaya

16. It is convenient, by way of setting the scene for what I have to decide, to give a very brief summary of the history of the love affair between Boris and Olga, which is central to the subject matter of both Lara and the East sections of TSWK.
17. Boris was born (in 1890) and brought up in Moscow. He studied philosophy at Moscow University, but became committed to poetry. In 1913 he wrote the verses for what would be his first published collection of poetry. Thereafter his reputation as a poet grew. While we are accustomed to think of Boris as the author of Doctor Zhivago, his fame in Russia rested and rests principally upon his work as a poet. By the 1920s, as the Claimant explains in the prologue to Lara, Boris enjoyed a level of fame in Russia which is difficult to comprehend by today’s standards, regularly filling auditoriums with audiences who gathered to hear Boris giving recitals of his poetry. The relevant point, for the purposes of this summary, is that Boris, by the time he met Olga, was a prominent and famous literary figure in Russia, who was also known abroad. This rendered it more difficult for the Soviet authorities to take direct action against him, when he fell out of favour with the authorities and the state sponsored literary establishment. This also meant that Boris, even when out of favour, enjoyed (at least in some respects) a relatively privileged lifestyle within the Soviet Union.
18. Boris married his first wife, Yevgenia Lure in 1922. They had a son, Yevgeni, born in 1923. The marriage did not last and Boris subsequently met and fell in love with the woman who would become his second wife, Zinaida Neigauk (“**Zinaida**”). They were married in 1934 and had a son, Leonid, in 1938. By this time, in addition to their Moscow apartment, Boris and his family were living

in a house (known as a dacha) in Peredelkino, a writer's colony which occupied the former estate of a Russian nobleman not far from Moscow.

19. In 1945 Boris began work on *Doctor Zhivago*. The following year, in October 1946, Boris met Olga in Moscow. At the time Olga was working for a monthly literary journal called *Novy Mir*. Olga's work brought her into contact with a number of writers, including Boris. Olga had been married twice by the time she met Boris. Her first husband had committed suicide, and her second husband had died of an illness. By her first husband she had a daughter, Irina Emelianova ("**Irina**"), whom I have mentioned above as the author of *Legendes*. Irina was born in 1938. By her second husband, Olga had a son, Dimitri, known as Mitia ("**Mitia**").
20. Not long after their first meeting Boris and Olga began a love affair which would last until the death of Boris, on 30<sup>th</sup> May 1960. Olga also gave up her employment with *Novy Mir*, and assisted Boris with his literary work. This literary work included a good deal of translation work, which Boris relied upon for a regular income. During the affair Boris remained married to Zinaida, and continued to live with her in their dacha at Peredelkino. Olga remained living in Moscow, where Boris would visit her regularly. In the summer of 1955 Olga moved with her children to her own rented dacha in Peredelkino, known as the Little House, which allowed her to be closer to Boris.
21. Olga paid a heavy price for her relationship with Boris. By the time Boris and Olga met, Boris had fallen out of favour with the Soviet authorities. Boris was however treated fairly leniently by the authorities. His international fame as a poet and a literary figure appears to have protected him from the fate of many of his fellow writers who suffered death or terms of imprisonment in labour camps during the purges instigated by Stalin in the 1930s. Olga however enjoyed no such protection, and provided a means by which the authorities could strike at Boris. In October 1949 Olga, who was by that time pregnant with Boris' child, was arrested and taken to the Lubyanka prison in Moscow, where she was interrogated and held for some months. During that time she suffered a miscarriage and lost her baby.
22. In July 1950 Olga was sentenced to five years in a labour camp in Potma, which lies some distance to the south east of Moscow. The precise distance from Moscow to Potma was not established in the trial. It appears to be a distance of several hundred miles. There are different figures given for this distance in the various books to which I was referred in the course of the trial, and the discrepancies in distance featured in the cross examination of the Defendant. The labour camp, which I shall refer to as "**Potma**", was part of the network of Soviet labour camps, often referred to as the Gulag.
23. Olga was sentenced for alleged political crimes. The statement of the crimes she was said to have committed is quoted on page 107 of *Lara*, and is of some

importance. The terms of this statement, which is referred to as the Accusation Act, are as follows (as quoted in Lara from the Legendes Translation):

*“The witnesses’ statements have enabled us to uncover your actions: you have continued to denigrate our regime and the Soviet Union. You have listened to the “voice of America”. You have slandered Soviet writers who had patriotic views and you have praised to the skies Pasternak’s work, a writer with anti-establishment opinions.”*

24. This wording, which I shall also refer to as **“the Accusation Act”**, is placed in quotation marks in Lara. In the extensive notes which appear at the end of Lara this quotation is acknowledged, on page 274, in the following terms:

*“The Accusation Act for her case: Emelianova, Légendes, p.46.”*

25. This acknowledgment can be said to be correct, in the sense that the terms of the Accusation Act ultimately come from Legendes, as originally written in Russian by Irina, and as translated into the French by Gerard Abensour. The English words of the Accusation Act which I have quoted above, and which are quoted in Lara, are however a direct quotation (with some minor changes) from the English translation of the Accusation Act in the Legendes Translation.

26. In March 1953 Stalin died and, pursuant to a subsequent amnesty, Olga was released from Potma and returned to Moscow in May 1953, where she resumed her relationship with Boris. In 1954 she suffered a second miscarriage. In 1955, as I have mentioned above, she moved with her two children to a rented dacha at Peredelkino (the Little House) in order to be nearer to Boris. It was also in 1955 that Boris completed the writing of Doctor Zhivago, and delivered the typescript to Soviet literary journals for publication. Olga acted as his effective literary agent, in seeking to find a Soviet publisher for the book. These efforts were unsuccessful. The Soviet authorities disapproved of the book, which was seen as an attack on the Bolshevik Revolution, and no Soviet publisher could be found.

27. In the meantime however Boris received a visit from Sergio D’Angelo, an Italian who worked in the Italian section of Radio Moscow. D’Angelo acted as a literary agent for Giangiacomo Feltrinelli, a wealthy Italian publisher. D’Angelo persuaded Boris to hand over a copy of the manuscript of Doctor Zhivago to Feltrinelli for publication in Italy. The book was first published in Italy in 1957. Other copies of the manuscript also found their way out of the Soviet Union to individuals in the West. The overall result of this was that while Doctor Zhivago remained unpublished, and effectively banned in the Soviet Union, it became widely published and known in the West. It was in these circumstances that, in 1958, the CIA mounted its operation, to infiltrate copies of Doctor Zhivago into the Soviet Union, which is the subject matter of TSWK. I will refer to this operation as **“the CIA Operation”**.

28. In October 1958 Boris was awarded the Nobel Prize for Literature. Initially Boris accepted the award but, under pressure from the Soviet authorities, he was forced to renounce the award shortly after this acceptance. At this time articles started

to appear in the Soviet press attacking Boris, and he was expelled from the Soviet Writers' Union.

29. Boris died in May 1960. Following his death the Soviet authorities took their posthumous revenge on Olga and her daughter Irina. In August 1960 Olga was arrested and taken back to the Lubyanka. In September 1960 Irina was also arrested and taken to the Lubyanka. Both were charged with alleged currency offences, arising out of the importation of roubles into the Soviet Union. Following the publication of *Dr Zhivago* in the West substantial royalties began to accrue, which could not be paid to Boris in the Soviet Union. Some of these royalties did however find their way to Boris, and to Olga, by the conversion of the royalties into roubles in the West, and the conveyance of the roubles into the Soviet Union by friendly parties. The process was monitored by the KGB and, following the death of Boris, provided the peg on which to hang criminal charges against Olga and Irina. In December 1960 they were both sentenced to terms of imprisonment in the Gulag, first at a prison camp in Taishet, in eastern Siberia, and then at Potma. Their treatment sparked a worldwide outcry. Irina was released in 1962, and Olga in 1964.
  
30. Olga died in Moscow in 1995. By that time Boris had been posthumously reinstated to the Soviet Writers' Union, in 1987. In 1989 the Swedish Academy posthumously awarded the 1958 Nobel Prize for Literature to Boris. The award, which Boris had been forced to renounce, was accepted on his behalf by his older son, Yevgeny. *Doctor Zhivago* remains internationally famous, as one of the great Russian novels, and as the subject of the equally, if not more famous 1965 film adaptation, directed by David Lean and starring Julie Christie and Omar Sharif.

#### Other relevant works

31. Both the Claimant and the Defendant made use of other books, as source materials, in writing their own books. It is convenient at this point to mention the following sources.
  - (1) *A Captive of Time ("ACOT")* – This book, published in English in the UK in 1978, comprises Olga's own memoirs, and contains extensive details of the history of her relationship with Boris. It is a lengthy book running, in the English edition, to 397 pages, together with appendices containing letters written by Boris. The English edition also contains an introduction, end notes and comments, and a biographical guide by Max Hayward, the translator of the original work. *ACOT* was characterised by both the Claimant and the Defendant in less than complimentary terms; being variously described as somewhat sprawling, lacking a clear structure, prone to jumping between events, often rambling, and bouncing around in the historical chronology. While my views on the literary merits of all the works I have been asked to consider are irrelevant to what I have to decide in this case, I think that it is relevant to record the following two impressions of my own, after reading *ACOT*. First, *ACOT* provides a wealth of first hand detail on the history of the relationship between Boris and Olga, and



indeed on what their lives were like in the Soviet Union of the post war period. In particular there is a wealth of detail on Olga's experiences in the Lubyanka and at Potma. Its value as a source to anyone writing about Olga and her relationship with Boris is obvious. Second, ACOT is a sophisticated work. While I have of course had to read the work in translation, its description of events is vivid and comes across as the work of someone with considerable literary ability, which no doubt reflects Olga's own literary background and experience.

- (2) The Zhivago Affair: The Kremlin, the CIA and the Battle Over a Forbidden Book (“TZA”) – This book, written by Peter Finn and Petra Couvée, was published in 2014. It gives a factual account of Boris' life, the writing of Doctor Zhivago, and the CIA Operation (the operation to infiltrate copies of Doctor Zhivago into the Soviet Union).
- (3) The Pasternak Affair (“TPA”) – This book, written by Sergio D'Angelo, was published in 2007 and recounts the involvement of D'Angelo in getting the manuscript of Doctor Zhivago out of the Soviet Union to Italy where, as I have described above, it was first published in the West.
- (4) Legendes – I have already mentioned this work, written by Irina and published, in Russian (Legendy Potapovskogo pereulka), in 1997 and then in the French translation by Gerard Abensour (Légendes de la rue Potapov) in 2002.

#### The writing of Lara

32. The Claimant gave evidence, which I accept, that the idea to write her own book about Boris Pasternak had a long germination period, stemming from an interview with her grandmother, Josephine Pasternak (younger sister of Boris), which the Claimant conducted for an article in the Spectator in 1990, at a time when the Claimant was not long out of university, and embarking on a career in journalism. Thereafter the Claimant's interest and research into the life of her great uncle continued, including his relationship with Olga. When Olga died in 1995, the Evening Standard wrote an obituary for her. Following the obituary, the Claimant was commissioned by the Evening Standard to write an article about Olga.
33. The Claimant dates her decision to write a book focussing on Olga and Olga's relationship with Boris to 2006, and produced her first synopsis for a book on this theme in 2008. Thereafter the Claimant, while also working as a journalist, continued to work on ideas for the book. The Claimant's evidence was that she began work in earnest on the book in 2014, when she stopped working in journalism. She produced a book treatment and sent it to a literary agent, Eugenie Furniss, to whom she had been introduced. Ms Furniss then set about finding a publisher. Eventually and after considerable efforts, the detail of which is set out in the Claimant's first witness statement, a publishing deal was secured with William Collins in February 2015.
34. The Claimant actually commenced the writing of Lara in February 2015. She wrote the book in a period of four months, during which the Claimant worked

intensively, writing for 3-5 hours every morning and, as she described it, barely leaving the house. The first completed draft of Lara was sent to the publishers on 17<sup>th</sup> July 2015. Thereafter a considerable amount of further work was done by the Claimant and her publishers editing the first draft and preparing the final draft for publication. Lara was eventually published on 25<sup>th</sup> August 2016. In this judgment all my references to Lara, in published form, are to the book as published in the UK, in the paperback edition.

35. In her first witness statement the Claimant describes the extensive research which she carried out over the years leading up to the actual writing of Lara. The book includes a Select Bibliography, which lists a large number of books which the Claimant read in the course of her research. The listed books include ACOT, TZA, and Legendes. The book also includes quite extensive notes (“**the Lara Notes**”), identifying the sources of quotations. The Claimant explained in her evidence that the Lara Notes were not her responsibility, but were prepared by Kate Johnson, the Claimant’s line editor at William Collins. The Lara Notes are introduced by the following words:

*“In most cases the sources of quotations are made clear in the text. The principal narrative sources are: Olga Ivinskaya’s A Captive of Time (Collins and Harvill 1978), Irina Emelianova’s Légendes de la rue Potapov (Fayard 1997), and author interviews with Pasternak family members (see Acknowledgements). With the help of the Bibliography interested readers will be able to trace any other references without undue trouble.”*

36. The reference to the “*Acknowledgements*” is a reference to a separate Acknowledgements and Note on Sources, which appears after the Lara Notes. This Acknowledgements section contains what is effectively a summary of the researches carried out by the Claimant. The Acknowledgements section identifies Legendes and ACOT as “*the principal sources of my research*”.
37. The above is no more than a summary of the process by which Lara came to be written. It is not intended to detail, and it is not necessary to detail all the research carried out by the Claimant, which is evidenced by the Lara Notes and the Acknowledgements section. I accept that the research carried out by the Claimant was extensive and spanned a considerable period of time. In particular, and as was emphasized on behalf of the Claimant, it included interviews with Irina and with various members of the Pasternak family in the UK and Russia.

#### Lara – the overall structure

38. As I have said, Lara is a non-fictional historical work. It tells the story of the love affair between Boris and Olga. The Claimant stressed in her evidence that while it was her object to tell the story in an accessible and readable manner, which would read more like fiction, the book was not a work of fiction but described actual events in the lives of Boris and Olga, forensically researched by the Claimant.

39. Lara commences with a prologue, which introduces the reader to Boris, to Olga, to the times and circumstances in which they lived, and to Boris' work as a writer. The book then runs for 12 chapters, which tell the story of the love affair. Chapter 1 (A Girl from a Different World) commences with the first meeting between Boris and Olga, in October 1946 at the offices of Novy Mir, where Olga then worked. Chapter 12 (The Truth of Their Agony) ends with the death and funeral of Boris, and the subsequent arrest of Olga and Irina, and their despatch to the labour camp in Taishet. There is then an epilogue. The first half of the epilogue gives a short summary of subsequent events, ending with the posthumous award of the Nobel Prize for Literature in 1989. The second half of the epilogue contains the Claimant's own reflections on the character of Boris, and his treatment of Olga. I will deal with the detail of the chapters of Lara, in respect of which copyright is alleged to have been infringed, when I come to consider the allegations of infringement in relation to the Selection Claim.

#### The writing of TSWK

40. As it is the Defendant who is accused of having infringed the copyright subsisting in Lara, I must give a more detailed account of the Defendant's writing of TSWK.
41. The Defendant's evidence was that it had always been her ambition to publish a novel. Until about ten years ago she was working for a political consulting firm in Washington. She became disillusioned with this career, and decided to devote herself full time to writing. In March 2015 she secured a place, referred to by the Defendant as a fellowship, at the Michener Centre for Writers at the University of Texas in Austin, on the basis of a short story she had written about refugees. She and her husband moved to Texas in June 2015. I understand that those selected for a fellowship attend classes, receive mentoring advice from established authors, and receive a stipend, intended to provide support for their writing, for a period of three years. This is a point of some relevance to the process by which TSWK was created, because it meant that the book was created and written in an academic environment where the Defendant had access to, and made use of the support and advice of those who acted as mentors to the students.
42. The Defendant gave evidence that she had always been fascinated with Doctor Zhivago, which she had read a number of times. The Defendant is named after Lara Antipova, one of the two central characters of Doctor Zhivago. The original catalyst for TSWK appears however to have been an article in the Washington Post by Peter Finn and Petra Couvée, the authors of TZA, about the CIA Operation. The Defendant was sent a copy of the article by her father in early April 2014, which piqued her interest in creating a novel around the CIA Operation. It was at that time, in April 2014, that the Defendant began her researches for the purposes of creating such a novel.
43. On 17<sup>th</sup> June 2014 TZA was published. The Defendant acquired TZA as soon as it was published, and immediately read it. The Defendant's evidence was that it became one of the primary sources for TSWK.

44. The Defendant began full time work on writing what would become TSWK in late 2015, while continuing her research into the history of the relevant events. In November 2015 the Defendant acquired a copy of ACOT, and read it immediately. Her evidence was that, while she had not found it an easy read, she had read it again and again while writing TSWK. As she put it, and as I accept, ACOT is a first-hand account of the lives and relationship of Olga and Boris and, thus, was indispensable. In the same month (November 2015) she also began to read TPA, the book by Sergio D'Angelo recounting how the manuscript of Doctor Zhivago was brought out of the Soviet Union and came to be published in Italy.
45. In her witness statement the Defendant identified ACOT as her primary research source. In cross examination the Defendant identified TZA and ACOT as her two primary resources in the writing of TSWK. I will come back, later in this judgment, to my assessment of this evidence. In this particular respect I make no findings at this stage.
46. The process of writing continued into 2016. It will be recalled that Lara was published in the UK on 25<sup>th</sup> August 2016. The Defendant was alerted to the publication of Lara by Peter Finn, one of the authors of TZA, with whom she was in email contact. Mr Finn sent the relevant email, alerting the Defendant to the publication of Lara, on 22<sup>nd</sup> September 2016. On the same day the Defendant emailed Jeffrey (Jeff) Kleinman, who was her literary agent, asking for a copy of Lara. By this time, specifically by 7<sup>th</sup> September 2016, the Defendant already had a first draft of the novel she was working on, which ran to 285 pages and 80,536 words, and was entitled the Living Ones.
47. The Defendant received a copy of Lara in early October 2016. There is a photograph which the Defendant took of this copy of Lara, with her cat, on 5<sup>th</sup> October 2016. The Defendant accepted in her evidence that she read Lara. In cross examination her evidence was that she began reading Lara shortly after she received it, probably at some time in October 2016. She said that she did not read it straight through, but read it over a period of time, while the process of writing her own novel was continuing. It was put to the Defendant that her publishers had said that she read Lara that winter, which appeared to be a reference to the end of 2016. The Defendant accepted this, and said that she had read the book over a period of a few months, which would have taken her into the winter, at the end of 2016. The Defendant made specific reference to December 2016 in this context. The Defendant accepted that she had read Lara with reasonable care. I accept all this evidence, given by the Defendant in cross examination. I find that the Defendant started reading Lara at some stage in October 2016, and completed her reading of Lara at some stage in December 2016. I find that the Defendant read Lara with reasonable care. Indeed this is what I would have expected of any author reading a book which dealt with an important part of the subject matter of her own intended book.
48. It is not in dispute that the Defendant made some use of Lara, in the process of writing TSWK. In her witness statement the Defendant said that she consulted Lara as secondary source material, essentially for the purposes of checking

historical details against other sources and/or for finding further historical details not in other sources. She said that, on reading Lara, she found it a disappointment. The reason for this, as the Defendant explained in cross examination, was that she did not consider Lara to contain anything new. She recognised, so she said, large parts of Lara as having come from ACOT, TZA and TPA. I will come back, later in this judgment, to my assessment of the evidence I have recited in this paragraph. In this particular respect I make no findings at this stage.

49. The process of writing and re-writing the material which would ultimately become TSWK continued through 2017. In January 2018 the Defendant sent a draft manuscript, still entitled the Living Ones, to her literary agents, Jamie Chambliss and Jeff Kleinman of Folio Literary Management LLC. Their feedback and feedback from the Defendant's thesis adviser at Michener resulted in a further draft of the Living Ones, which was completed in March 2018. On 23<sup>rd</sup> May 2018 the US rights to the book, which then had the working title We Were Never Here, were sold to Alfred A Knopf. UK and English territory rights were sold to Hutchinson. The process of revision continued through 2018. The title The Secrets We Kept was adopted by the Defendant in October 2018. The final draft of TSWK was completed on 6<sup>th</sup> December 2018. Thereafter the process of copy editing commenced.
50. The Defendant did in fact meet the Claimant, in March 2019, at a drinks party hosted by the Defendant's foreign publishers. A conversation took place between the Defendant, the Claimant, and the Claimant's husband, Andrew Wallas. There is a conflict of evidence over what was said in that conversation, which I will come back to later in this judgment.
51. TSWK was finally published in the United States on 3<sup>rd</sup> September 2019 and in the United Kingdom on 5<sup>th</sup> September 2019. In this judgment all my references to TSWK, in published form, are to the book as published in the UK, in the hardback edition.
52. There is an Author's Note and Acknowledgments ("**the TSWK Note**") which appears at the end of the book. The TSWK Note identifies TZA as an "*indispensable asset*", and makes reference to the petitioning of the authors of TZA, which is credited with achieving the release of CIA memos and reports relating to the CIA Operation. The TSWK Note then continues:

*"Throughout the novel are many direct descriptions and quotes, including excerpts of conversations, as documented in first-hand accounts."*
53. ACOT and TPA are singled out for specific mention in this context, as shedding "*light on what it was like to have lived through many of the events described in my novel.*". Lara is also referenced, but within a list of books which are introduced as "*Some of the other books I consulted*".
54. As with my account of the writing of Lara, the above is intended only to be a summary of the process by which TSWK came to be written. As with the writing

of Lara by the Claimant, I accept that the research carried out by the Defendant was extensive and spanned a considerable period of time.

55. There are three additional, and important points to make in relation to the writing of TSWK.
56. First, I have already made the point that the account of the writing of TSWK given above is only a summary of the way in which TSWK was conceived, researched and written. The summary does not convey the extent to which the Defendant wrote, re-wrote, and, with the assistance of her mentors at Michener, her literary agents, and her publishers, edited, and re-edited the material which would ultimately become TSWK. The entire process can be tracked through the numerous previous drafts and notes which the Defendant produced in the course of writing what would become TSWK. This material was disclosed by the Defendant in this action, and was thus available to the court. This disclosure was particularly valuable because it allowed one to see what the Defendant had written before she obtained a copy of Lara, and what she wrote thereafter. This provided a useful means of assessing what had been derived, or might have been derived from the Defendant's reading of Lara.
57. In this context a particular point which emerged from the evidence of the writing process followed by the Defendant was the extent to which the Defendant revised and changed her material as she went along. Scenes were written and abandoned, new scenes introduced, structures changed, characters revised. It will be recalled that the Claimant wrote Lara in a single period of intensive writing, over a four month period. No doubt the writing method varies considerably between authors. It seems to me that the Defendant's writing method can reasonably be described as being at the opposite end of the spectrum to the Claimant. I would characterise the Defendant's writing method as experimental; experimenting with and revising the relevant material until she reached, or found a final draft with which she was satisfied. It was also a writing method which owed a considerable amount to the input of those I have mentioned in my previous paragraph; namely the Defendant's mentors at Michener, her literary agents, and her publishers.
58. Second, the Defendant did not write with the books she was using as source materials open in front of her. Instead the Defendant would constantly read and re-read her sources. In cross examination the Defendant explained that she would not write with the books open in front of her. Instead, as she put it, she would read her source materials, close them, and write a scene. She would only look at a source while actually writing if, as she put it, she needed a quote from history or someone's name. I accept this evidence of the Defendant as to the way in which she used and worked with her source materials.
59. Third, the Defendant's disclosure included her marked up copies of ACOT, TZA, and Lara. As with the Defendant's previous drafts and notes, examinations of these markings provided a useful means of assessing what use the Defendant had made of these sources.

60. In referring to previous drafts of what ultimately became TSWK, I shall identify each draft by reference to the month and year in which it was produced, or finalised as a draft. I shall therefore refer to the draft from September 2016 (then entitled the Living Ones), as “**the September 2016 Draft**”, and so on.

### TSWK – the overall structure

61. As I have said, TSWK is a work of historical fiction. It is a fictionalised account of the CIA Operation told in alternating parts, described as West and East, which effectively divide the story into two narrative threads. The book has a prologue and an epilogue and 28 chapters. Each West and East section starts with an identification of the period to which it relates. There are 11 chapters of East narrative, and 17 chapters of West narrative. By reason of this divided narrative structure it is convenient, at this stage, to give a more detailed summary of the overall structure of TSWK than is required, again at this stage, for Lara.
62. The prologue is entitled The Typists and introduces, in the first person plural, the women who work as typists in the relevant office of the CIA in Washington, called the Soviet Russia Division, in the 1950s. The point is made in the prologue that some of the women working in the typing pool had done challenging intelligence work during the War, but were now condemned, by the conventions of the time, to secretarial work, while the men in the office enjoyed positions of responsibility.
63. Chapter 1 then commences with the East narrative, set in the period 1949-1950. It is told by Olga, and deals principally with the arrest of Olga in October 1949 and her time in the Lubyanka prison, ending with her sentencing to a term of five years at Potma. Chapters 2-4 then revert to the West narrative, set in autumn 1956, and introduce the two principal protagonists of the West narrative, Irina Drozdova and Sally Forrester (“**Sally**”). The West narrative is told through their characters, and through the first person plural of the pool of typists who comprise something not unlike, to borrow the Defendant’s own expression, the chorus in a Greek tragedy. I will refer to Irina Drozdova as “**Irina D**”, in order to differentiate her from Irina, Olga’s daughter and author of Legendes.
64. Chapters 5-7 then revert to the East narrative, set in 1950-1955. This section starts with an imagined letter, written by Olga to Anatoli Semionov, who interrogated Olga in the Lubyanka. The letter describes Olga’s experiences at Potma, and ends with her return to Moscow following her release. There is then the reunion with Boris, with one chapter told from Boris’ perspective, and one chapter told (in the first person by Olga) from Olga’s perspective.
65. Chapters 8 and 9 revert to the West narrative, set in February to autumn of 1957, and take the story to the inception of the CIA Operation, first from Irina D’s perspective, and then from the typists’ perspective. This is followed by further East narrative, in Chapters 10 and 11, set in 1955-1956. Chapter 10 tells the story of Sergio D’Angelo obtaining the manuscript of Doctor Zhivago and taking it to

Berlin, where it is handed over to Mr Feltrinelli, the Italian publisher who first published Doctor Zhivago. The chapter is told from D'Angelo's perspective, but in the third person. Chapter 11 reverts to Olga, and tells (in the first person by Olga) the story of her unsuccessful attempts to recover the manuscript, fearing the consequences if Doctor Zhivago was published in the West.

66. There then follows a substantial section of West narrative, in Chapters 12-18, which carries forward the story of the CIA Operation and is set in the period from the autumn of 1957 through to August 1958. It is worth adding, at this point, that there is considerably more to the West sections than the simple story of the CIA Operation. Much of the writing is devoted to the lives and concerns of the typists and, in particular, the lives and concerns of Sally and Irina D. By way of example, this section of the West narrative deals with the developing relationship between Sally and Irina D, and with Irina D's engagement to a fellow CIA employee, Teddy Helms, with whom she is working. This section of the narrative also includes a scene where Sally is raped at a New Year's Eve party by a CIA officer. The point I am making is that it is potentially misleading to describe TSWK as a fictionalised account of the CIA Operation. It is that, but there is a great deal more to the narrative, both in the West and East sections.
67. Chapter 19 reverts to the East narrative, set in May 1958. It deals (as told in the first person by Olga) with a single incident set in the Little House (Olga's rented dacha at Peredelkino) when Olga and her children are disturbed by Mitia (her son) hearing a noise in the night. In Lara the anglicised spelling of the name of Olga's son, which I am using in this judgment, is given as "*Mitia*". In TSWK the Defendant uses the anglicised spelling "*Mitya*". The incident described in this chapter is used to reflect Olga's concerns over state surveillance, following the publication of Doctor Zhivago in the West.
68. There are then two chapters, 20 and 21, in the West narrative, set in the period from August to September 1958. The story of the CIA Operation is carried forward, told from the perspective of the typists, and then from the perspective of Irina D.
69. Thereafter the narrative is carried forward by individual chapters alternating between East and West. A summary is as follows:
  - (1) Chapter 22 continues the East narrative in the period from September to October 1958. Boris learns that he has been awarded the Nobel Prize for Literature and sends a telegram to the Swedish Academy, indicating his acceptance. The chapter is narrated from Boris' perspective, but in the third person.
  - (2) Chapter 23 continues the West narrative in the period from October to December 1958. It follows Sally's story, her decision to leave the US and the CIA and her revenge on the CIA officer who raped her.
  - (3) Chapter 24 continues (as told in the first person by Olga) the East narrative in the same period from October to December 1958. The front page of this section (in the UK hardback edition but not in the paperback edition) refers



to the relevant period as being October to December 1956, but it seems to me that the reference to 1956 must be an error, because the chapter deals, from Olga's perspective, with the attacks on Boris following his winning of the Nobel Prize, and Boris' decision to renounce the Prize. These events occurred in 1958. The contents page in the UK hardback edition also gives the year for chapter 24 as 1958.

- (4) Chapter 25 continues the West narrative in December 1958, and deals with Sally's situation as a defector from the CIA.
  - (5) Chapter 26 continues (as told in the first person by Olga) the East narrative in January 1959, and continues the story, from Olga's perspective, of the state persecution of Boris following the publication of Doctor Zhivago in the West and the winning of the Nobel Prize.
  - (6) Chapter 27 continues the West narrative in summer 1959. It deals with a visit by Irina D to Vienna, on assignment as part of a CIA operation to infiltrate further banned works into the Soviet Union. Irina D thinks that she sees Sally. The chapter concludes with an account of Irina D thinking that she sees Sally in various subsequent locations around the world, and an account of her feelings for Sally.
  - (7) Chapter 28 continues (as told in the first person by Olga) the East narrative in the period 1960-1961. The chapter deals with the final part of Boris' life, including his death and funeral, from Olga's perspective. There then follows Olga's arrest and her arrival at the Lubyanka. The chapter concludes with another imagined letter to Anatoli Semionov, Olga's former interrogator on the occasion of her first arrest in 1949.
70. The epilogue is also entitled the Typists, and reverts to the perspective of the typists. The epilogue concludes, years later, with the typists, now retired but still in touch with each other, seeing an article in the Washington Post about a woman in her eighties, awaiting extradition to the US on a charge of leaking information to the Soviet Union decades before. The typists recognise the woman as Sally, and speculate as to whether the woman she had been living with until her death in the early 2000s, was in fact Irina D, who had retired from the CIA in the 1980s.

### The evidence

71. The two principal witnesses were the Claimant and the Defendant, both of whom were cross examined at length. The case is not one which seems to me to turn on a direct conflict of evidence between the witnesses. I also agree with the point made in the written closing submissions on the behalf of the Claimant; namely that the credibility of the Claimant is really only relevant to the question of what was said in the conversation at the drinks party in March 2019. I further agree with the Claimant's submission that the credibility of the Defendant is much more important, given that the main factual issue in the case is the extent to which the Defendant used Lara as a source, and copied elements from Lara when writing TSWK. With this in mind my general comments on the evidence of the Claimant and the Defendant are as follows.

72. I found the Claimant to be an honest witness. She was straightforward in her evidence, and did not try to evade questions. When she was occasionally shown to be wrong on matters of detail, she acknowledged this. What also came across is that the Claimant is a passionate person who has strong views (i) on protecting the legacy of her great uncle as a literary figure, (ii) on protecting the Pasternak name, and (iii) on the question of the extent to which writers of historical fiction should be able, without proper attribution, to make use of the work of historians. It was also clear that the Claimant was finding this litigation a considerable strain. I do not hold this against her in any way. Litigation is a stressful business. Lengthy cross examination, even when conducted perfectly properly (as it was by Mr Lykiardopoulos), is also a stressful business. All this did however cause the Claimant, at certain points in her cross examination, to use questions as a platform to make speeches, rather than answer the question. The Claimant also became more emotional as the cross examination proceeded. I do not consider however that these matters in any way detracted from the Claimant's credibility as an honest witness.
73. There is one particular feature of the Claimant's evidence which surprised me, and which deserves specific mention. The Claimant's evidence was that she had never read more than a small fraction of TSWK. The Claimant was provided with a proof of TSWK a few days before the drinks party in March 2019. In her witness statement the Claimant did not pull her punches. She said that she dipped into the book and came across a passage, which is at the beginning of chapter 7 of TSWK, where Boris and Olga are reunited following Olga's release from Potma. They go to bed together and are described as coming together "*like crashing boulders that echoed across Moscow*". The Claimant said that she was appalled by this writing, and decided never to read what she considered "*to be a trashy book that Boris and Olga would have hated*". This evidence was corroborated by Mr Wallas, who said that he had never read TSWK, and that his wife had read less than 10%. In cross examination the Claimant said that she threw the proof copy of the book away. She confirmed that she had still not read the book, beyond her initial dipping into the proof copy.
74. It struck me as extraordinary that an author could bring a copyright claim, claiming infringement of the copyright in their own book, without actually having read the book which is alleged to infringe their copyright. At the very least, and while such dealings would normally be protected by legal professional privilege, one would expect dealings between the author and their legal representatives in an action such as this to involve a certain amount of unavoidable consideration and discussion of the content of the book alleged to infringe the relevant copyright. The Claimant explained in her evidence however that she had commissioned a review of the two books, and I assume that her case in this action derives from that review. It would have been interesting to see that review, but it was not available. It may be that it is said to be subject to legal professional privilege. I was told by Mr Lykiardopoulos that his instructing solicitors had sought a copy of the review, but that the review had not been provided. Odd as all this is, I accept the Claimant's evidence that she has read very little of TSWK. It was clear from the Claimant's evidence that her essential motivation for bringing this action was her perception, based upon what she was told by others

and based upon the publicity for TSWK, that the Defendant had committed a form of identity theft. As the Claimant explained in cross examination:

*“No, I had read that sentence, and when I am talking about the identity theft, I am talking about the defendant claiming in interviews she was telling the untold love story, she was telling the story of a woman whose voice deserved to be told, that the world needed to hear the voice of this woman, when I had told the world this two years prior, That was the identity theft, the sense that the defendant was coming out and claiming that she was telling the story of a woman whose voice deserved to be told when I had very clearly told that story.”*

75. The Claimant’s only other witness was her husband, Andrew Wallas. His evidence was short, being essentially confined to the disputed conversation at the drinks party in March 2019. Mr Wallas was clearly an honest witness, and the limited evidence which he did give was helpful.
76. Turning to the Defendant I found her an impressive witness. She was cross examined for two days by Mr Caddick. Throughout this period the Defendant gave her evidence in a composed and professional manner. She listened to the questions clearly, and made sure that she answered them. Cross examination can sometimes drift away from the question, and the particular point being pursued can sometimes get lost, particularly where a question involves a lengthy preamble or the answer involves a digression by the witness. The Defendant was notably conscientious in bringing the cross examination back to the question she had been asked, and making sure that she gave her answer to that question.
77. The Defendant was clearly an honest witness. The best illustration of this came in the cross examination of the Defendant on what she had taken from Lara. Although the Claimant’s case is that the Defendant has copied the selection (meaning, by way of reminder, selection, structure, arrangement and form of expression) of events in Lara, the Claimant sought to support the allegation of copying by pointing to particular details in Lara, such as words or phrases or descriptions or scenes, which the Defendant was said to have copied from Lara. It was said that this alleged copying, while not itself an infringement of copyright, could and should help me to infer that the Defendant had copied the selection (selection, structure, arrangement and form of expression) of events in the relevant chapters in Lara. When these various details were put to the Defendant, the Defendant did not resort to a blanket denial. In a few cases, where the Defendant thought that she had taken details from Lara, the Defendant was perfectly open in accepting this. In most cases however the Defendant was simply unable to recall if the relevant detail had come from Lara or from somewhere else, and said so. In another case, a witness being unable to remember matters might raise concerns as to their credibility. This case is not such a case. In the present case I did not find it surprising that the Defendant could not recall this sort of detail. I have already explained the Defendant’s writing style, which involved a lengthy process of writing and re-writing without, save where a specific reference needed to be made, the sources open on her desk as she wrote. The writing

process, from the commencement of writing to the final draft, spanned a period of over three years, from 2015 to December 2018. I would not have expected the Defendant to be able to recall, in most cases, whether she had taken a particular detail from a particular source.

78. The relevant point is that I am satisfied that the Defendant was being completely open in her evidence as to what details she could recall taking from Lara. I reject the Claimant's argument that the Defendant was taking refuge in an inability to remember. It was quite clear, from the Defendant's cross examination, that this was not the case.
79. The Claimant also submitted that the time taken by the Defendant in the writing and rewriting process was the result of her being a novice writer. This may well be true, in part. I also note that TSWK was written in an academic environment, where the Defendant was engaged in developing her skills in writing, as a student at Michener. This no doubt also accounts, in part, for the lengthy process of writing and rewriting, and the amount of external feedback and editing to which the book was subject. I do not think however that this provides a complete explanation for the writing and editing process followed by the Defendant. The Defendant struck me as very professional and dedicated in her approach to her work as a writer. The lengthy writing and editing process which she followed seemed to me to be entirely consistent with that approach.
80. In saying this I should make it absolutely clear that I am not drawing any unfavourable contrast with the Claimant, who is also clearly professional and hard working in her work as a writer. I am focussing on the Defendant in this context because her credibility, and the way she worked in her writing of TSWK are relevant to the factual question of whether she did or did not copy elements from Lara.
81. Finally, in the context of the witness evidence, there is the evidence of the five US witnesses, whose witness statements stood as their unchallenged evidence, and whose evidence I accept. These witnesses were Deborah Unferth, associate professor in creative writing at Michener, Elizabeth McCracken, chair of creative writing at Michener and the Defendant's thesis adviser, Jamie Chamblis and Jeff Kleinman of Folio Literary Management LLC, literary agents for the Defendant, and Jordan Pavlin, editor in chief at Alfred A. Knopf, the Defendant's US publishers. All of these individuals provided editorial input and/or feedback/advice to the Defendant, in relation to the development and writing of TSWK. Their evidence provides useful confirmation of the lengthy process of writing and re-writing and editing and re-editing to which the book was subject. All five witnesses confirm that they had never read Lara. Three of the witnesses state that they had never heard of Lara, until these legal proceedings. As I have described in an earlier section of this judgment, the Defendant's literary agent, Mr Kleinman, did obtain a copy of Lara for the Defendant, in response to her request, at the end of September 2016. Mr Kleinman states in his witness statement that he did not read the copy of the book at the time, and has not since

read Lara. Mr. Kleinman's colleague, Ms Chambliss, also refers to the Defendant's request for a copy of Lara at end of the September 2016, but says in her witness statement that she was not involved in the obtaining of a copy of the book by Mr Kleinman.

82. Beyond this, the documentary evidence in the trial was extensive, as were the written and oral submissions of the parties and the legal materials relied upon. I also heard some three and a half days of cross examination, of which I have had the benefit of transcripts. It is neither necessary nor feasible, in this judgment, to make reference to all of the materials and arguments which were put before me in the course of this trial. It has all been taken into account, whether or not the subject of specific reference in this judgment.

### The law

83. It is helpful, at this point, to identify the principal statutory provisions which are relevant to the claims in this action, and also to set out certain principles which emerge from the relevant case law, again relevant to the claims in this action. Unless otherwise indicated, all references to Sections in this judgment are references to sections of the Copyright, Designs and Patents Act 1988 ("**the 1988 Act**").

84. Section 1 defines copyright in the following terms:

- “(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work-*
- (a) original literary, dramatic, musical or artistic works,*
  - (b) sound recordings, films or broadcasts, and*
  - (c) the typographical arrangement of published editions.*
- (2) In this Part "copyright work" means a work of any of those descriptions in which copyright subsists.*
- (3) Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 153 and the provisions referred to there).”*

85. A literary work is defined in Section 3 to mean *“any work, other than a dramatic or musical work, which is written, spoken or sung”*. Lara thus qualifies as a literary work. An author is defined in Section 9(1), in relation to the relevant work, to mean the person who created that work. As such, the Claimant is the author of Lara.

86. Section 11(1) identifies the author of a work as the first owner of any copyright in it. It is not in dispute that the Claimant owns the copyright subsisting in Lara, and I assume that this is on the basis that the Claimant, as the author of Lara, is the owner of the copyright subsisting in Lara. So far as the Legendes Translation

is concerned, it is also not in dispute that the Claimant has acquired, by assignment, such copyright as subsists in the Legendes Translation.

87. As the owner of the copyright in Lara, the Claimant has the exclusive rights conferred by Section 16(1), to the extent that copyright protects Lara and, specifically, to the extent that copyright protects the selections in the relevant chapters of Lara which the Defendant is said to have copied. The same applies to the Legendes Translation, to the extent that copyright protects the Legendes Translation and, specifically, to the extent that copyright protects the extract from the Legendes Translation which comprises the English translation, from the French, of the words of the Accusation Act.

88. The exclusive rights conferred by Section 16(1) are as follows:

*“(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom*

- (a) to copy the work (see section 17);*
- (b) to issue copies of the work to the public (see section 18);*
- (ba) to rent or lend the work to the public (see section 18A);*
- (c) to perform, show or play the work in public (see section 19);*
- (d) to communicate the work to the public (see section 20);*
- (e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);*

*and those acts are referred to in this Part as the "acts restricted by the copyright".”*

89. In the present case infringement of copyright is said to have occurred by reason of copying and issuing to the public. It follows that paragraphs (a) and (b) of Section 16(1) are the relevant paragraphs in the present case.

90. In terms of infringement of the copyright, Section 16(2) and (3) provide as follows:

*“(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.*

*(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it-*

- (a) in relation to the work as a whole or any substantial part of it,*  
*and*
- (b) either directly or indirectly;*

*and it is immaterial whether any intervening acts themselves infringe copyright.”*

91. It will be noted that copyright can be infringed by the doing of an act restricted by the copyright in a work in relation to the work as a whole or in relation to any substantial part of it. Infringement can therefore occur, and is said to have occurred in the present case where only part or parts of the work as a whole have been copied and/or issued to the public.

92. Subsections (1) and (2) of Section 17 define infringement of copyright by copying in the following terms:

- “(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.*
- (2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.”*

93. Subsections (1) and (2) of Section 18 define infringement of copyright by publishing in the following terms:

- “(1) The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work;*
- (2) References in this Part to the issue to the public of copies of the work are to the act of putting into circulation in the United Kingdom copies not previously put into circulation in the EEA by or with the consent of the copyright owner.”*

94. Turning to the principles which govern copyright protection, these derive partly from English case law, but also from international treaties which have shaped the UK copyright regime, as well as EU law through Directive 2001/29/EC (“**the InfoSoc Directive**”). This part of EU law remains a retained part of UK law.

95. In terms of what is protected by copyright, the first principle to draw out is the general principle that copyright arises only in the expression of a work, and does not arise in ideas themselves.

96. This distinction was explained by Lord Hoffmann in his speech in the House of Lords in *Designers Guild v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416, at 2423A-D.

*“My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own: see *Kleeneze Ltd. v. D.R.G. (U.K.) Ltd.* [1984] F.S.R. 399. The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. *Kenrick & Co. v. Lawrence & Co.* (1890) 25*

*Q.B.D. 99 is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection."*

97. It will be noted that Lord Hoffmann identified two propositions in this extract from his speech. So far as the first proposition is concerned, ideas of a non-literary kind, such as matters of historical fact or technical information cannot be subject to copyright protection. As Mummery LJ explained in *Baigent v The Random House Group Ltd* [2007] EWCA Civ 247 [2007] F.S.R. 24, at [146]:

*"It is not, however, sufficient for the alleged infringing work simply to replicate or use items of information, facts, ideas, theories, arguments, themes and so on derived from the original copyright work."*

98. Turning to the second proposition, ideas of an artistic or literary nature are not necessarily subject to copyright protection. This principle was usefully explained by Laddie J, in *IPC Media v Highbury* [2004] EWHC 2985 (Ch), at [14]:

*"The need to prove copying involves showing a design nexus between the defendant's and the claimant's works. However it is a mistake to believe that any nexus will do. The law of copyright has never gone as far as to protect general themes, styles or ideas. Monet, like those before him, acquired no right to prevent others from painting flowers or even water lilies or, to take an example referred to by Mr Howe, Georges Seurat would not have obtained, through copyright, the right to prevent others from painting in a pointillist style. Even someone who is inspired by Monet to paint water lilies or by Seurat to paint using coloured dots would not infringe copyright. Such general concepts are not put out of bounds to others by the law of copyright. Needless to say, it is impossible to define the boundary between mere taking of general concepts and ideas on the one hand and copying in the copyright sense on the other. Judge Learned Hand in *Nichols v Universal Pictures Co* 45 F 2nd 119 (2nd Cir. 1930) said that wherever the line is drawn will seem arbitrary. He also said:*

*"Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended." (p.121)"*

99. Returning to the 1988 Act, paragraph (a) of Section 1(1) confers copyright protection on an original literary work. The relevant work must be original work. The concept of originality was explained by the CJEU in *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 20. As the Court explained, at [33]-[37]:



“33 Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit reproduction is intended to cover "work".

34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular art.2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.

35 Similarly, under arts 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9-11 and 20 in the preamble thereto.

37 In those circumstances, copyright within the meaning of art.2(a) of Directive 2001/29 is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation.”

100. Two other aspects of the judgment in *Infopaq* can usefully be mentioned. First, at [45] to [47], the Court explained further the concept of intellectual creation, in the following terms:

“45 Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

46 Words as such do not, therefore, constitute elements covered by the protection.

47 That being so, given the requirement of a broad interpretation of the scope of the protection conferred by art.2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in art.2(a) of that Directive.”

101. Second, Section 16(1) defines an infringement of copyright as the doing of an act restricted by the copyright in the relevant work “*in relation to the work as a whole or any substantial part of it*”. In terms of what qualifies as a substantial part, the Court gave the following guidance, at [38] to [39]:

“38 As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant Directive indicating that those parts are to be treated any differently from the work as a whole.

*It follows that they are protected by copyright since, as such, they share the originality of the whole work.*

39 *In the light of the considerations referred to in [37] of this judgment, the various parts of a work thus enjoy protection under art.2(a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.”*

102. In the *Infopaq* case the claimant operated a media monitoring and analysis business which consisted primarily of drawing up summaries of selected articles from Danish daily newspapers and periodicals. The articles were selected on the basis of certain subject criteria agreed with customers and the selection was made by means of a data capture process. The data capture process operated by capturing 11 words from the relevant article. The question was whether this process infringed the copyright of the publishers of the relevant newspapers and periodicals. I have already quoted [47] from the judgment of the Court. It will be noted that the Court accepted that a sequence of 11 words was capable of conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which was, in itself, the expression of the intellectual creation of the author of the article. The question of whether the taking of 11 words would be sufficient in any particular case to amount to an infringement of copyright was left to national courts to determine.

103. The effect of *Infopaq* and the concept of intellectual creation was considered by Lewison LJ in *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482 [2014] R.P.C. 8. At [38] Lewison LJ explained the test for what is a substantial part, post *Infopaq*, in the following terms (underlining also added):

*“Our domestic legislation confines the doing of a restricted act (e.g. copying) to doing that act in relation to the work as a whole or any “substantial part of it”: Copyright Designs and Patents Act 1988 s.16 (1), s.16 (3), Nova Productions Lid v Mazooma Games Lid [2007] EWCA Civ 219, [2007] R.P.C. 25 at [29]. It has long been the position in domestic law that what is substantial is a question to be answered qualitatively rather than quantitatively. In Infopaq the court said that parts of a work are entitled to the same protection as the work as a whole. But the parts in question must “contain elements which are the expression of the intellectual creation of the author of the work”: [39]. This is now the test for determining whether a restricted act has been done in relation to a substantial part of a work. Both counsel agreed that to interpret s.16 (3) in this way was consistent with the court’s duty to interpret domestic legislation, so far as possible, so as to conform with European directives. I do not think that anything in the decisions of this court in Nova Productions Lid v Mazooma Games Lid and The Newspaper Licensing Agency v Meltwater Holding BV [2011] EWCA Civ 890, [2012] R.P.C. casts doubt on that proposition.”*

104. Immediately prior to this part of his judgment in *SAS*, Lewison LJ also considered the concept of intellectual creation, as expressed in *Infopaq*. As he explained, at [29]:

*“As Mr Howe Q.C. pointed out, unlike the Software Directive, the Information Society Directive does not expressly deal with the scope of copyright protection (i.e. what is capable of being protected by copyright). Nevertheless the ECJ (and latterly the CJEU) has supplied the omission. What is protected is the expression of an author's "intellectual creation". The phrase "intellectual creation" does not appear in the Information Society Directive.”*

105. Lewison LJ proceeded to quote from the *Infopaq* decision. He then identified what was meant by intellectual creation in the following terms, at [31]:

*“The court has also considered what amounts to an "intellectual creation" on a number of occasions. The essence of the term is that the person in question has exercised expressive and creative choices in producing the work. The more restricted the choices, the less likely it is that the product will be the intellectual creation (or the expression of the intellectual creation) of the person who produced it. In Case C-393/09, *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* [2010] E.C.R. I-13971, [2011] ECDR 3, [2011] F.S.R. 18 ("BSA") what was in issue was a graphic user interface which enabled a computer user to communicate with a computer program. The question referred was whether it was protected by the Software Directive. The answer was "no", The reason was that it was not "a form of expression of a computer program"; see [42]. However, both Advocate-General Bot and the court itself also considered whether it could be protected by the Information Society Directive. The Advocate-General began at [73] and [74] by recognising that the development of an interface required considerable intellectual effort on the part of its developer. That intellectual effort included using a programming language to create a complex structure. But that did not necessarily mean that the product of that intellectual effort qualified for copyright protection. He continued at [75] and [76]:*

*"75. The difficulty as regards determination of the originality of the graphic user interface lies in the fact that the majority of the elements which comprise it have a functional purpose, since they are intended to facilitate the use of the computer program. Accordingly, the manner in which those elements are expressed can be only limited since, as the Commission stated in its written submissions, the expression is dictated by the technical function which those elements fulfil. Such is the case, for example, of the mouse which moves the cursor across the screen, pointing at the command button in order to make it operate or of the drop-down menu which appears when a text file is open.*

*76. In such cases, it seems to me that the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable. If such a possibility was offered, it would have the consequence of conferring a monopoly on certain companies on the computer program market, thus significantly hampering creation and innovation on that market, which would run contrary to the objective of Directive 2001/29." "*

106. At [36] Lewison LJ noted the test of intellectual creation, as set out in *Infopaq* and as applied in subsequent European cases might not be quite the same as the traditional test of originality in English law. In this context the conclusion of Lewison LJ was as follows, at [37]:

*“If the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtaining copyright protection.”*

107. The test of originality is therefore a qualitative, not a quantitative test. It seems to me that the post *Infopaq* test is usefully and succinctly stated by Zacaroli J in *Sheeran v Chokri* [2022] F.S.R. 15, at [21] in the following terms:

*“To amount to an infringement, however, the copying must be of either the original work or a "substantial part" of it: s. 16(3)(a) of CDPA. This is a qualitative, not quantitative, question. The test is whether the part in question contains elements which are the expression of the intellectual creation of the author of the work: Newspaper Licensing Agency Ltd v Meltwater Holding BV[2011] EWCA Civ 890, at [24]-[28], applying Infopaq International A/S v Danske Dagblades Forening [2009] E.C.D.R. 16; [2010] F.S.R. 20. The essential consideration is to ask whether a defendant has taken that which conferred originality on the claimant's copyright work (or a substantial part of it): Mitchell v BBC[2011] EWPC 42, per HHJ Birss QC at [28]-[29].”*

108. In this context, and turning more specifically to the circumstances of the present case, there is the decision of the Court of Appeal in *Baigent*, which I have already mentioned above. *Baigent* is the well-known case in which two of the three authors of *The Holy Blood and The Holy Grail* brought a claim for alleged infringement of copyright by the defendant's publication of *The Da Vinci Code* by Dan Brown. The allegation was that Mr Brown had copied what was described as the Central Theme of *The Holy Blood and The Holy Grail*. The claim failed, essentially on the basis that the so called Central Theme, so far as it could be found at all in *The Holy Blood and The Holy Grail*, existed as no more than a selection of features from the book, collated for forensic purposes, which did not qualify for copyright protection as a substantial part of the work.

109. The claim in *Baigent* was a rather different claim to the claims in the present case, and, for that reason, I am not convinced that *Baigent* is directly relevant in the present case. What is relevant is the guidance given by the Court of Appeal in *Baigent* as to the correct approach to copyright cases of the present kind. In particular, Mummery LJ provided the following explanation of what was and was not protected by copyright in *The Holy Blood and the Holy Grail*, at [156]:

*“The literary copyright exists in HBHG by reason of the skill and labour expended by the claimants in the original composition and production of it and the original manner or form of expression of the results of their research. Original expression includes not only the language in which the*

*work is composed but also the original selection, arrangement and compilation of the raw research material. It does not, however, extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about.”*

110. On the question of what constitutes the intellectual creation of the author of a work, I should also make reference to *Martin v Kogan* [2019] EWCA Civ 1645 [2020] F.S.R. 3. The issue in this case was whether the first claimant in the relevant proceedings was the sole author of, and sole owner of the copyright in the screenplay for the film *Florence Foster Jenkins*. The film was based on the life of a New York heiress and socialite who became famous for her striking soprano voice. The defendant was an opera singer by training, and the former partner of the first claimant. The defendant claimed to be entitled to a share of the copyright in the screenplay as joint author. The final version of the screenplay was written by the first claimant after the breakdown of the relationship between the first claimant and the defendant. The defendant’s case was that she had made contributions to earlier drafts of the screenplay which had been carried over into the final version of the screenplay, and entitled her to claim joint authorship. This claim failed at first instance, but the Court of Appeal overturned the decision of the first instance judge, and remitted the case for a new trial before a different judge.

111. For present purposes the relevance of this case lies in what Floyd LJ, in giving the judgment of the Court of Appeal, identified as helpful guidance on the concept of intellectual creation. At [44] and [45] Floyd LJ said this:

*“44 In SAS Institute Inc v World Programming Ltd [2013] EWCA Civ 1482; [2015] E.C.D.R. 17; [2014] R.P.C. 8 at [29]-[37] this court reviewed the jurisprudence of the CJEU on “intellectual creation”, As Lewison LJ (with whom Tomlinson and Vos LJJ agreed) explained:*

*“The essence of the term is that the person in question has exercised expressive and creative choices in producing the work. The more restricted the choices, the less likely it is that the product will be the intellectual creation (or the expression of the intellectual creation) of the person who produced it.”*

*45 Painer v Standard Verlags GmbH (C-145/10) EU:C:2011:798; [2012] E.C.D.R. 6 concerned copyright in photographs. The CJEU gave some helpful guidance on the sort of creative choices with which copyright is concerned:*

*“88. As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author’s own if it reflects the author’s personality.*

*89. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative*

*choices (see, a contrario, Football Association Premier League Ltd v QC Leisure (C-403/08) EU:C:2011:631, paragraph 98).*

*90. As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production.*

*91. In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.*

*92. By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch".*

*93. Consequently, as regards a portrait photograph, the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent. 94. In view of the foregoing, a portrait photograph can, under Article 6 of Directive 93/98, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph."*

112. Mr Caddick also drew my attention specifically to what the Court of Appeal had to say on the nature of the threshold which had to be crossed, by a party claiming joint authorship. At [139] Floyd LJ said this (underlining also added):

*"It must be recalled, first, that the specific instances dealt with above were put forward by Ms Kogan as examples, and not as the totality of her case. Secondly, the task for the court was to ascertain whether Ms Kogan's contribution was made in the course of a collaboration, and, if so, whether it crossed the relatively undemanding threshold for joint authorship set by *Infopaq* [2010] F.S.R. 20 and subsequent authority."*

113. Turning to the factual question of whether copying has in fact taken place or, in a case where some copying is accepted or found to have taken place, the factual question of the extent of that copying, it is useful to keep in mind the following general guidance given by Laddie J in the *IPC* case, at [10]:

*"Once the claimant has identified a copyright work, he must prove that the defendant has copied at least a substantial part of it. In many cases he will not be able to call upon a witness who observed the act of copying. He, therefore, will have to make out his case in other ways. Normally he will point to similarities between the alleged infringement and the copyright work, taking into account evidence of opportunity to copy and motive, and will ask the court to infer that copying has occurred. As a general rule, the greater the similarities between the alleged infringement and the copyright work, the greater the prospect of copying being inferred. However, similarities do not necessarily indicate copying. The author and the defendant may have worked quite independently from common sources, in similar environments, to achieve similar objectives and made use of similar*

*common design techniques so as to produce works which have a degree of visual similarity.”*

114. It is also useful to have in mind, in the circumstances of the present case, the warning given by Laddie J in *IPC* against similarity by excision. At [11] Laddie J provided the following memorable example of grains of sand dropped on the floor (underlining also added):

*“Furthermore it is necessary to be alert to the possibility of being misled by what may be called similarity by excision. Michelangelo said of one of his sculptures, “I saw the angel in the marble and I carved until I set him free”, In copyright cases, chipping away and ignoring all the bits which are undoubtedly not copied may result in the creation of an illusion of copying in what is left. This is a particular risk during a trial. Inevitably the court will be invited by the claimant to concentrate on the respects in which his work and the alleged infringements are similar. But with sufficient concentration one may lose sight of the differences. They may be just as important in deciding whether copying has taken place. The effect can be explained by an analogy, Two individuals drop similar small quantities of sand on the floor. If one removes all the grains of sand which are not in equivalent positions, all you are left with are those which are in equivalent positions. If you look at those remaining grains it is possible to say that similar patterns of distribution exist. It is even possible to say that these similarities are surprising. But the similarities and the surprise they elicit are an artefact created by the very process of ignoring all the other grains. This type of artefact created by close attention only to the areas of similarity is a risk in any court proceedings.”*

115. A related point relevant to the present case, in the context of the factual question of whether copying has taken place, is the need for caution where writers are dealing with the same historical events, and working from common sources. In *Harman Pictures v Osborne* [1967] 1 WLR 723, the publishers of the book *The Reason Why*, about the Charge of the Light Brigade, brought a claim against the defendants who were intending to produce a film entitled *The Charge of the Light Brigade*, with a screenplay written by John Osborne, the famous playwright and first defendant in the action. The publishers sought an interlocutory injunction to prevent the defendants from releasing their film pending the trial of the action. The claim for the interlocutory injunction came before Goff J. The case is potentially a very useful authority in the present case because it also involved two writers dealing with the same historical events. Given the nature of the relief sought however, it was not necessary for Goff J to consider more, in the context of the strength of the claim, than whether a prima facie case of infringement had been established. Goff J decided that the publishers had surmounted this hurdle.
116. In his judgment in *Harman* Goff J did however provide the following guidance. After identifying the rule that there is no copyright in ideas or schemes or systems or methods, but only in their expression, Goff J said this, at 728C-D:

*“But there is a distinction between ideas (which are not copyright) and situations and incidents which may be: see per Swinfen Eady L.J. in Rees v. Melville ”:*

*“In order to constitute an infringement it was not necessary that the words of the dialogue should be the same, the situations and incidents, the mode in which the ideas were worked out and presented might constitute a material portion of the whole play, and the court must have regard to the dramatic value and importance of what if anything was taken, even although the portion might in fact be small and the actual language not copied, On the other hand, the fundamental idea of two plays might be the same, but if worked out separately and on independent lines they might be so different as to bear no real resemblance to one another.”*

*One must, however, be careful not to jump to the conclusion that there has been copying merely because of similarity of stock incidents, or of incidents which are to be found in historical, semi- historical and fictional literature about characters in history, see Poznanski .v. London Film Production Lid. In such cases the plaintiffs, and that includes the plaintiffs in the present case, are in an obvious difficulty because of the existence of common sources, as was emphasised in the case of Pike v. Nicholas.”*

117. Finally, on the factual question of copying, I return to the judgment of Mummery LJ in *Baigent*. At [141] Mummery LJ identified the following different forms of copying:

*“For example, it is easier to establish infringement of the copyright in a literary work if the copying is exactly word for word (verbatim or "slavish" copying), or if there are only slight changes in the wording, perhaps in some optimistic attempt to disguise plagiarism. The essence of literary copyright is proprietary protection (in the form of exclusive rights to do acts restricted by the copyright in the work) for a literary work in recognition of the investment of effort, time and skill in reducing it into material form, such as words, signs and symbols. Although there is no objection to calling word for word copying "language copying", it is, in my view, potentially confusing to describe it as "textual copying" and it is better to avoid the use of that expression. The "text" of a literary work may cover more than the particular words in which it is expressed and extend to its overall content, including the selection, arrangement and development of ideas, theories, information, facts, incidents, characters, narrative and so on.”*

118. In his next paragraph, at [142], Mummery LJ supported his analysis by the following example of copying an anthology of poetry.

*“Take the case of alleged infringement of copyright in an anthology of out of copyright literary works (seventeenth century metaphysical poetry). There will usually be word for word copying of the pieces anthologised, but that verbatim copying of the anthologised pieces is irrelevant to infringement of copyright in the anthology as such being an original work (a literary compilation). The relevant form of expression of the work for*



*deciding whether there has been an infringement of copyright in such a case is the selection and arrangement of the poetry, not the text of the individual poems themselves. An original selection and arrangement of the poems may also be properly described as "the text" of the anthology. For the purposes of establishing infringement the focus would be on the similarity of the selection and arrangement of the anthologised pieces. To apply the term "textual copying" to such a case would not clarify the issue for decision."*

119. In the present case therefore the copying of the Accusation Act, as translated in the Legendes Translation and so far as the same has been copied, is correctly referred to as language copying. In relation to the Translation Claim, the case is that the actual words of the translation have been copied. In relation to the Selection Claim a different kind of copying has been alleged; namely copying of the selection of events in the relevant chapters of Lara.
120. With all the above guidance in mind, and with all the legal materials cited to me at the trial in mind, I turn to consider directly the claims in the action. I will take the Selection Claim first and, after I have reached my conclusions in relation to the Selection Claim, I will turn to the Translation Claim. I should also mention that it is convenient to leave to the discussion of the Translation Claim certain legal materials specific to the Translation Claim.

#### The issues in the Selection Claim

121. The particulars of the alleged infringements of copyright which comprise the Selection Claim are set out in paragraphs 8-25 of what are now the Re-Amended Particulars of Claim. As will be apparent from my reference to re-amendment, the pleaded case has been subject to some revision, first by amendment, and then by re-amendment. Permission to re-amend was sought, and granted by me at the trial itself. In summary, the Selection Claim, as now pleaded, is that the Defendant has, in 7 of the 11 East chapters in TSWK copied the Claimant's selection (in whole or in part) of what are referred to as events and aspects in 7 of the 12 chapters in Lara.
122. The allegations of infringement were gathered together into a Schedule B ("**Schedule B**"), which was attached to the Claimant's skeleton argument for the trial. Schedule B was then revised in the course of the trial, and eventually reached its final form as Annex 2 to the Claimant's written closing submissions. Annex 2 thus contains the final particulars of the infringements of copyright which constitute the Selection Claim. In closing submissions Mr Caddick confirmed to me that it was this Annex 2 ("**Annex 2**") which I needed to work through in order to determine whether all or any of the allegations of infringement of copyright which constitute the Selection Claim have been made out.
123. All this made life difficult for the Defendant's legal team, in terms of making the Defendant's response to each iteration of Schedule B. As the written closing submissions of the parties were exchanged only the day before oral closing

submissions the Defendant did not have the opportunity to prepare a revised response to Annex 2. That said, I have the detailed response of the Defendant to the revised version of Schedule B, as produced in the course of the trial. Taking that detailed response with the Defendant's written and oral closing submissions, I am satisfied that I have the details of the Defendant's response to the allegations of infringement in Annex 2 which I require in order to make a decision on those allegations of infringement.

124. Annex 2 is helpfully formulated as a Scott Schedule. Each of the chapters in Lara, in respect of which infringement is alleged to have occurred, is separated out into a separate section, with the exception of chapters 9 and 10, which are taken together. Each section contains a series of numbered items, which are said to be the events of the relevant chapter of Lara whose selection, in whole or in part, has been copied by the Defendant. Each section is divided into columns. The organisation of the columns is as follows:

- (1) In the case of chapters 5 and 7, and working from the left hand side, there are five columns. The first column identifies the numbered item whose selection is alleged to have been copied. The second column identifies whether the same event can be found in ACOT and, if so, whether and to what extent it is dealt with in different terms. The third column identifies whether the same event can be found in TZA and, if so, whether and to what extent it is dealt with in different terms. The fourth column identifies where it is said that the selection of an event has been copied in TSWK and, in many cases, adds comments in support of the allegation of infringement. The fifth column is headed "*Other comments*", and contains occasional additional comments by the Claimant.
- (2) In the case of chapter 6 there is no column for TZA, and no column for other comments. Otherwise, the columns are the same.
- (3) In the case of chapters 8, 9, and 10 there is no column for other comments. Otherwise the columns are the same.
- (4) In the case of chapter 12 there is no column for other comments, but there is a column for another source book, which is Boris Pasternak: His Life and Art, by Guy De Mallac, published in the UK in 1981 ("**De Mallac**"). Otherwise the columns are the same.

125. Annex 2 includes a number of instances of what are said to have been copying by the Defendant of individual points and details from Lara which, while not said to be infringements of copyright in themselves, could and should help me to infer, so it was submitted, that the Defendant had copied the selection of events in the relevant chapters of Lara.

126. I have the benefit of the response schedule from the Defendant, which I have mentioned above. As I have explained, the Defendant's response schedule contains the detailed response of the Defendant to the revised version of the Claimant's Schedule B which was produced in the course of the trial. This response schedule ("**the Response Schedule**") was attached to the Defendant's written closing submissions and comprises the Claimant's revised Schedule B (the predecessor schedule to Annex 2), marked up with the Defendant's response.

The Claimant's revised Schedule B had the same system of sections and columns as Annex 2, save for the additional column for other comments. Subject to this difference, the Response Schedule is thus organised into the same sections and columns as Annex 2. Subject to keeping in mind that the Response Schedule does not itself respond to any differences between the Claimant's revised Schedule B and the Claimant's Annex 2, I thus have the benefit of the cases of both parties on the Selection Claim organised into versions of the same schedule.

127. The Claimant's suggested approach to my task of considering the allegations of infringement of copyright was that I should work through the allegations of infringement in Annex 2, section by section, in order to determine the Selection Claim; see paragraph 47 of the Claimant's written closing submissions. I also understood it to be common ground between the parties that I should approach the allegations of infringement in this way. Independent of this common ground, it seems to me that this is the sensible way to consider and determine the allegations of infringement which comprise the Selection Claim.
128. The detail of the issues between the parties can be discerned by looking at Annex 2 and the Response Schedule and, where necessary, the other written and oral arguments of the parties and the now re-amended statements of case, together with the various other annexes and schedules attached to the written submissions and the statements of case. In broad terms the issues, in relation to the Selection Claim and in this first part of the split trial of the action, can be summarised as follows:
- (1) It is, as I understand the position, common ground (i) that Lara is a literary work, (ii) that the Claimant is the author of Lara and (iii) that, in that capacity, the Claimant owns the copyright subsisting in Lara. This however only takes one a limited way, since it leaves open the question of whether what is alleged to have been taken from Lara actually constitutes the intellectual creation of the Claimant, subject to copyright protection. Mr Caddick used the expression "*AOIC*" (author's own intellectual creation) to mean elements of Lara which were subject to copyright protection as, in the language of *Infopaq*, the Claimant's own intellectual creation. Where I use this expression in this judgment, in relation to Lara or otherwise, it has the same meaning.
  - (2) There is an issue between the parties as to whether the selections of events, as set out in each section of Annex 2, qualify for copyright protection as substantial parts of Lara. As I understood the submissions of Mr. Lykiardopoulos, this issue raised two questions; namely (i) whether the events listed were at too high a level of abstraction, as historical events, to allow their selection to qualify for copyright protection, and (ii) whether the selection of the events was not the original work of the Claimant, but rather something derived from ACOT and/or TZA.
  - (3) There is an issue between the parties as to whether the Defendant did in fact copy the selection of events, or part or parts of that selection, as listed in Annex 2.

### The questions to be answered in the Selection Claim

129. I asked counsel to formulate for me, in their closing submissions, the questions which they said I should address in order to consider and determine the Selection Claim. Unfortunately, and perhaps inevitably, the questions formulated by counsel bore little resemblance to each other, and generated a good deal of argument, of doubtful value, as to the right approach.
130. Mr Caddick's questions were as follows:
- (1) What is the work on which the Claimant relies as her copyright work?
  - (2) Was that work the expression of the Claimant's AOIC?
  - (3) Does TSWK contain the same or substantially the same expression?
  - (4) Is that because, on the balance of probabilities, the Defendant has copied the Claimant's expression or does the evidence show that the Defendant used another source or sources?
131. Mr Lykiardopolous' questions were as follows:
- (1) What is the selection, structure and arrangement of Lara relied upon by the Claimant which is alleged to have been copied?
  - (2) Is the selection, structure and arrangement of Lara relied on by the Claimant a fair summary of the relevant parts of Lara? If not, what would be?
  - (3) Is the selection, structure and arrangement of the parts of TSWK relied upon a fair summary of the relevant parts of TSWK? If not, what would be?
  - (4) Did the Defendant copy a substantial part of what is original in the selection, structure and arrangement of Lara? (Or, in *Infopaq* terms: did the Defendant copy a part of the selection, structure and arrangement of Lara and is the part copied, itself the expression of the intellectual creation of the Claimant?)
132. It seems to me, having heard the arguments of counsel on this topic, that there is a risk of overcomplicating the analysis. I also bear in mind the following warning given by Mummery LJ in *Baigent*, at [127]:
- “There is some confusion in this case both in the judgment and in the defendant's submissions between the subsistence of copyright (what is the copyright work?) and its infringement (has a substantial part of the copyright work been copied?). Under the 1988 Act subsistence and infringement are distinct issues.”*
133. In my judgment, the basic questions which I have to answer are as follows:
- (1) What is the material which is said by the Claimant to have been copied from Lara? In the present case this first question is answered by Annex 2. The relevant material is the selection of events set out in each section of Annex 2.
  - (2) Is each selection of events the expression of the Claimant's own intellectual creation (AOIC), so as to have the benefit of copyright protection?
  - (3) Has the Defendant copied the selection of events (in whole or in part) set out in all or any of the sections of Annex 2?

134. The third and fourth questions formulated by Mr Caddick, which I have set out above, seem to me to be relevant questions in answering the third of my questions above; that is to say the factual question of whether copying has actually occurred. As Laddie J observed in *IPC*, in the extract from his judgment (at [10]) which I have quoted above, the greater the similarities between the alleged infringement and the copyright work, the greater the prospect of copying being inferred.
135. It seems to me that the second and third questions formulated by Mr Lykiardopoulos, as quoted above, are also relevant to the factual question of whether copying has actually occurred. I can see that it is important, particularly in a selection case such as the present case, to ensure that the comparison exercise which is being carried out is a fair one. By way of example, one needs to ensure that the comparison exercise is not one which has been contrived to produce apparent similarities, of the kind described in Laddie J's memorable example of comparing grains of sand; see *IPC* at [11] as quoted above.
136. There are two other points which I should make about the basic questions which I have formulated above, and my approach to the answering of those questions.
137. First, my questions do not make express reference to "*a substantial part*" of Lara. Given that the Selection Claim does not allege copying of Lara as a whole, what must be demonstrated in order to establish infringement, is that a substantial part, or more accurately substantial parts of Lara have been copied. The question of what qualifies as a substantial part is a qualitative, not a quantitative question. The test is whether the relevant part contains elements which are the expression of the intellectual creation of the author of the relevant work. I accept Mr Caddick's point that the relevant part can, in theory and on the authority of *Infopaq*, constitute as little as 11 words of the relevant work. If the required elements of the expression of the intellectual creation of the author are present in the relevant part, the relevant part qualifies as a substantial part of the relevant work. As such I also accept, in principle, that the Claimant does not need to establish that the entire selection of events set out in each section of Annex 2 has been copied. Copying a part of that selection will be sufficient, if the relevant part qualifies as a substantial part of Lara, so that copyright subsists in that relevant part.
138. Second, the Defendant devoted considerable effort to seeking to demonstrate that large parts of the text of Lara had actually been copied directly from the text of the sources used by the Claimant, and principally from the text of ACOT. To this end the Defendant produced a lengthy Annex A (as amended) to her pleaded case in what is now the Re-Amended Defence and Counterclaim. The Defendant's Annex A comprised a table showing common text between (i) the chapters of Lara which are alleged to have been the subject of copying by the Defendant, and (ii) the relevant source; principally ACOT. The Claimant riposted with a Schedule A to her skeleton argument for trial, which subsequently became Annex 1 to her written closing submissions for trial. What the Claimant had done in Schedule A/Annex 1 was to go through various parts of the Defendant's Annex A, setting out the common text between Lara and the relevant source, but also

including non-common text in, respectively, Lara and the relevant source, which was said to have been omitted from the Defendant's Annex A.

139. Subject to one exception, to which I shall come, I am not convinced that the extensive work which had been done in the production of the Defendant's Annex A and the Claimant's Schedule A/Annex 1 was particularly helpful to what I have to decide. For that reason I do not regard it as necessary to go into the detail of the competing tables, or to make any detailed findings on the competing tables. The Defendant's Annex A did demonstrate the very extensive use made by the Claimant of her source materials, principally ACOT, in the writing of Lara. This use included (as I find) the direct copying of text from the source materials.
140. I agree with Mr Caddick however that, in this as in other contexts, it is essential to keep in mind the distinction between subsistence of copyright in Lara and infringement of copyright in Lara.
141. The exercise carried out by the Defendant in the Defendant's Schedule A/Annex 1 was, as I understood it, intended to demonstrate that the material in Lara which is alleged to have been copied was either not original or was of a very low level of originality. It seems to me that the exercise therefore goes to the question of whether copyright subsists in the relevant material in Lara which is alleged to have been copied. Putting the matter another way, the exercise goes to the question of whether the relevant material in Lara constitutes the expression of the AOIC of the Claimant. In this context however I accept, in principle, what seemed to me to be an important point made by Mr Caddick. The point is that copyright can subsist in the original skill and labour (or intellectual creativity) used in selecting and arranging material taken from other sources. The example given was an anthology of poetry. The creator of the anthology will have copied the poems, with the result that the creator will have no copyright in the words of the poems themselves. The selection of the poems for the anthology is however the result of the creator's own original skill and labour in deciding what poems to include in and exclude from the anthology, and can be the subject of copyright protection. The same would apply to editorial notes prepared by the creator of the anthology which commented on the selection and/or the poems.
142. In the present case the Selection Claim relies upon copyright which is said to subsist in the Claimant's selection of events in the relevant chapters of Lara, using selection in a wide sense to encompass the selection, structure and arrangement of events and the forms of expression of events. In principle I accept Mr Caddick's argument that copyright can subsist in this selection in each of the relevant chapters of Lara, notwithstanding that those chapters may contain a large amount of material taken from ACOT and other sources.
143. The exception which I have mentioned above concerns common sources. The exercise carried out by the Defendant in the Defendant's Annex A does demonstrate the extensive and direct use made by the Claimant of her source materials, and in particular ACOT and also including (albeit to a considerably

lesser extent) TZA. In cross examination the Defendant identified ACOT and TZA as her two primary resources in the writing of TSWK. I have yet to make my assessment of this particular part of the Defendant's evidence. For present purposes the relevant point is this. If the present case is one where the Claimant and the Defendant were working from common sources, that is plainly a factor which falls to be considered, when making a decision on whether the Defendant has, either as alleged or at all, copied the selection of events in the relevant chapters of Lara or any of them (assuming there to be such a selection in each relevant chapter in which copyright subsists). The use of common sources may, or may not be a possible explanation for apparent similarity in the selection of events.

#### The drinks party in March 2019

144. Before I embark on the task of working through the allegations of infringement in Annex 2, section by section, I should deal with the drinks party which took place in March 2019, at which the Claimant and the Defendant met. For reasons which I shall explain, I do not regard the question of what was said at the drinks party as particularly important to what I have to decide. There is however a conflict of evidence as to what was said at the drinks party, which I should resolve.
145. The drinks party was hosted by the Defendant's literary agents and her UK publishers, Hutchinson. The Defendant had travelled to London for pre-publication promotion and publicity events in connection with the impending publication of TSWK. The Defendant was told by her UK publicist that the Claimant and her husband would be attending the party. The Defendant's evidence, which I accept, is that the Defendant was excited to meet the Claimant, as another member of the Pasternak family. The reference to another member of the Pasternak family is explained by the fact that the Defendant and her husband had travelled to England in early October 2018, when the Defendant had various meetings with Hutchinson, and also met Dr Ann Pasternak Slater, daughter of Lydia Pasternak. Lydia Pasternak was the youngest sister of Boris.
146. There is a rather odd question mark over the date of the drinks party. The relevant witnesses, namely the Claimant, Mr Wallas, and the Defendant, all say in their witness statements that the drinks party took place on 18<sup>th</sup> March 2019. Mr Wallas gave evidence that he had a diary entry, confirming that date as the date of the party. The agreed chronology for the trial gives the date of the party as 13<sup>th</sup> March 2019, and I was told by counsel on both sides that this was the correct date. As nothing appears to turn on the precise date I make no finding as to the correct date. It is sufficient to describe the party as taking place in March 2019.
147. The evidence of Mr Wallas, the Claimant's husband was that the Claimant had been reluctant to attend the drinks party, but that he persuaded her to go. I accept this evidence. Mr Wallas was clearly an honest witness, and the Claimant's reluctance to attend is consistent with her reaction, described earlier in this judgment, to reading the extract from the proof copy of TSWK, which she had

been sent a few days before the party, which referred to Boris and Olga coming together like crashing boulders.

148. It is not in dispute that the Defendant met with the Claimant and her husband at the party, and that they had a conversation. The accounts of the three witnesses of this conversation were as follows.

149. The Claimant's evidence, in her second witness statement, was that the Defendant said to the Claimant and her husband; *"I managed to get a US proof of Lara. It was an invaluable resource and I based the love story on Boris and Olga on your book."* This evidence was challenged in cross examination. It was put to the Claimant that she might be confused and, in particular, that she had confused the word *"invaluable"* with the use of the word *"incredible"* in a subsequent e mail exchange. It was also put to the Claimant, on various bases, that her memory of what was said at the party was unreliable. The Claimant accepted her recollection of some matters from this time was at fault. She also accepted the possibility of confusion between invaluable and incredible. Nevertheless, she essentially stuck to her guns on her recollection of the conversation itself. As she said in cross examination:

*"A. I would completely agree with what you are saying. There is similarities between invaluable and incredible and differences, yes. But I still stand by the fact that Lara Prescott came up to me at that party and, in my memory, she said it was an invaluable resource, because I remember being so stunned by it. I was really, really surprised."*

*Q. But your memory may be confused, might it not?*

*A. It might have confused invaluable and incredible, that is possible.*

*Q. Actually, you may, in fact, be confusing what was said at the event with what you then had received later -....*

*A. No.*

*Q. -- in an e-mail?*

*A. No, that cannot be the case because why then in an e-mail to Jeff Kleinman would I have said I so surprised by the lack of acknowledgment when Lara Prescott had told me at the party that she had based the Boris and Olga sections on my book? Why would I have written that to Jeff Kleinman if that encounter had not happened?"*

150. The evidence of Mr Wallas in his witness statement was that the Defendant was very enthusiastic to see them (or at least the Claimant) at the party, that the Defendant was very deferential to the Claimant, and was clearly delighted that she was there, treating her as if she was a celebrity. Mr Wallas also described the Defendant as *"gushing"* in their conversation. According to Mr Wallas, the Defendant said that *"she had received an advance copy of Lara while writing The Secrets We Kept. Ms Prescott said that Lara was invaluable to her in writing her book and that she decided to base the love story between Boris and Olga on Anna's book."* This evidence was also challenged in cross examination. It was



put to Mr Wallas, on various grounds, that his recollection was unreliable. Mr Wallas was however adamant that the Defendant has said what he recalled in his witness statement. As Mr Wallas explained in cross examination:

*“To be particular, I thought it was important and relevant that she had said that my wife's book was an invaluable resource and she had based the love story between Olga and Boris on my wife's book. That is what I thought was important.”*

151. As Mr Wallas also explained in cross examination:

*“I think there was an e-mail from Lara Prescott to my wife, which used the same word. And the reason why I think I remember it is the context that I gave to it. Obviously there is a huge amount of things that are said that I do not remember, but my wife had particularly not wanted to go to this event, and I persuaded her to go and I even argued that she should go. And the reason she did not want to go was that she had read a little bit of Lara's book and had not really appreciated it. So I was encouraging her to collaborate with Lara Prescott.*

*So on the way home from the event, I went through these statements from Lara Prescott in the car, as we walked to the car, to say, "Look she found it invaluable. She said she based the love story on your book. What more could you ask for", type thing. I thought this was vindication of my argument for going to the event.”*

152. In her witness statement the Defendant gave no specific account of the conversation. She said that she and the Claimant and Mr Wallas met at the party and “*chatted nicely for about five minutes*”. Later in her witness statement, when dealing with a later email exchange in August 2019, the Defendant said that she would never have told the Claimant that she had based the love story of Olga and Boris on Lara, as that was not true. This evidence was also challenged in cross examination. In cross examination the Defendant confirmed that she was excited to meet the Claimant and her husband. She was sure that she was gracious and polite. She was sure she thanked the Claimant for writing Lara. What the Defendant did not do, so she asserted, was to “*have a superlative, “I based my book on Lara’s depiction of Boris and Olga”.*”. The Defendant accepted that she could not remember what she had said, but she denied that she said that she had found Lara “*invaluable*”. The essence of the Defendant’s evidence on the question of what was said in the conversation can be found in the following exchange:

*“Q. I want to focus in on what you admit you did say which was thanking her for writing the book?*

*A. Mmm.hmmm.*

*Q. What exactly were you thanking her for. What did you mean by thank you for writing the book?*

A. *I was thanking her because she was one of my secondary sources. I acknowledged her, I used her book, I was thanking her, as I would any of the people's books I had read.*"

153. On the question of what was said in this conversation I broadly prefer the evidence of the Claimant and her husband. I find that the Defendant did, in the course of this conversation, say that she had found Lara an invaluable resource. In particular, I find that the Defendant did use the word "*invaluable*" in describing Lara as a source. I also find that the Defendant did say that she had based the love story of Boris and Olga on Lara. I make these findings essentially for four reasons.
154. First, both the Claimant and her husband were clear in their evidence as to what the Defendant said in this conversation. Both were skilfully cross examined, but my impression was that neither the Claimant nor her husband were shaken in their recollection of this conversation.
155. Second, both the Claimant and her husband had good reason to remember the conversation. The Claimant had not wanted to attend the party, and had to be persuaded to attend by her husband. She had already formed a highly unfavourable view of the little she had read of TSWK. For his part Mr Wallas had seen the advantages to the Claimant of collaboration with the Defendant and had persuaded her to attend. While I accept that human recollection of the detail of historic conversations, particularly conversations at events such as a drinks party, can be highly unreliable, it seems to me that both the Claimant and Mr Wallas had good reason to remember this particular conversation, which appeared to open the way to collaboration between the two authors.
156. Third, and looking at matters from the Defendant's side, the conflict of evidence in the present case is not an outright conflict of evidence. The Defendant has not given her own account of what was said in the conversation. The Defendant could not remember what she had said. Rather, her evidence was that she had not said what the Claimant and Mr Wallas said that she said. The Defendant was however concerned to make a good impression at the party, the purpose of which was to publicise TSWK. Her own evidence was that she was gracious and polite in her meeting with the Claimant and her husband. In such circumstances it seems to me much more likely than not that the Defendant would have described Lara as an invaluable resource. Describing Lara to its author as a secondary source would hardly have struck the desired note. Equally it seems to me much more likely than not that the Defendant would have paid the Claimant the compliment of saying that she had based the love story of Boris and Olga on Lara. Again, silence on this point, or a statement that the love story had been derived from some other source would hardly have struck the desired note.
157. Fourth, the evidence of the Claimant and Mr Wallas is consistent with a later email exchange between the parties, in August 2019. Following the party, in April 2019, there was an email exchange between the Claimant and Jeff

Kleinman, in connection with a proposed collaboration between the authors in relation to publicity efforts. Matters then seem to have gone quiet until August 2019, when the Claimant sent an email to Mr Kleinman, on 22<sup>nd</sup> August 2019, with the following complaint:

*“I have to be honest with you that on reading Lara Prescott's acknowledgments for The Secrets We Kept, I was surprised that my book Lara: The Untold Love Story That Inspired Doctor Zhivago was not listed after Lara Prescott's fulsome mention of The Zhivago Affair. This was curious to me when Lara admitted to me in person that she based the love story between Olga and Boris in The Secrets We Kept on my book and how useful an early American proof had been to her. I also feel similarly put out that in the listing for my book, she has failed to include the book's full title which is as above, Lara; The Untold Love Story that Inspired Doctor Zhivago. Please can this be remedied asap and for all foreign publications? As you will appreciate I put a lot of work into Lara; The Untold Love Story That Inspired Doctor Zhivago- ten years of research and the use of original family and archive material and I feel very strongly that all sources should be properly acknowledged. I am vigilant about acknowledging sources in my books and always seek to be as generous as possible to authors whose work has been invaluable to me.”*

158. The response from the Defendant, in an email sent on 23<sup>rd</sup> August 2019, was in the following terms:

*“I'm so sorry about the oversight in my acknowledgments! I loved your amazing book and found it an extremely important resource, and absolutely should have made that known more prominently. The acknowledgments were very tough for me to write for some reason (even my own husband wasn't happy with how I acknowledged him at first!). The first editions in the US and UK have been printed already, though I'll work on changing it for future printings, and will change immediately for all international editions that haven't been printed yet. How's something like this?*

***My utmost gratitude goes to Anna Pasternak, who spent over a decade researching the life of Olga Ivinskaya for her tremendous book Lara: The Untold Love Story and the Inspiration for Doctor Zhivago. She brought Olga back to the forefront of Boris Pasternak's story, and I found her book an incredible resource as I attempted to do the same.***

*What do you think? My sincere apologies; it was a real oversight and I feel terrible. I've been talking about your book during my interviews this week (New York Times, Wall Street Journal, and The Sunday Times) to let readers know how to learn more about the real story, and will certainly continue talking about it with future media. I'm also drafting a piece to hopefully run in the Telegraph around publication that mentions your book as a resource to learn more.*

*I can't wait to see you in October and hope I can buy you a drink.”*

159. This response from the Defendant is entirely consistent with the evidence of the Claimant and her husband as to what the Defendant said at the drinks party.

160. The next question is whether my findings as to the content of the conversation at the drinks party are important to what I have to decide. The same question may also be said to arise in relation to the Defendant's email of 23<sup>rd</sup> August 2019, which continues the theme of Lara being an extremely important resource. I do not consider that my findings are important, or indeed of much relevance to what I have to decide. The same applies to the email of 23<sup>rd</sup> August 2019. I say this for the following reasons.

161. First, and most obviously, the resolution of the Selection Claim requires me to work through Annex 2, and to decide whether there has been infringement of copyright. This requires careful analysis of the relevant parts of Lara and TSWK, and of the source materials used by the authors, and careful attention to the relevant evidence of the Defendant as to how she came to write the relevant parts of TSWK. In relation to the Translation Claim, I am required to concentrate upon the issues surrounding the specific part of the Legendes Translation which is the subject of the Translation Claim. I do not think that any of these exercises is assisted by considering what the Defendant said at a drinks party, or in an email when, in respect of both events, it is quite clear that the Defendant was anxious to ingratiate herself with the Claimant and was anticipating collaboration between the two of them, to their mutual advantage. In this respect, I am inclined to agree with the Claimant's counsel, who put the matter this way in their written closing submissions, at paragraph 24:

*“24. Ultimately, the issue of precisely what D said to C and Mr Wallas at the party on 13th (or 18th) March 2019 may be something of a red herring. The real issue for the court is to look at the evidence and to assess whether it does show that there had been copying of a substantial part of C's copyright work.”*

162. Second, it is also quite clear that the exchanges between the Claimant and the Defendant did not reflect their actual views of the situation. On the Claimant's side, the Claimant had already formed a highly unfavourable impression of TSWK before she attended the drinks party. By the time of the email exchange of August 2019, which I have quoted above, the Claimant had already received, on 21<sup>st</sup> August 2019, an email from an Irish journalist, Eilis O'Hanlon. Ms O'Hanlon had been asked to review TSWK, and contacted the Claimant to express her concerns that the Defendant had, in TSWK, made extensive use of the work of other authors, and the Claimant in particular, without any proper acknowledgment. The Claimant replied the same day, expressing her complete agreement. Less than a month later, on 17<sup>th</sup> September 2019, the Claimant's solicitors sent a formal letter of claim to the Defendant.

163. On the Defendant's side there was a similar gap between the Defendant's conduct towards the Claimant, and the Defendant's actual view of the situation. I have already described the Defendant's desire to ingratiate herself with the Claimant at the drinks party. It is however also illuminating to examine the chain of internal emails which intervened between the Claimant's email of 22<sup>nd</sup> August 2019, and the Defendant's response on 23<sup>rd</sup> August 2019. Mr. Kleinman forwarded the

Claimant's email to the Defendant on 22<sup>nd</sup> August 2019, with the following message:

*"Yikes. We can of course have everything changed in future, but for reprints let's get the acknowledgments changed in the US and UK, and any other publication we can? Lara, do you want to draft something?"*

164. The Defendant emailed her husband, Matthew Prescott, seeking his assistance on how to reply. It is clear that the Defendant's concern was to preserve good relations with the Claimant *"since she's doing all these events with me in the UK"*. The relevant events included the Cheltenham Literary Festival, where the Claimant and the Defendant were due to make a joint appearance in October 2019. The Defendant also said this in an email sent that day to her husband.

*"This is sooo annoying and you know the reason why! So much of that book was copied! How should I respond? Also -- her book is acknowledged -- just not top billing."*

165. The Defendant's husband replied in the following terms:

*"I would just tell Jeff to reply and say that it'll be amended in future editions. And yeah, brazen move for someone who literally plagiarized her book! Haha."*

166. As all of the above material demonstrates, the dealings between the Claimant and the Defendant, both in March 2019 and August 2019, did not reflect the actual views of the situation held by each party. In particular, the Defendant plainly did not regard Lara as an invaluable resource or as the basis for her account of the love story between Boris and Olga. There may be cases where polite exchanges at drinks parties provide useful evidence, but I do not think that the present case is such a case. The same can be said of the email exchange between the parties in August 2019.

167. I now turn to the specific allegations of infringement of copyright in the Selection Claim, and to the exercise of working through Annex 2. Given the scale of the exercise, I start with an explanation of the methodology I will adopt in working through Annex 2.

#### The exercise of working through Annex 2 – methodology

168. As I have explained above, Annex 2 is divided into sections; one for each of the relevant chapters in Lara, with the exception of chapters 9 and 10 which are taken together. Each section contains a series of numbered items, which are said to be the events of the relevant chapter of Lara whose selection has been copied by the Defendant. It is convenient to take each section in turn.

169. In considering the events and the allegations of copying in each section of Annex 2, the basic questions to be answered are as follows:

- (1) The first question to be answered, as identified earlier in this judgment, is whether copyright subsists in the relevant selection of the events.
- (2) The second question to be answered, as identified earlier in this judgment, and assuming that copyright subsists in relevant selection, is whether the Defendant has copied that selection, or a part of it in which copyright subsists.

170. In relation to the second of the above questions, namely the factual question of whether copying of selection has taken place, a more detailed explanation of my approach is required:

- (1) In considering the allegations of copying it is necessary to have in mind two forms of alleged copying. The first form of alleged copying, which constitutes the Selection Claim, is the alleged copying of the selection of the events specified in each section of Annex 2. The second form of alleged copying comprises the particular instances of alleged copying which are listed in relation to each section of Annex 2.
- (2) As I understand the position, these particular instances of alleged copying are not alleged to constitute infringement of copyright in themselves, but are said to be instances of copying of particular details from the relevant chapters of Lara. These particular instances of alleged copying are said to provide evidence of copying from Lara by the Defendant which, in turn, is said to support the allegations of copying of selection in relation to the events specified in each section of Annex 2.
- (3) It seems to me that it is necessary to consider both the allegations of copying of selection and the supporting allegations of particular instances of copying before reaching a conclusion on whether the Defendant has copied the selection of the events specified in each section of Annex 2 or a relevant part thereof.
- (4) In these circumstances, in working my way through each section of Annex 2, I will proceed as follows:
  - (i) I will first set out my discussion in relation to the selection of the events specified in each section of Annex 2, comparing the selection of events in the relevant chapter or chapters in Lara with the selection of events in the relevant chapter of TSWK, where the selection of events in TSWK is said to have been copied from Lara.
  - (ii) I will then set out my discussion in relation to the supporting allegations of alleged copying in the relevant section of Annex 2.
  - (iii) I will then state my conclusions on the allegations of copying of selection in relation to the relevant section of Annex 2.

171. I will use the expression “**the Supporting Allegations**” to refer generally to these supporting allegations of particular instances of copying, as they appear in each

section of Annex 2. The Supporting Allegations are helpfully collated together and listed at paragraph 91 of the Claimant's written closing submissions.

172. I will use the expression **“the Events”** to refer generally to the events listed in each section of Annex 2, the selection of which is said to have been copied from the relevant chapters of Lara. It will be understood, from what I have said above in relation to my approach, that the order of my discussion of the Events and the Supporting Allegations in each section of Annex 2 does not reflect the order in which I have considered them. In relation to each section of Annex 2, the selection of the Events and the Supporting Allegations have been considered together.

#### The Selection Claim – Chapter 5 of Lara (Marguerite in the Dungeon)

173. The Claimant relies upon seven Events in chapter 5 of Lara, the selection of which, in substantial part, is said to have been copied in chapter 1 of TSWK. The seven specified Events, as described in Annex 2, are as follows:

- (1) Olga discovering her pregnancy and the conditions of her confinement in the Lubyanka being eased.
- (2) Olga being told during interrogation that she is being taken to see Boris; then being taken in a van to another government building, to a morgue.
- (3) Olga being taken back to her interrogator, where Irina's English teacher is brought in to confess.
- (4) The teacher later writes to Olga to apologise.
- (5) Olga suffers a miscarriage, brought on by her experience in the morgue.
- (6) Irina's reflections on the miscarriage.
- (7) Olga sentenced and reference to Potma.

174. In the case of chapter 5 of Lara the Supporting Allegations fall into two categories. First, there are the Supporting Allegations which are listed in relation to the Events in this section of Annex 2. Second, there are the Supporting Allegations which are separately listed at the end of this section of Annex 2. For this reason I will, in considering the Supporting Allegations, depart slightly from the methodology set out in the previous section of this judgment. I will consider the Supporting Allegations which are listed in relation to specific Events as part of my consideration of the Events themselves. I will then consider the Supporting Allegations which are listed separately at the end of this section of Annex 2. I will then come to my conclusions.

175. Returning to the Events in chapter 5 of Lara which have been listed in Annex 2, there are two important points to make at the outset.

176. The first point is that the list of Events in chapter 5 of Lara is a considerably pruned version of the list of events in Schedule B (the predecessor of Annex 2),

as attached the Claimant's skeleton argument for trial. The first Event now listed in Annex 2 (Olga's discovery of her pregnancy and the easing of prison conditions) was originally event 13 of the events listed from chapter 5. Events 1-12, as originally listed, were removed because it was apparent that the Defendant had written her own treatment of these events before acquiring a copy of Lara. I regard this pruning of the Claimant's case as significant. I have already made reference to the fact that the Claimant has brought this claim without herself having read more than a fraction of TSWK. I have also made reference to the review which was commissioned by the Claimant. That review is not available, but what I assume to have happened is that a person or persons went through TSWK looking for points of similarity between the Lara and TSWK. Part of the product of that forensic exercise was events 1-12, as originally listed in Schedule B. When however the evidence came to be examined, it became apparent that the Claimant had no case in relation to events 1-12. The fate of events 1-12 is an apt warning, in a case where authors are using common sources and making reference to actual historical events, against assuming copying simply because of a similarity or apparent similarity of events and their selection.

177. The second point is that the list of Events in this section of Annex 2, as now constituted, represents only a small number of events from chapter 5 of Lara. Chapter 5 runs from page 81 to page 107. Event 1 does not occur until page 101. It follows that there are some 19 pages of events in chapter 5 of Lara before one reaches Event 1. In addition to this the Events differ, in terms of what is encompassed within them. By way of example Event 5 (Olga's miscarriage) occupies a single paragraph on page 106. The same is true of Event 6 (Irina's reflections on the miscarriage), which also occupies a single paragraph on page 106. Event 4 is characterised as the English teacher later writing to Olga to apologise, and is described as being located on pages 105-106. This description is questionable. The letter from the English teacher is dealt with in the second half of page 105. On the top half of page 106 one finds a paragraph containing Olga's reflections on those who gave in to state intimidation and terror, followed by a paragraph paying tribute to Olga's own bravery in the face of interrogation. Each of these paragraphs might be said to contain a separate event. Equally, Event 1 is described as Olga discovering that she is pregnant and conditions easing, and is said to be located on pages 101-102. Again, this is questionable. The discovery of the pregnancy and the eased conditions are described on page 101 and in the first paragraph on page 102. The next three paragraphs on page 102 deal, respectively, with a description of life in the prison, contact by her interrogator (Semionov) with Olga's mother, Maria, and a call from a woman called Lidia Petrovna to Maria. Then Event 2, which is quite lengthy, begins. If one was recording the selection of events at this point in chapter 5, it seems to me perfectly legitimate to say that there are several separate events intervening between Event 1 and Event 2.

178. I have already accepted Mr Caddick's point that copyright can exist in a selection of events which form only part of a larger selection of events. I have also accepted Mr Caddick's point that, assuming copyright subsists in the relevant selection, infringement of copyright can occur if there is copying of only part of that



selection, assuming that what is copied qualifies as a substantial part of the relevant work. The relevant point which seems to me to emerge from the analysis in my previous paragraph is one which goes to the factual question of whether there has been copying in the present case. The point is that in making the comparison between the relevant chapters of Lara and TSWK it is important to make sure that the comparison is a full and fair one, rather than necessarily isolating certain events in the relevant chapter of Lara, and seeing if they can be found in TSWK.

179. With these two points made, I come to the first substantive question to be answered, which is whether copyright subsists in the selection of the Events in chapter 5 of Lara which is set out in Annex 2. The general answer to this question seems to me to be straightforward. In my judgment copyright clearly subsists in the selection of Events in chapter 5 set out in Annex 2. The bulk of the material comprising these Events is not original to the Claimant, but is derived from the sources; principally ACOT and TZA. By way of example, most of the wording of Event 4 (the teacher later writing to Olga to apologise) has been copied, almost verbatim, from passages in TZA and ACOT. The copyright is however said to subsist in the selection of the Events. In the case of the Events in chapter 5 set out in Annex 2, and applying the relevant legal principles set out earlier in this judgment, I am satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapter 5 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapter 5 of Lara. I therefore accept that copyright protection extends to the selection of these Events.
180. In his submissions on the question of subsistence of copyright Mr Lykiardopoulos argued strongly that this was a *Baigent* case. By this, I mean that he argued that the selection of the Events in chapter 5 of Lara was no more than a forensically assembled set of events, which was an artificial construct, and bore no relation to the actual structure and arrangement of the events of chapter 5 of Lara. In *Baigent* those elements of the so called Central Theme which could be found in The Holy Blood and the Holy Grail were considered by the Court of Appeal, in upholding the decision of the first instance judge, to be of too general a character and to exist at too high a level of abstraction to qualify for copyright protection. In reality they were not a central theme of the book at all. Mr Lykiardopoulos advanced the same argument, based upon *Baigent*, in relation to the selections of Events in the other chapters of Lara relied upon by the Claimant.
181. Dealing with chapter 5 of Lara, I accept the argument that the selection of the specified Events relied upon by the Claimant is a long way from anything resembling the complete set of events in chapter 5 of Lara. Even if one concentrates upon pages 101-107 of Lara, to which the selection of the specified Events is now confined, it still seems to me that the selection is not a complete statement of the events in this part of chapter 5. I do not think that it is right however to put the selection of the specified Events in chapter 5 of Lara in the

same category as the Central Theme which was under consideration in *Baigent*. The specified Events can all be found in chapter 5 of Lara, and I do not think that their selection by the Claimant, in her writing of chapter 5 of Lara, can be said to be too general or to exist at too high a level of abstraction to qualify for copyright protection. I have taken the point that the specified Events are only part of the events which can be found in chapter 5 of Lara, and specifically within pages 101-107 of Lara, but I do not think that this disqualifies the specified Events from constituting a selection of events, which are part of the intellectual creation of the Claimant in writing chapter 5 of Lara. Ultimately I think that Mr Caddick is right to say, in relation to the selection of the specified Events in chapter 5 of Lara, that the Claimant is entitled to identify a particular selection of events within chapter 5 which she alleges to have been copied, without being required to make that selection an exhaustive statement of the events in chapter 5, or a part of chapter 5.

182. I should stress that this is not the end of this particular argument advanced on behalf of the Defendant. It seems to me that if it is the case that the selection of Events relied upon, either in relation to chapter 5 of Lara or in relation to other chapters of Lara, is only a partial selection of the events in that chapter or in the relevant part of that chapter, that may well be relevant to the question of whether copying has taken place. In such a case one may be into a situation where the warning given by Laddie J in *IPC*, in relation to similarity resulting from excision, becomes relevant. This is however relevant to the question of whether infringement of copyright has taken place, not the question of subsistence of copyright. So far as subsistence of copyright is concerned, and concentrating on chapter 5 of Lara at this stage, I do not accept that the selection of the specified Events is disqualified from copyright protection on the basis contended for by Mr Lykiardopoulos.
183. As it will be necessary to return to this particular argument of the Defendant, in relation to the other chapters of Lara which are relied upon, I will, for ease of reference, refer to this particular argument as “**the Baigent Point**”.
184. There is one further point to add on the question of subsistence of copyright. In the case of the selection of Events in chapter 5 of Lara it is not said that the Defendant has infringed the copyright in the selection of all seven specified Events. The Claimant’s case is that the Defendant has copied the selection of five of the seven specified Events. I accept however, applying my reasoning above on the question of subsistence of copyright, that the selection of these five Events constitutes a substantial part of the selection of the seven specified Events in chapter 5 of Lara, and a substantial part of Lara as a whole. As such, I accept that the selection of the five specified Events is equally protected by copyright.
185. I should stress that the above conclusions relate to the selections of Events to which I have referred in my previous paragraphs. The qualification to these conclusions is that it does not necessarily follow that every detail of each Event which is relied upon by the Claimant in Annex 2 is necessarily protected by

copyright in the selection of the specified Events in chapter 5, even in the wide sense in which I am using the concept of selection. I have accepted Mr Caddick's point that copyright can exist, and be infringed in a selection of events which form only part of a larger selection of events. As however one descends to the level of individual detail, it seems to me that there comes a point where one is no longer considering matters which are protected by the copyright in selection, which is what is relied upon in the Selection Claim. As I work through the specified Events in chapter 5, and in the other relevant chapters of Lara, I will indicate where it seems to me that the Claimant is attempting to rely on a detail which is not protected by copyright. For the purposes of this judgment, I will refer to the qualification expressed in this paragraph as **"the Selection Copyright Qualification"**.

186. This leaves the question of whether the Defendant has copied the selection of the specified Events, or a part of that selection in the relevant chapter of TSWK, which in this instance is said to be chapter 1 (The Muse). The Defendant accepted, in cross examination, that she first wrote a draft containing events which are said to be equivalent to certain of the seven specified Events in chapter 5 of Lara after she had acquired a copy of Lara, in early October 2016. What she did not accept was that she had copied the selection of the relevant Events, in whole or in part.
187. In my analysis of the relevant chapters of Lara and TSWK I find it most convenient to take the Events individually. So far as the Supporting Allegations are concerned my approach, as I have explained, is not quite the same in relation to chapter 5 of Lara. This is because, as I also have explained, the Supporting Allegations are, in relation to chapter 5 of Lara, in two different locations in the first section of Annex 2. Some of the Supporting Allegations are in the main part of Annex 2, and are identified by reference to individual Events. There is then the group of Supporting Allegations which appear at the end of the first section of Annex 2, outside the list of the specified Events. The reason for this separation in the Supporting Allegations is that all of the instances which comprise this latter group of Supporting Allegations are to be found in chapter 1 of TSWK before the reference to Olga's pregnancy which is said to be the equivalent of Event 1. None of these instances are linked to any of the specified Events in chapter 5 of Lara. As I have already explained, in these circumstances, and departing slightly from the practice which I will follow in relation to other sections of Annex 2, I find it convenient to deal with each Supporting Allegation which is linked, in Annex 2, to a particular Event as part of my consideration of that Event. I will then consider separately the group of Supporting Allegations in the first section of Annex 2, which are not linked to specified Events. I will then come to my conclusions on the question of copying.
188. Adopting the approach set out in my previous paragraph, my analysis of the position is as follows:
189. There is no Event 1, as such, in chapter 1 of TSWK. Event 1 is described in Lara as Olga discovering her pregnancy after she had been confined in the Lubyanka.

The discovery is immediately followed by a description of the easing of her prison conditions. In TSWK Olga is already aware of her pregnancy when she is taken to the Lubyanka. The pregnancy is disclosed to the reader, on page 6, when one of the guards responsible for strip searching Olga on arrival asks if she is pregnant. There then follows an account of how Olga came to discover that she was pregnant, before her imprisonment. The narrative then returns to Olga's introduction to the Lubyanka and her fellow prisoners. Reference to the easing of Olga's prison conditions does not come until page 19, in two short paragraphs. In the first of these paragraphs reference is made to Olga being allowed an extra hour to lie down, and to the provision of extra food, both from the prison and from her fellow prisoners sharing portions of their food. In the second paragraph there is reference to Olga being provided with a larger prison smock. In between pages 6 and 19 of TSWK there is a mass of material, including extensive flashbacks to Olga's first meeting with Boris and to her relationship with Boris and also including accounts of her interrogations by Semionov. The essential point is that the arrangement of events, in pages 6-19 of TSWK is utterly different to the arrangement of Event 1 in Lara. Any similarity is produced only by carrying out a grains of sand comparison exercise, of the kind identified as illegitimate by Laddie J in *IPC*.

190. On behalf of the Claimant, and by way of Supporting Allegation, it was said to be significant that both Lara and TSWK deal with the pregnancy and the easing of prison conditions after Olga's first interrogation, whereas this is dealt with before the first interrogation in ACOT. I cannot see any significance, or evidence of copying in this. The easing of prison conditions consequential upon the pregnancy is dealt with completely differently, and in completely different contexts, as between Lara and TSWK. I should however add that if I had found that the Defendant had taken this ordering of events from Lara, I would not have regarded this as good or any evidence to support the allegations of the Defendant having copied the selection of the specified Events in chapter 5 of Lara, or any part of that selection, or indeed any other relevant selection of Events in Lara. For ease of reference I will, in my discussion of the Supporting Allegations in relation to chapter 5 of Lara, use the expression "**selection copying**" as shorthand for the copying referred to in my previous sentence. I have not here given my reasons for saying that I would not have regarded this Supporting Allegation, if it had been proved as an instance of copying, as providing good or any evidence to support the allegations of selection copying. As I will be making the same point, for the same reasons, in relation to other of the Supporting Allegations in this section of Annex 2, I will briefly set out my reasons for making this point when I come to my conclusions on the question of copying. I will adopt the same procedure in dealing with the Supporting Allegations in all the other sections of Annex 2.
191. Events 2 and 3 do appear in TSWK, at pages 20-22. The same events are in ACOT and TZA, and all four accounts (ACOT, TZA, Lara, and TSWK) follow the same chronological order. This is hardly surprising since, as a matter of historical fact (by reference to ACOT), Event 3 immediately followed Event 2. There can be no copyright in the chronological order itself. Beyond this, Events

2 and 3, as they are written in TSWK, are written in a completely different fashion to Events 2 and 3 as they appear in Lara. In relation to Events 2 and 3, by way of Supporting Allegations, reference is made to a few minor details of description and omission in the two accounts, which are said to show that the Defendant was copying Lara. They are as follows.

192. In relation to Event 2, when Olga is told that she is being taken to see Boris, she is described in TSWK (page 20) as being loaded “*into the back of a van with no windows*”. After reference to Olga’s hope that she would see Boris, there is reference to their arrival “*at another government building*”. In Lara there is a description of Olga being “*put in a prison van with blacked out windows and driven through the city to another government building*”. The same scene is in ACOT, at page 110, where the reference is to Olga being “*put into a windowless van prison van and driven off somewhere- to the premises of the oblast Lubyanka\*, as I was told later*”. A footnote identifies this building as a branch of the Lubyanka serving the Moscow region. A region is an oblast. The same scene is in TZA, at page 71, where Olga is described as being “*signed out of the Lubyanka, placed in a wagon with blacked-out windows, and driven to another secret- police facility just outside the city.*”.
193. The Defendant accepted in cross examination that she first wrote this scene in the October 2016 Draft, by which time she had received a copy of Lara. In the October 2016 Draft, Olga is described as being loaded into the back of a van, and there is reference to arrival at “*another government building*”, but the van is described as having “*blacked out windows*”. It was put to the Defendant in cross examination that she had written this scene with Lara open in front of her. The Defendant denied this. She said that the book would not have been open in front of her as she wrote, and that the same applied to ACOT and TZA. The Defendant also pointed out a couple of the differences between the scene she wrote, and the equivalent scene. The relevant scenes in the Defendant’s copies of ACOT and TZA are both marked.
194. It seems quite clear to me, and I so find, that the Defendant did not copy this scene from Lara. The references to the windows of the van and another government building are trivial details. Given that Olga was being loaded into a prison van, one would expect it to be a van with either no windows or obscured windows. In relation to the van’s destination, “*another government building*” is simply one way of describing where Olga was taken, using a commonplace expression. I can see the possibility that the Defendant took these details, or either of them, from Lara, but I am not satisfied that this was the case and, on the evidence, I find that the Defendant did not take these details or either of them from Lara. If am wrong, and these details or either of them were taken from Lara, I do not think that this provides good or any evidence to support the allegations of selection copying.
195. Turning to Event 3 the equivalent scene in ACOT has Semionov scornfully identifying Irina’s English teacher as a former merchant called Yepishkin, who had previously fled abroad. Thereafter, in ACOT, the English teacher is referred to as Yepishkin rather than Nikiforov; the name by which he is introduced into the scene. In Lara, TSWK and TZA there is no reference to Yepishkin. This

detail is omitted in all three works, and the English teacher is identified simply as Nikiforov, or Sergei Nikolayevich Nikiforov, to give him his full name. This scene is marked in the Defendant's copy of TZA.

196. The Defendant accepted in cross examination that this was another scene which she wrote after obtaining a copy of Lara. It was put to the Defendant that she had made no reference to Yepishkin because she was copying Lara and, in particular, was copying the omission of Yepishkin. The Defendant's response to this suggestion was that it just seemed an easier way of describing the English teacher (ie. as Nikiforov). I accept this evidence of the Defendant, and thus the explanation for this omission. I find that the Defendant did not copy this omission from Lara. I should add that even if I had found that the Defendant had copied this omission from Lara, I would not have regarded this omission as providing good or any evidence to support the allegations of selection copying.
197. Event 4 (the teacher's letter of apology) is not in chapter 1 of TSWK. Nor are the reflections on the effect of imprisonment and interrogation which follow Event 4 in chapter 5 of Lara. Event 6 (Irina's reflections on the miscarriage) is not in chapter 1 of TSWK, and is also not in ACOT or TZA, which the Defendant identified as her primary sources. These omissions seem to me to be significant. If the Defendant had been copying the selection of the specified Events in chapter 5 of Lara, one might have expected her to include these two Events in chapter 1 of TSWK, including the reflections which follow Event 4. There is however no sign of any of this. Put simply, these omissions seem to me strongly to suggest that the Defendant was not copying the selection of the specified Events in chapter 5 of Lara. Turning to Event 5 (the miscarriage), this is described in chapter 1 of TSWK, and follows the teacher's confession. The description of this event is however very different in TSWK. It has plainly not been copied from Lara.
198. This leaves Event 7. In one respect there is no dispute that part of the material in Event 7, as it appears in Lara, was copied by the Defendant. At the end of chapter 1 of TSWK the Defendant quotes, with some minor changes, the Accusation Act as it appears in Lara. It is not in dispute that the Defendant copied this wording, with the minor changes mentioned, from Lara. Whether this language copying amounted to infringement of the copyright in the Legendes Translation is a question I will consider when I come to the Translation Claim. For present purposes this similarity does exist in relation to Event 7, and does result from the Defendant copying the language of Lara. Beyond this however the two works diverge. Chapter 5 of Lara concludes with Event 7. After quoting the Accusation Act, chapter 5 concludes with the following striking paragraph:

*"It marked the beginning of a new and terrible ordeal for Olga, who was destined for the labour camps of Potma, over 450 kilometres away from Moscow, in the "Autonomous Soviet Socialist Republic of Mordovia". If they couldn't touch Boris, Olga would serve in his place."*
199. Chapter 1 of TSWK has a very different ending. Following the quotation of the Accusation Act, the sentence is described, together with Olga's reaction to the

sentence when, back in her cell, the reality of the sentence hits her. The description is as follows:

*“And it was only then that it hit me: five years in a reeducation camp in Potma. Five years, six hundred kilometres from Moscow. My daughter and son would be teenagers. My mother would be nearly seventy. Would she still be alive? Boris would have moved on – maybe having found a new muse, a new Lara. Maybe he already had.”*

200. Chapter 1 then ends with a separate scene, on pages 23 and 24, describing Olga’s departure from Moscow for the camp in Potma. This serves to bring out the differences between Event 7, as it appears in Lara, and the equivalent scene in TSWK. I find no evidence of copying from Lara in the Defendant’s writing of this scene
201. In Annex 2, by way of Supporting Allegation, the Claimant sought to make something of the distance of Potma from Moscow, in support of the Claimant’s case in relation to Event 7. There is no reference to Potma or its distance from Moscow in the equivalent passages in ACOT or TZA. Both ACOT and TZA do reference the distance from Moscow to Potma, but in different places and in different terms. The point was made that in an earlier draft of TSWK, postdating Lara, Potma was stated as being 500km north, which was then changed in the final draft of TSWK to 600km from Moscow. I am bound to say that I found this particular line of argument somewhat baffling. If the Defendant was copying Lara, the obvious question is why she did not give the distance from Moscow as *“over 450 kilometres away from Moscow”*, which is the language used in Lara. Equally, it strikes me as entirely natural for the Defendant, on her own initiative, to have given the distance from Moscow, in order to bring out the severity of the sentencing; being a severity which only hit Olga when she returned to her cell. I cannot see that the reference to the distance of Potma from Moscow in chapter 1 of TSWK provides any evidence of the Defendant copying Lara, let alone engaging in selection copying.
202. In any event, and even if I had found copying in relation to this Supporting Allegation, it seems to me that there can be no copyright in the idea of giving the distance from Moscow to Potma, or in giving this distance just after the sentencing of Olga, as a means of bring out the severity of the sentence. As I have noted above, it is important to keep my finding of copyright in the selection of the specified Events in chapter 5 of Lara properly confined. It does not necessarily mean that every detail of that selection is protected by copyright. The distance from Moscow to Potma, and its use in Lara are, in my judgment, examples of details in Lara which are not protected by the copyright in the work.
203. With this analysis of the specified Events and the relevant Supporting Allegations in place, I turn to the Supporting Allegations which are grouped separately in the first section of Annex 2. There are 7 alleged instances of copying, which I will consider in turn.

204. First, Chapter 1 of TSWK opens with the state security police raid on Olga's apartment. The police are described on page 1 as "*riffling*" through closets, and on page 2 are described as having "*ransacked*" Olga's letters from Boris, her notes, food lists, newspaper clippings, magazines and books. In chapter 5 of Lara the police are described as proceeding to "*ransack*" Olga's apartment, and as having "*rifled*" through Olga's books and papers. The Claimant's point was that the word "*rifling*" (the actual word used by the Defendant was "*riffling*") was added in the October 2016 Draft, and that the word "*ransacked*" was added to the November 2016 Draft. Both words, it was said, must have been derived from Lara. In cross examination the Defendant accepted that it was possible that she had derived these words from Lara, although she also thought that they might have come from other source materials she had read. In my view it is neither necessary nor possible to determine where the relevant words, as they appear in chapter 1 of TSWK, came from.
205. In terms of the possibility of making a finding on this question, it seems to me that there are several, equally plausible explanations as to where these words, as used by the Defendant, came from. They might have come from the Defendant's reading of Lara. I have already found that the Defendant began to read Lara in October 2016. The Defendant's evidence was that she used Lara as a secondary source, but that she did not write with the sources open in front of her. It would be entirely consistent with this evidence to find the Defendant making use of a word or words which she recalled, consciously or unconsciously, from her reading of Lara. Equally, the recollection of these words might have been retained from the other sources referred to by the Defendant as possible sources for the use of these words. Equally, the Defendant might simply have settled on these words, from her own mind, as common words appropriate to describe the extensive and destructive search carried out by the police.
206. In terms of the necessity of making a finding on this question, I cannot see any evidential value in determining whether or not the Defendant derived these words from Lara or from another source or from her own mind. It is not in dispute that the Defendant used Lara as a secondary source. As I have just noted, it would be entirely consistent with this to find the odd word, or phrase, or indeed detail of some other kind from Lara being used in TSWK. It is not suggested that this constituted an infringement of copyright, if and in so far as it occurred. In my view the use of odd words or phrase or other detail from Lara in TSWK provides no evidence to support the allegations of selection copying.
207. The next Supporting Allegation concerns the joke about the view from Lubyanka. This joke appears on page 5 of TSWK, when Olga arrives at the Lubyanka. The Defendant originally wrote this joke into the September 2016 Draft, as part of Olga's second arrest, following the death of Boris. In the September 2016 Draft this is where the reader is first introduced to the Lubyanka. The Defendant then moved the joke back to her account of Olga's first arrest, while retaining the use of the joke (now on page 444 of TSWK) on the occasion of Olga's second arrest. In cross examination the Defendant accepted that the moving back of the joke to the first arrest took place after she had seen Lara. In Lara the joke appears on page 87, as part of the scene where Olga is taken to the Lubyanka. I do not find any evidence of the Defendant copying Lara in the moving of the joke. It is quite



clear, and I so find, that the Defendant moved the joke as part of the re-writing process which I have described earlier in this judgment, but not as a result of reading Lara. Essentially what the Defendant did was to move the travelling to the Lubyanka scene (including the joke) back to Olga's first arrest, so that it could then be referenced in relation to Olga's second arrest. The joke is a very well-known one. It first appears in the July 2016 Draft. I accept that the Defendant sourced the joke from the Lubyanka Wikipedia page. The Defendant's revision of her treatment of this joke seems to me to have been a natural part of the re-writing process. I can see no good basis for concluding that the Defendant made this revision as a result of reading Lara and deciding to copy Lara. In summary, I find that the Defendant did not, in her treatment of this joke, copy Lara. I add the point that if I had found copying in this respect I do not consider that such a finding would have provided good, or any support for the allegations of selection copying.

208. The next Supporting Allegation arises from the fact that, in the October 2016 Draft, the Defendant corrected the number of Olga's cellmates from 15 to 14. The correct number was in ACOT, TZA, and Lara. In the Defendant's copies of ACOT and TZA the relevant passage is marked by the Defendant. In cross examination the Defendant was unsure what had prompted the correction. I do not find it surprising that the Defendant could not recall a trivial detail of this kind; see my assessment of the Defendant as a witness in a previous section of this judgment. I do not think that it is possible or necessary to make a finding on a trivial detail of this kind. The correction might have been caused by the Defendant reading Lara. It might not. Whatever the answer to this question, I cannot see that there is anything here to support the allegations of selection copying.

209. The next Supporting Allegation arises in respect of page 91 of Lara, where there is a description of a guard rushing in to "*demand: "What are your initials? Get dressed for interrogation!"*". In TSWK at page 8 there is a scene where the guards comes into the cell. The relevant wording is as follows:

*"I was awoken with the tap of a wooden truncheon against my bare shoulder. "Initials!" spat the guard hovering over my bed. The men who came at night always demanded our initials before taking us away."*

210. It is said that the guard demanding initials was evidence of copying from Lara. The same scene is in ACOT and has been marked up by the Defendant in her copy of ACOT. There are significant differences in the way this scene is written in Lara and in TSWK. Ultimately, the Claimant's argument appeared to come down to the use of the words "*demand*" and "*demanded*", respectively, in the two works, which is far too tenuous to support any allegation of copying. In the relevant part of Annex 2 it was contended that the Defendant had accepted in cross examination that she might have copied the guard demanding initials from Lara. This is not how I read this part of the Defendant's cross examination. As I read the Defendant's cross examination this was an instance where the Defendant did not accept that she had copied the guard demanding initials from Lara. All that the Defendant did accept in this part of the cross examination was that the word "*demand*" was not in this scene as it was written in ACOT, and that

the words “demand” and “initials” were added to the draft of TSWK after the Defendant had seen Lara. The cross examination seemed to me to bring out the weakness of the Supporting Allegations, as allegations of copying supporting the Selection Claim. The reference to “initials” can be found in ACOT; indeed it is the whole point of the scene in ACOT, which was a common source used by the Claimant and the Defendant. The word “demand” is a natural and a commonplace word to use for a peremptory instruction to provide initials. I find that the Defendant did not copy anything from Lara in respect of this particular scene. Nor can I see anything here to support the allegations of selection copying, even if I am wrong in the finding which I have just made.

211. I must take the next Supporting Allegation in more detail, because some particular points of general importance emerge. On page 92 of Lara there is a description of “a haul of books and correspondence” piled up on the desk of Viktor Abukamov, who conducted Olga’s first interrogation. On page 9 of TSWK Olga’s first interrogation is conducted by Anatoli Semionov, and there is a description of “stacks of books and letters: my books, my letters” on his desk. It was said that the Defendant had copied this detail from Lara. A problem which confronted the Claimant in this respect was that there is reference to books and letters in the September 2016 Draft, which was written prior to the Defendant seeing Lara. The books and letters are however produced by Semionov, in the September 2016 Draft, from his desk drawer. As a result this particular Supporting Allegation, as set out in Annex 2, ultimately became an allegation that the Defendant had copied the idea of the books and letters being on the desk, as opposed to being taken from the drawer, from Lara. The Defendant did not accept this in cross examination, and pointed out that TZA makes reference to books and other materials, including letters, being piled on Abakumov’s desk. This is one of many extracts from the Defendant’s copy of TZA which have been heavily marked by the Defendant. In the relevant part of Annex 2 it is again asserted that the Defendant had accepted in cross examination that she might have copied the reference to books and letters on the desk from Lara. Again, this is not how I read the relevant part of the Defendant’s cross examination. The following extract from this part of the Defendant’s cross examination, where the Defendant was being asked about her use of the scene from TZA (page 68) which describes the books and other materials piled on Abakumov’s desk, seems to me to be important:

*“Q. You had this book [TZA] ....*

*A. Yes.*

*Q. ... for two years before you got Lara, you had this book for two and a half years before you had this September document we are looking at, and yet those words did not find their way in as a result of what was in The Zhivago Affair or A Captive of Time?*

*A. That is correct. However, you are talking about my first experimental draft. You are talking about how -- it is dismissing the point that I was re-reading these constantly. I feel like any time you re-read these books, which I have read all of these several times since these allegations, you pick up new facts. You pick up all of these facts that Peter Finn already said. So it*

*is saying that between this chapter and this chapter the only book I could have read is Lara, and that is just not true.*

*Q. The question is what inspired you to go and look at this, because when you saw -- A. Because of the scene --*

*Q. Let me finish my question. When you saw the references to books and letters, that was as a result of reading Lara, was it not?*

*A. Honestly, I am writing a scene about the interrogation and Lubyanka and going to look at each of those books, because it is important to me. I highly prized what Peter Finn said. I wanted to go to the direct source in A Captive of Time. How can I remember if it was Lara that I picked up first versus Peter Finn and A Captive of Time book that I picked up first, which I had already considered to be the primary sources."*

212. Three points of particular and general importance seem to me to emerge from the extract from the Defendant's cross examination which I have just quoted. First, this was a reiteration by the Defendant of her evidence, which I have accepted, of the way in which she wrote TSWK; that is to say a constant process of revision, in which the Defendant wrote and re-wrote scenes until she had them in a final form with which she was satisfied. Second, this extract includes the Defendant's evidence, which I also accept, that the Defendant was constantly going back to her sources, as she wrote and revised her material. Third, and as the Defendant reasonably pointed out in this extract, she could not reasonably be expected to recall which source she had picked up first, at any particular point in time.
213. Ultimately, it seemed to me that the Claimant fell well short of establishing that the Defendant had copied the reference to books and letter on the desk from Lara. On the evidence, I find that the Defendant did not copy this reference from Lara. Nor can I see anything here to support the allegations of selection copying, even if I am wrong in the finding which I have just made.
214. The next Supporting Allegation concerns page 11 of TSWK, where there is reference to Olga looking back to when she first saw Boris, at a public recital of his poetry. There is a description of how the audience sometimes could not hold back, and "*yelled out*" the lines of poetry before Boris could finish them. Over the page Olga recalls how the crowd "*rushed the staged* [there appears to be a misprint here] *and engulfed*" Boris at the finish of the performance. On page xv of the prologue in Lara there is reference to the crowd roaring back the next line of poetry to Boris, similar to a pop concert today. On page 4 of chapter 1 of Lara there is reference to the excitable crowd surging forward at the finish of the recital. It was put to the Defendant that these details of what happened at the poetry recital where Olga first saw Boris were copied from Lara. The Defendant did not accept this in cross examination. In Annex 2 it is claimed that the Defendant accepted that she might have copied the details of the crowd yelling out the lines of poetry and the crowd rushing forward and engulfing Boris at the finish of the recital. This seems to me to overstate the relevant part of the cross examination. All that was established was that the specific detail of how the crowd "*yelled out*" and the specific detail of how the crowd "*rushed*" the stage

and “*engulfed*” Boris were not in the September 2016 Draft, but were added to later drafts. The references to yelling out and to rushing the stage first appeared in the October 2016 Draft. The reference to Boris being engulfed first appeared in the November 2016 Draft. Beyond that, the Defendant acknowledged the existence of these similarities with Lara, but I did not understand her evidence to concede either actual or possible copying of these details.

215. The Defendant first wrote the relevant scene, to which the above details were subsequently added, before she saw Lara. In addition to this, in March 2016 she visited Moscow with her husband, and went to the building, which she referred to as the State Historical Museum, where Olga had heard Boris recite his poetry. The Defendant also made reference to a Time cover story from 1958 (The Passion of Yurii Zhivago) which contains reference to the audience chanting the next stanza by heart from a poem Boris was reciting. The Defendant was given a copy of this article by her husband in August 2016, before she read Lara. On page 7 of ACOT there is reference to Boris being surrounded by the crowd at the end of a recital. In TZA, at page 15, there is reference to the near adulation accorded to Boris as a poet, and to his ability, together with Anna Akhmatova and a few others, to fill concert halls. In relation to this particular Supporting Allegation it is also important to note that the relevant copying is said to have been of scene details which are not in chapter 5 of Lara, but are found in separate locations elsewhere in Lara. I also repeat the general point that, given the Defendant’s writing method, which involved the constant revision of her material, and constant re-reference to her sources, it seems to me very difficult to say, without more, that the Defendant must have copied a particular detail from Lara simply because that detail first appeared in a draft of TSWK after the Defendant had read Lara.
216. Bearing in mind all the factors listed in my previous two paragraphs it seems to me, again, that the Claimant has failed to establish that the Defendant copied the relevant details of this scene in TSWK from Lara. On the evidence, I find that the Defendant did not copy these details from Lara. Nor can I see anything here to support the allegations of selection copying, even if I am wrong in the finding which I have just made, and these details were copied from Lara.
217. The final separate Supporting Allegation, in relation to the allegations of copying the selection of the specified Events in chapter 5 of Lara, is that the Defendant copied the idea of the dacha occupied by Boris and his family at Peredelkino (the Big House) being the domain of Zinaida from Lara. In chapter 4 of Lara, at page 71, there is reference to Olga being unable to attend the Peredelkino soirees “*as the dacha was Zinaida’s domain*”. In chapter 1 of TSWK, when Olga is recalling her relationship with Boris, Olga explains that she did not attend readings in Peredelkino because “*The dacha in the writers’ colony was his wife’s territory*”. The Defendant accepted, in Amended Annex B to her Amended Defence and Counterclaim, that she picked up the idea of the dacha being Zinaida’s domain from Lara. The idea is differently expressed in TSWK and it is, as the Defendant pointed out in cross examination, an entirely commonplace notion. The Claimant does not seek to claim that the copying of this idea from Lara constituted an infringement of copyright. This is plainly correct. There can be no copyright in

the idea of the dacha being Zinaida's domain, or territory, and the expression of the idea is different in each work. I cannot see that the use of this particular idea by the Defendant provides any support for the Selection Claim. The taking of this particular idea from Lara is consistent with the Defendant's evidence that she used Lara as a secondary source. I cannot see that it gives any support to the allegations that the Defendant engaged in selection copying.

218. There is one other Supporting Allegation, which I cannot find in Annex 2, but was put in cross examination, and can be found in the list of Supporting Allegations at paragraph 91 of the Claimant's written closing submissions. Chapter 1 of TSWK opens, on page 3, with the state police, described as "*the men in black suits*" coming into Olga's apartment. In ACOT, at page 91, the same scene is described as "*some strange men bursting into my room*". In TZA, at page 67, the reference is to "*the secret police*" bursting into Olga's apartment. In chapter 5 of Lara, at page 83, the relevant description not at the beginning of the chapter, and is "*At around eight, the door burst open and a dozen uniformed police entered.*". The relevant extracts from ACOT and TZA are both marked by the Defendant in her copies of these works.
219. The essential point which was put to the Defendant in cross examination was that if one looked at the September 2016 Draft, there is a section called The Muse, written as a letter, which starts in 1956 and then reverts back to the police coming into the apartment in 1949 to arrest Olga. In the October 2016 the section entitled The Muse had been re-written, and opened with the words "*When the men in black suits came into our apartment*". The Defendant was asked in cross examination whether it was possible that the change in this scene was picked up from Lara which, as I have found, the Defendant had obtained and started to read in October 2016. The Defendant accepted that this was possible, but also identified the possibility that the change could have come from ACOT or TZA. This was one of a number of instances where the Defendant made reference to her practice of going back to the sources and writing and re-writing her material, as she experimented with different structures.
220. I am not satisfied that the Defendant made the change in this scene as a result of reading Lara. Nor am I satisfied that the Defendant copied anything from Lara in this respect. The language is not the same, and the Defendant's evidence, which I have already accepted, was that she was constantly revising and experimenting with her material. It seems to me much more likely, and I so find, that the inspiration for this scene in TSWK came from ACOT and/or TZA, so far as it came from anywhere. I find that the Defendant did not make the relevant change in this scene as a result of reading Lara. I add that if I am wrong in the findings which I have just made, I cannot see anything in this Supporting Allegation which gives any support to the allegations that the Defendant engaged in selection copying.
221. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapter 5 of Lara or any part of that selection. So far as the Events themselves can actually be found in chapter 1 of TSWK, it seems to me that there is no evidence of the Defendant having copied

the selection of these Events, or any part of it. The reality is, as my analysis of the Events demonstrates, that the Events are dealt with in a completely different manner in chapter 1 of TSWK, so far as they appear at all. They are differently expressed, differently ordered in terms of the selection of events in chapter 1 of TSWK, and appear in very different contexts. None of this supports the allegation of copying of the selection of these Events. Rather, the evidence seems to me to demonstrate, and I so find, that such copying did not take place.

222. So far as the Supporting Allegations are concerned they seem to me to offer some, very limited evidence of the Defendant making use, or possibly making use of odd details picked up from Lara. They offer no evidence to support the allegations of selection copying. At best, a couple of the Supporting Allegations serve to corroborate the Defendant's evidence that she used Lara as a secondary source. On my findings the Supporting Allegations demonstrate only a few instances of the Defendant making use or possibly making use of details picked up from Lara. Those instances do not, in my view, support the allegations of selection copying. In the case of the bulk of the Supporting Allegations I have found that the Defendant did not copy the relevant details from Lara. I have also however gone on to make the point that, if I had found such copying, I would not have regarded the relevant Supporting Allegation as providing good or any evidence to support the allegations of selection copying. I reiterate this point. If my findings had been different in relation to this group of Supporting Allegations, and if I had found that the Defendant had copied further particular details from Lara as alleged, I would not have regarded this as good or any evidence of selection copying. I can give my reasons for saying this very briefly. In relation to each such Supporting Allegation, it seems to me that the relevant details, even if assumed (contrary to my findings) to have been copied from Lara, are too trivial to support the allegations of selection copying. It also seems to me that the differences between the relevant parts of the two works, in terms of the selection of events, are too great for a finding of selection copying to be possible on the basis of the relevant Supporting Allegations, even if the same had been established as instances of copying.
223. In terms of providing support for the claim that the Defendant copied the selection of the specified Events in chapter 5 of Lara or part of that selection, I have considered this question in the case of each individual Supporting Allegation, and found no such support. There is however the question of whether the Supporting Allegations in relation to chapter 5 of Lara, if taken cumulatively, provide support for the allegations of selection copying. Given my findings on the question of whether copying took place in relation to each Supporting Allegation, this question does not arise. On my findings, it seems to me that there is no such accumulation of Supporting Events to support the allegations of selection copying. I should however say that even if I had found all or a material number of the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara, this would not have caused me, looking at the Supporting Allegations on a cumulative basis, to conclude that the Defendant had copied the selection of the specified Events or a part of it. I say this for the same reasons as I have just expressed in relation to the Supporting Allegations when taken individually. Those reasons seem to me equally to apply if the Supporting Allegations are taken cumulatively.

224. In relation to the Supporting Allegations, it seems to me that there is also a separate problem with the allegation of copying of details, and with the Claimant's case that this copying provides support for the allegations of selection copying. It is convenient to identify this problem at this stage in this judgment, because it seems to me to be a general problem which affects all of the Supporting Allegations. The problem is as follows. Each Supporting Allegation is an allegation that the Defendant copied some particular detail or details from Lara, which in turn is said to support the allegations of selection copying. The general problem with the Supporting Allegations is that the Claimant picks out a detail or a couple of details from a scene which, even where there is a similar scene in Lara, is written in a very different way in TSWK. In each such case there are any number of differences between the two works, both in relation to points of detail and, at a more general level, in terms of selection of events (in the omnibus sense in which I am referring to selection in this judgment). In the case of each Supporting Allegation it is not feasible to set out all of these differences in full, but they exist.
225. If the Defendant was copying Lara in the manner alleged by the Claimant it seems to me very odd that the writing of the relevant parts of TSWK and Lara is so different. If the Defendant was copying from Lara details of the kind alleged in the Supporting Allegations, one would expect to see the copying of much more detail than is alleged in the Supporting Allegations. By way of example, and if the Defendant was copying Lara as alleged, one would expect to find the sort of verbatim copying that one can find as between sections of ACOT and sections of Lara. Putting the matter another way, and in relation to this particular scene, why would the Defendant, if she was copying Lara to the extent alleged, copy a particular detail or details from a scene in Lara, and nothing else?
226. By contrast, if the Defendant did use Lara as a secondary source, which she read but did not have open beside her when she wrote, it is not surprising that the odd detail from Lara should find its way into TSWK. The Defendant's admissions and my own findings in relation to the Supporting Allegations demonstrate that this did occasionally occur.
227. As I have said, this is a problem which seems to me generally to affect the Supporting Allegations, and the case which is sought to be made on the basis of the Supporting Allegations. In order to avoid unnecessary repetition, I will refer to this general problem as **"the Consistency Problem"**.
228. On the basis of the above discussion, and taking into account all the evidence and arguments which I have received and heard, and reviewing my analyses of the specified Events in chapter 5 of Lara and the Supporting Allegations, the position seems clear to me. I find that the Defendant has not copied the selection of these Events in chapter 5 of Lara, or any part of it.
229. In summary, and drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to chapter 5 of Lara are as follows:

- (1) The selection of the specified Events in chapter 5 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara. The same is true of the selection of these Events which is alleged to have been copied.
- (2) I find that the Defendant has not, either in chapter 1 of TSWK or elsewhere in TSWK copied the relevant selection of these Events or any part of this selection.
- (3) I conclude that the Defendant has not, in relation to chapter 5 of Lara, infringed the copyright in Lara.
- (4) Accordingly, and in relation to chapter 5 of Lara, the claim of infringement of copyright in Lara fails.
- (5) It should be kept in mind, in this context, that I have yet to consider whether the Defendant's use of the wording of the Accusation Act in chapter 5 of Lara amounts to an infringement of copyright in the Legendes Translation. More simply, I have yet to consider the Translation Claim.

#### The Selection Claim – Chapter 6 of Lara (Cranes over Potma)

230. The Claimant relies upon fourteen Events in chapter 6 of Lara, the selection of which is said to have been copied, in substantial part, in chapter 5 of TSWK (The Rehabilitated Woman). Three of these Events are said to have been copied in chapter 6 of TSWK (the Cloud Dweller). Of these three Events, two are relied upon not as instances of infringement of copyright in themselves, but rather as instances of copying (ie. effectively as Supporting Allegations). The third of these Events, also said to have been copied in chapter 6 of TSWK, is relied upon as the ground of a separate claim of infringement of copyright. The fourteen specified Events, as described in Annex 2, are as follows:

- (1) Olga transferred to transit camp.
- (2) Boris supporting Olga's family.
- (3) Olga transferred onward to Potma.
- (4) Gruelling life at camp; being tormented by Buinaya.
- (5) Presence and treatment of nuns.
- (6) Summers worst; description; worrying about Boris, memorising Boris' poems; and composing her own poems.
- (7) An attempt by Olga to rebel.
- (8) Olga taken to see Godfather; receiving letter, notebook and poems from Boris.
- (9) Postcards from Boris.
- (10) Boris writing Doctor Zhivago (including poems) (inspired by Olga's plight); anguish; two heart attacks; nursed by Zinaida.
- (11) Stalin's death; news of amnesty.
- (12) Boris meeting with Irina on a bench before Olga's release.
- (13) Olga worrying about appearance; recalling Boris' concerns about sister ageing.



(14) Boris driven back into Olga's arms.

231. Event 12, the bench scene (“**the Bench Scene**”) is the Event which is the subject of its own self-contained infringement claim. I will therefore consider the claim based on the Bench Scene separately, in the next section of this judgment. There are also a number of Supporting Allegations, which are said to provide support for the allegations of copying of the selection of the specified Events in chapter 6 of Lara.
232. The first question to be answered, again, is whether copyright subsists in the selection of the Events in chapter 6 set out in Annex 2. The general answer to this question seems to me, again, to be straightforward. My reasoning is essentially the same as my reasoning on this question in relation to the selection of the specified Events in chapter 5 of Lara. In my judgment copyright clearly subsists in the selection of Events in chapter 6 set out in Annex 2. Again, the Claimant's work owes a heavy debt to ACOT, substantial parts of which have been taken, often verbatim, from ACOT. The relevant point remains however that the copyright is said to subsist in the selection of the Events. In the case of the Events in chapter 6 set out in Annex 2 I am, again, satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapter 6 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapter 6 of Lara. I reject the Baigent Point, for the reasons which I have already stated in relation to chapter 5 of Lara. I therefore accept that copyright protection extends to the selection of these Events.
233. I add the further point, on the question of subsistence of copyright, that it is not said that the Defendant has infringed the copyright in the selection of all fourteen specified Events. I have already mentioned the two Events which are relied upon as instances of copying in chapter 6 of TSWK. I have also mentioned the Event which is the subject of a separate claim of infringement of copyright. Of the remaining eleven Events, the Claimant's case is that the Defendant has copied the selection of nine of the eleven specified Events in chapter 5 of TSWK. For the reasons which I have previously set out in my discussion of this question, I accept that the selection of these nine Events constitutes a substantial part of the selection of the eleven specified Events, or the fourteen specified Events (if this be the correct analysis for this purpose) in chapter 6 of Lara, and a substantial part of Lara as a whole. As such, I accept that the selection of the eleven specified Events is equally protected by copyright.
234. I again stress that the above conclusions relate to the selections of Events referred to in my previous paragraphs. Those conclusions remain subject to the Selection Copyright Qualification. I also repeat the important point that this conclusion excludes the question of whether any copyright exists in the details of the Bench Scene specified in Annex 2, which I shall consider in the next section of this judgment.

235. This leaves the question, again excluding the details of the Bench Scene, of whether the Defendant has copied the relevant selection of the specified Events, or a part of it in TSWK. I understood the Defendant to accept, in cross examination, that she wrote the relevant material after she received a copy of Lara. I will consider the specified Events first, and then consider the relevant Supporting Allegations, before coming to my conclusions on the question of copying.
236. Commencing with my discussion of the specified Events, the starting point is that the relevant material in each work is completely different, and is written in a completely different way. Starting with chapter 6 of Lara, the fourteen specified Events can be found in the chapter, but they are located amidst a number of different events, or arguably different events. By way of illustration:
- (1) Event 1 occurs 2 pages into the chapter, following a description of Boris' activities in Moscow, which is not included in the Events. Event 1, the transfer to the transit camp, effectively occupies a sentence, before a description of how Olga was punished by the state; for the purposes of striking at Boris. This occupies another page before one comes to Event 2, which is Boris supporting Olga's family. Events 3, 4 and 5 then follow.
  - (2) Event 6 is a collection of events which together constitute a description of life for Olga at Potma. Event 7 is separated out as an act of rebellion by Olga, but it might equally well be included in Event 6 as part of the description of her life at Potma.
  - (3) Events 8 and 9 do constitute discrete events. Event 10 however occupies some 6 pages of chapter 5. In my view it is questionable as to whether it is correctly characterised as an event. In my view it is better characterised as a series of events in Boris' life.
  - (4) Events 11 and 12 are separated by lengthy quotations from postcards sent by Boris (pretending to be Olga's mother) to Olga. Following the Bench Scene, Events 13 and 14 respectively occupy each of the last two paragraphs of the chapter.
237. Turning to TSWK, chapter 5 is written in the form of a letter, from Olga at Potma to Semionov, her interrogator in the Lubyanka. The letter opens with an explanation to Semionov of why and how the letter is being written, and with Olga asking herself, in the form of questions put to Semionov, what she should be telling him about from her experiences getting to Potma, and at Potma.
238. Thereafter, my analysis of the structure of chapter 5 of TSWK, as compared to chapter 6 of Lara, is as follows:
- (1) In terms of Event 1 a description of the transit camp is given in the letter. This description is not in chapter 6 of Lara. There is only an equivalence with Event 1 in the sense that both works mention the transit camp. The letter contains none of the material about Boris' activities which opens chapter 6 of Lara. Nor does the letter contain any of the material about the state getting at Boris through Olga which follows the single sentence which comprises Event 1 in chapter 6 of Lara.

- (2) Event 2 is not in the letter. Instead the letter moves on to a description of the journey to, and arrival at Potma. The description of the journey and arrival is lengthy, occupying some 5 pages, with a wealth of detail. It bears no relation to Event 3 in chapter 5 of Lara.
- (3) There then follows a brief description of life at Potma, concentrating on Olga's difficulties with the work she was required to do. There is little similarity with Event 4 in chapter 5 of Lara.
- (4) There is then a description of the nuns. It is written in very different terms to Event 5 in chapter 5 of Lara.
- (5) The letter then resumes with a description of Olga's sufferings at Potma, including her victimisation by Buinaya. The collection of events which comprises Event 6 in chapter 6 of Lara is very different, in terms of its content and writing.
- (6) Event 7 is not in the letter. There is no act of rebellion by Olga. Instead there is the reverse of this, when Olga is humiliated by being forced to wash Buinaya's underclothes. Following this, the description of Olga's suffering at Potma continues for a further page. It is only then that one reaches the occasion of Olga being taken to see the Godfather and receiving Boris' letter and notebook, which is the equivalent of Event 8 in chapter 6 of Lara. In terms of writing and content, the visit to the Godfather and the receiving of Boris' letter and notebook are very different.
- (7) Event 9 is a distinct part of chapter 6 of Lara, dealing with the postcards sent by Boris while pretending to be Olga's mother. Event 9 is said to be replicated on pages 104 and 106 of TSWK. I do not think that this is correct. There are isolated references on each of these pages to Olga receiving letters and a postcard from Boris. They bear no relation to the account in Lara of Boris sending postcards to Olga, pretending to be Olga's mother.
- (8) Following the visit to the Godfather, the letter moves on to the death of Stalin and the subsequent amnesty for Olga. This corresponds to Event 11 in chapter 6 of Lara, but these events are written in a completely different way in the letter. This is followed by Olga examining herself in the mirror and wondering what Boris will think of her when she returns to Moscow. This corresponds to Event 13 in chapter 6 of Lara, but the writing is, again, very different.
- (9) The letter then moves on to a further encounter with Buinaya, which is not in Lara. This is followed by a reference to those who had not received the amnesty eventually rising up, and burning the whole of Potma (the labour camp) to the ground. Olga speculates that it would have been Buinaya who lit the match. This is also not in Lara. The letter concludes with a description of Olga taking the train back to Moscow. Chapter 5 of TSWK thus ends with the return to Moscow. This ending does not correspond to chapter 6 of Lara which, following Event 13, concludes with a final paragraph which moves from Olga's thoughts to the reunion of Olga and Boris which is Event 14.

239. It will be noted that the above comparison exercise, in my previous paragraph, does not refer to Events 10 and 12, and only refers to Event 14 in relation to chapter 6 of TSWK. This is because there is nothing said to be equivalent to Events, 10, 12 or 14 in the letter which constitutes chapter 5 of TSWK. Instead the allegation is that these Events in chapter 5 of Lara has been copied in chapter

6 of TSWK. Carrying out the same comparison exercise as in my previous paragraph, the position is as follows:

- (1) As I have pointed out, Event 10 in chapter 6 of Lara occupies some 6 pages of chapter 6. In my view it is better characterised as a series of events in Boris' life. Event 10 is said to be copied in chapter 6 of TSWK, at pages 115-120. These pages of TSWK come immediately before the Defendant's description of Boris' meeting with Irina, which is said to have been copied from the Bench Scene. If one reads the specified pages of Lara, and the specified pages of TSWK, what immediately strikes one is how different they are. Leaving aside the different ordering of events in TSWK, which means that what is said to be the equivalent of Event 10 is not in chapter 5 of TSWK, I find it hard to see how the relevant extracts of each work could have been written in more different terms.
- (2) My consideration of the selection of events within the Bench Scene is for the next section of this judgment. For present purposes, what is said to be the equivalent of the Bench Scene (Event 12) can be found on pages 120-123 of TSWK, where Boris meets Irina. It is important to note that chapter 6 of TSWK begins at page 109. The chapter is effectively divided into two parts. In the first part, which occupies the bulk of chapter 6, Boris' thoughts and actions are described, as he waits for Olga to return to Moscow. The first part includes extensive flashbacks over events in Boris' life, including his meeting on the bench with Irina. The second, much shorter part of chapter 6 starts with Boris catching the train to Moscow from Peredelkino, early in the morning. In Olga's street Boris finally makes the decision to see her again. The chapter ends with their reunion in Olga's apartment.
- (3) What is said to be equivalent to Event 14 can be found in the last part of chapter 6 of TSWK, where Boris and Olga are reunited. The reunion is written in completely different terms in each work, independent of the different placing of the reunion in each work.
- (4) I should add that the Claimant's written closing submissions stated that Events 10 and 14 are not relied upon as grounds of infringement of copyright in themselves, because they appear in a separate chapter of TSWK. My observation on this point is that the different ordering of the parts of chapter 6 of TSWK which are said to correspond to Events 10 and 14 is only one of many differences between the relevant parts, respectively, of TSWK and Lara.

240. With this analysis of the specified Events in place, I turn to the Supporting Allegations in this section of Annex 2, as they appear in relation to particular Events.

241. The first Supporting Allegation appears in relation to Event 5. The point is made that the presence and treatment of the nuns is dealt with in both Lara and TSWK before Event 6 and before the equivalent section in TSWK, which include descriptions of Olga's working conditions at Potma. In ACOT the nuns are described after Olga's description of working conditions at Potma, including her dealings with Buinaya. The problem with this point is that it ignores the actual structure of the relevant sections of TSWK and Lara. In TSWK the section dealing with the nuns is sandwiched between two sections which describe Olga's

life at Potma. First, there is an account of Olga's struggles with the work, and the consequent deprivation of food rations. This is followed by a description of the nuns. Then the narrative in the letter returns to Olga's own circumstances, with (i) Olga mastering the work, (ii) Olga's physical discomfort, (iii) the inadequate rations, (iv) Olga thinking about Boris, (v) Olga's victimisation by Buinaya. In chapter 6 of Lara the description of the nuns is preceded by an account of the gruelling work conditions at Potma, and the immediate introduction of Buinaya, whose hatred of rich and privileged Muscovite prisoners is described. The general resentment of Muscovite prisoners by other peasant prisoners is then described, followed by an account of the only emotional sustenance being the receipt of letters from home. The nuns are then described. Olga's memories of the terrible conditions of the summer of 1952 are then described, together with an account of the uncomfortable and inadequate clothes the prisoners had to wear. There are then Olga's thoughts of Boris and the composing and memorising of poetry in her mind. There is then a description of the end of Olga's working day, and her act of rebellion in failing to turn out for roll call.

242. It would be possible to continue with this account of the structures of the relevant parts of TSWK and Lara, further bringing out the differences between the two structures. It is however apparent, from the brief survey set out in my previous paragraph, that the structures are substantially different. The only, and very general point of similarity is that the nuns are described after accounts (albeit different accounts) of conditions at Potma. I do not consider this similarity to be good, or any evidence of the Defendant having copied the relevant details from Lara. On the evidence I find that the Defendant did not copy these details from Lara. I also add that if my finding had been that the relevant details relied upon in relation to this Supporting Allegation had been taken from Lara, I would not have regarded this as good or any evidence of the Defendant having copied the selection of the specified Events in chapter 6 of Lara, or any part of that selection, or indeed any other relevant selection of Events in Lara. For ease of reference I will, in my discussion of the Supporting Allegations in relation to chapter 6 of Lara, again use the expression “**selection copying**” as shorthand for the copying referred to in my previous sentence.
243. Event 6 is relied upon for further points of alleged similarity. It said that Lara and TSWK are similar in making reference to summers being worse than winters at Potma (unlike in ACOT), and that there is the same ordering of the references to (i) summer being worse than winter, (ii) smocks called devil's skins, and (iii) hats worn by the prisoners to ward off the sun (again unlike in ACOT). It is also said that there is a similarity in the references to Olga reciting Boris' poems in her head, and running his words through her mind, whereas the reference in ACOT is to Olga reciting her own poems.
244. If one starts with ACOT, on pages 119-120, there is reference to (i) the weird looking hats made of gauze stretched over pieces of wire, (ii) the grey prison smocks with numbers on the back and hems with chloride of lime, (iii) the smocks being made of a shiny stiff material known as Devil's skin, (iv) sweat pouring off the women, prickling their breasts, (v) flies crawling all over them, (vi) snatches

of verses hammering at Olga's temples, (vii) Olga's pick being too heavy to lift, (viii) shoes of imitation leather which were far too big (size 44 when a size 36 was too big for Olga), and seemed glued to the ground, (viii) abuse from Buinaya on her inability to work, (ix) longing for autumn in place of summer.

245. If one then turns to pages 113-114 of Lara, the same events can be found, but re-ordered and revised by the Claimant. Minor details are changed. There is no reference to sweat prickling the breasts of the women. There is a reference to sweat pouring off the prisoners, not prickling their breasts. The hats are described after the description of the smocks and Olga's shoes. Turning to TSWK, the Defendant also made use of the material from ACOT, and also re-ordered and revised the material, but not in the same way as the Claimant. On page 99 of TSWK the smocks are described, but it is not mentioned that they have numbers or hems weighted with chloride of lime, both of which details are in Lara. Sweat is referred to as pooling in the smocks, not pouring off the prisoners (Lara) or prickling their breasts (ACOT). The hats are then referred to, but as hats which resembled a beekeeper's hat. This description is not in ACOT or Lara. One could go on identifying such differences of detail, but the relevant point emerges from the comparison exercise which I have just carried out. It is clear that the Defendant was not copying Lara in this part of TSWK, but creating her own account of Olga's working conditions at Potma, based on the source materials derived from ACOT. I do not consider the limited similarities between TSWK and Lara in relation to Event 6 to be good, or any evidence of the Defendant having copied the relevant details from chapter 6 of Lara. On the evidence I find that the Defendant did not copy these details from chapter 6 of Lara. I again add that if my finding had been that the relevant details relied upon in relation to this Supporting Allegation had been taken from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
246. In relation to Event 8 (the visit to the Godfather), there are said to be similarities in the reference to Boris having written Olga a poem, in the reference to Boris' looping or loopy handwriting, and in the fact that on page 125 in ACOT (but not in TSWK or Lara) the content of the letter from Boris is separated out into two parts, with Olga's thoughts described in between. The point here is essentially the same point as I have made in relation to Event 6. These sections of Lara and TSWK bear no resemblance to each other. The Claimant quotes the letter. The Defendant changes the terms of the letter with her own fictional words. The poem written by Boris is described in completely different terms in TSWK and in Lara. Indeed, as the Defendant pointed out in cross examination, it was obvious that poems sent to Olga at Potma by Boris would be written for her. Equally, the references to Boris' "*free-flowing hand looping over*" (page 117 of Lara) and Boris' "*loopy scrawls*" (the January 2017 Draft, but changed thereafter to "*broad scrawls*"), are differently written in the two works, independent of the fact that the reference to "*loopy scrawls*" did not even make it into the final version of TSWK.
247. In cross examination the Defendant did accept the possibility that she had taken the reference to loopy scrawl from the description of Boris' handwriting in Lara.

It is interesting to note that in the prologue of the Defendant's copy of Lara, there is marking by the Defendant of a reference to Boris' "*bold, looping handwriting in black ink*". Such marking of the Defendant's copy of Lara is relatively sparse, whereas the Defendant's copies of ACOT and TZA are heavily marked. It seems to me reasonable to accept, and I so find, that the Defendant did derive the reference to Boris' "*loopy scrawl*" from her reading of Lara. The use of a detail of this kind, albeit not in the final version of TSWK, is consistent with the Defendant using Lara as a secondary source.

248. This however is as far as my finding goes. I do not think that the similarities identified in relation to Event 8 constitute good, or any evidence of any further copying by the Defendant of the details from chapter 6 of Lara relied upon in relation to this Supporting Allegation, and I so find. I did not understand the Claimant to contend that the Defendant's actual description of Boris' handwriting in TSWK, taken on its own, infringed the copyright in Lara. I do not see how it could have done so. The word "*scrawl*" is commonplace. The use of the word "*loopy*" as a descriptive word would not, in my view, have infringed the copyright in Lara, but in any event this word did not make it into the final version of TSWK. So far as selection copying is concerned, it seems to me that the detail which the Defendant did take from Lara does not offer good or any evidence to support of the allegations of selection copying. If however I am wrong in finding that this was the limit of the Defendant's copying in respect of this Supporting Allegation, and if the Defendant did copy the further details relied upon in this context, I would not have regarded this as good or any evidence to support the allegations of selection copying.

249. In relation to Event 13 (Olga worrying about appearance; recalling Boris' concerns about sister ageing) there is reference, at page 118 of Lara, to Olga studying her face in a small piece of tarnished mirror. She notes that her eyes had not lost their "*cornflower-blue intensity*". On page 106 of TSWK there is a scene where Olga, having received a letter giving the date of her release pursuant to the amnesty following Stalin's death, examines her face in a jagged piece of mirror. Her eyes are described as "*still cornflower blue, but framed by wrinkles and dark bags*". There are two points made in this context. First, it is said that the Defendant took the reference to cornflower blue eyes from Lara. The Defendant accepted this. In cross examination the Defendant explained why she had done this:

*"I picked up some of the details of one off the hand before really comparing them. There is definitely the cornflower colour. I know that come from Lara because cornflower is such a particular shade of blue. There is really no photos of Olga in colour, so I thought it was a great detail."*

250. The second point was that the scene in ACOT, where reference is made to Boris' horror of changes and to his concerns about seeing his sister after a long period of time, appears much earlier than in Lara or TSWK, at page 26 of ACOT. As such, it was put to the Defendant in cross examination that she had copied from Lara the scene where Olga looks in the mirror and worries about what Boris will think. As the Defendant pointed out however in cross examination, the scene in

ACOT is written by reference to Olga's time at Potma. It is a good example of how Olga did not follow a consistent chronology in ACOT, but tended to move backwards and forwards in time in her narrative. The Defendant was not able to be certain where the details of her scene had come from, with the exception of the reference to cornflower blue eyes, but the passage on page 26 of the Defendant's copy of ACOT is heavily marked, and it seems much more likely to me, and I so find, that the relevant scene in TSWK, where Olga looks in the mirror and worries about how she will appear to Boris, was based by the Defendant on ACOT, not Lara.

251. Accordingly, I find that the Defendant did not copy this scene from Lara, with the exception of the detail of Olga's cornflower blue eyes. As such I do not think that this scene is capable of constituting good, or any evidence in support of the allegations of selection copying. Nor, save for the admitted use of the reference to cornflower blue eyes, do the similarities between Event 13 and the equivalent scene in TSWK seem to me to be any evidence of any copying of Lara by the Defendant. In terms of the use of cornflower blue eyes, I did not understand the Claimant to contend that her use of this expression, on its own, enjoyed any copyright protection. In my view the Defendant's use of this expression, which is a commonplace way of describing blue eyes, did not, on its own, enjoy any copyright protection. Nor do I think that the Defendant's use of this expression provides good or any evidence to support the allegations of selection copying. I again add that if I had found that the Defendant had copied more of this scene than the reference to cornflower blue eyes, I would not have regarded this as good or any evidence to support the allegations of selection copying.
252. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapter 6 of Lara or a part of that selection.
253. So far as the Events themselves are concerned, the comparison exercise which I have conducted above seems to me to offer no evidence of the Defendant having copied the selection of the specified Events in chapter 6 of Lara, or any part of that selection. The selection of events in chapters 5 and (so far as relevant) in chapter 6 of TSWK is very different to the selection of events in chapter 6 of Lara. The best which can be said is that if one ignores substantial parts of the structure of chapters 5 and 6 of TSWK, and if one ignores parts of chapter 6 of Lara, it is possible to put together a sequence of events in Lara which has the same order as the specified, but differently described events in TSWK.
254. This strikes me as another example of someone, presumably the person or persons who carried out the review on which this action is based, carrying out the equivalent of the grains of exercise identified as illegitimate by Laddie J in *IPC*. There is however this difference. In *IPC* Laddie J described a process which resulted in two sets of grains of sand, in equivalent positions. The similarities in position thus exist, even though they are the product of an artificial process. In the present case it does not seem to me that the exercise which has been carried out on the Claimant's side, which has produced the selection of the Events in



chapter 6 of Lara, can actually be said to have produced a selection of events which has any material similarity to the specified events in chapters 5 and 6 of TSWK.

255. Turning to the Supporting Allegations the position, on the basis of my analysis set out above, seems to me to be similar to the position in relation to chapter 5 of Lara. The Supporting Allegations offer some, very limited evidence of the Defendant making use of details picked up from Lara. They offer no evidence of selection copying. At best, some of the Supporting Allegations serve to corroborate the Defendant's evidence that she used Lara as a secondary source. On my findings the Supporting Allegations demonstrate only a few instances of the Defendant making use of details picked up from Lara. Those instances do not, in my view, support the allegations of selection copying. In the case of the bulk of the Supporting Allegations I have found that the Defendant did not copy the relevant details from Lara. I have also however gone on to make the point that, if I had found such copying, I would not have regarded the relevant Supporting Allegation as providing good or any evidence to support the allegation of selection copying. I again reiterate this point. My reasoning is the same as before. If my findings had been different in relation to this group of Supporting Allegations, and if I had found that the Defendant had copied further particular details from Lara as alleged, I would not have regarded this as good or any evidence to support the allegations of selection copying. My reasons for saying this are the same as those on which I have relied for making the same point in relation to the Supporting Allegations drawn from chapter 5 of Lara. In relation to each such Supporting Allegation, it seems to me, again, that the relevant details, even if assumed (contrary to my findings) to have been copied from Lara, are too trivial to support the allegations of selection copying. Again, it also seems to me that the differences between the relevant parts of the two works, in terms of the selection of events, are too great for a finding of selection copying to be possible on the basis of the relevant Supporting Allegations, even if the same had been established as instances of copying.
256. In terms of providing support for the claim that the Defendant copied the selection of the specified Events in chapter 5 of Lara or part of that selection, I have considered this question in the case of each individual Supporting Allegation, and found no such support. There is however the question of whether the Supporting Allegations in relation to chapter 6 of Lara, if taken cumulatively, provide support for the allegation of selection copying. Given my findings on the question of whether copying took place in relation to each Supporting Allegation, this question does not arise. On my findings, it seems to me that there is no such accumulation of Supporting Events to support the allegation of selection copying. I should however say that even if I had found all or a material number of the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara, this would not have caused me to conclude that the Defendant had copied the selection of the specified Events or a part of it. The selection of events in each work is simply too different for the Supporting Allegations to be sufficient to establish such selection copying. I say this for the same reasons as I have just expressed in relation to the Supporting Allegations when taken individually. Those reasons seem to me equally to apply

if the Supporting Allegations are taken cumulatively. I also repeat, from my discussion of the Supporting Allegations in relation to chapter 5 of Lara, the Consistency Problem. The Consistency Problem seems to me to apply equally to the Supporting Allegations in relation to chapter 6 of Lara.

257. On the basis of the above discussion, and taking into account all the evidence and arguments which I have received and heard, and reviewing my analyses of the specified Events in chapter 6 of Lara and the Supporting Allegations, the position seems clear to me. I find that the Defendant has not copied the selection of the specified Events in chapter 6 of Lara, or any part of it.
258. In summary therefore, drawing together all of the discussion in this section of this judgment and leaving aside the details of the Bench Scene, my overall conclusions in relation to chapter 6 of Lara are as follows:
- (1) The selection of the specified Events in chapter 6 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara. The same is true of the selection of these Events which is alleged to have been copied.
  - (2) I find that the Defendant has not, either in chapters 5 or 6 of TSWK or elsewhere in TSWK, copied the relevant selection of these Events or any part of this selection.
  - (3) I conclude that the Defendant has not, in relation to chapter 6 of Lara, infringed the copyright in Lara.
  - (4) Accordingly, and in relation to chapter 6 of Lara, the claim of infringement of copyright in Lara fails.

#### The Selection Claim – the Bench Scene

259. The Bench Scene can be found on pages 128 and 129 of Lara. The Claimant bases the allegation of copying of selection on the alleged copying of the following seven details, which I shall refer to as Events, of the Bench Scene:
- (1) The meeting takes place on a bench.
  - (2) At the time Boris was unable to climb the stairs to Olga’s apartment.
  - (3) Irina had a sense of family connection with Boris.
  - (4) Boris had lost weight and had his teeth done.
  - (5) Boris wanted Irina to make Olga see a “*new reality*”.
  - (6) Olga could only count on Boris’ “*friendship*”.
  - (7) Irina’s reaction was that they would have to deal with it themselves.
260. A similar scene is in ACOT, at page 26. In order to do justice to the Selection Claim, so far as based upon the Bench Scene, it is easiest to set out the actual text of this scene in ACOT:

*“But then suddenly, when our reunion was actually in the offing, he got it into his head that neither I nor he were what we had been before, that he received from his heart attack only thanks to Zinaida Nikolayevna, and that*

*he must therefore sacrifice his personal feelings on the altar of devotion and gratitude to her. With this in mind he summoned Ira, now fifteen years old, to meet him on Chisty Prudy Boulevard, and charged her with a very peculiar errand: she was to tell me, her mother, when I returned from the camp after my four years there, that he still loved me and that all was well, but that a change might now come about in our relationship.*

*It is a pity Ira never made a note of the conversation to preserve the full flavour of his words – the mixture of candour, guileless charm, and undeniable heartlessness.”*

261. In TSWK the relevant scene which is the subject of the allegation of copying of selection forms part of a longer narrative, which follows a varied timeline. Chapter 6 of TSWK opens, on page 109, with Boris waking at his dacha at Peredelkino on the day of Olga's return from Potma. Boris thinks back to their last meeting, three years before, on a bench in the public gardens outside the editorial offices of Goslitizdat, a Soviet publishing house. This is followed by Boris' recollection of visiting Olga's apartment, to find her taken to the Lubyanka. Boris promised Olga's mother to do everything to secure her release, but knows that this is an empty promise. Boris returns to Zinaida, in his own apartment in Moscow. The narrative then moves back to the present, with Boris getting dressed, having his breakfast, and informing Zinaida that he is going into Moscow. The narrative then moves to Boris working at his desk, remembering the fate of his friend, the Georgian poet Titsian Tabibize, who lost his life in 1937 in the purges instituted by Stalin, and remembering the fate of other friends. From this Boris turns to thinking about his garden, and his relationships with Olga. Boris is described as having been in an equivocal mood about continuing the relationship. The narrative then describes how Boris had decided to end things with Olga and, a week before Olga's return to Moscow, had asked Irina to meet him in Pushkinskaya Square, where he had first asked Olga to meet him, seven years before. This leads into Boris' recollection of the meeting itself with Irina, which is the relevant scene said to copy the selection of the Events in the Bench Scene.
262. In Lara the Bench Scene takes place the day after Boris has sent a postcard to Olga at Potma, pretending to be Olga's mother, looking forward to Olga's return to Moscow. The postcard gives no hint of ending the relationship, and is passionate in looking forward to the reunion with Olga. Olga was aware that this and other postcards purporting to be from her mother had in fact been sent by Boris. The postcard mentions the meeting with Irina, but gives no hint of what was actually discussed. The Bench Scene then commences. It is quite lengthy, occupying about a page which comprises three lengthy paragraphs. Events 1-4 are part of a number of details of the meeting, including the passionate kisses of Boris and Irina, which are given in the first paragraph. Events 5 and 6 are two details from the second paragraph, which recounts the course of the conversation after it had taken "*an unpleasant and almost farcical turn*", involving Boris trying to get Irina to tell Olga that Boris and Olga could no longer be together. Event 7 comes at the end of the third paragraph. In the third paragraph Irina's

reactions to the request from Boris are described. The reactions are less than complimentary to Boris.

263. In TSWK the relevant scene runs from page 120-124. The scene opens with Boris arriving first at Pushkinskaya Square; the appointed meeting place. Boris sits on a bench, and watches an elderly man feed the pigeons. Irina arrives, and the narrative switches to Boris' recollection of his first meeting with Irina. Irina is described as being a young woman of fifteen. Boris admires her beauty and feels ashamed when he feels the same stirring of passion as when he first met Olga. Irina then suggests that they walk, and begins an excited account of the preparations for Olga's return, including a party at their apartment where Boris and Olga will be guests of honour. Boris then announces that he cannot attend. This is followed by two excuses for his non-attendance, the first of which is that he cannot climb the stairs, and the second of which is that he is too busy. Boris then drops the bombshell that the relationship is over, and that they would have to adjust to the new reality. He explains to Irina that he and Olga could only have a friendship, and that he had realised that he needed to stay with his family. Irina protests that they (Olga's family) are his family, as he has repeatedly told them. Boris explains that he needs Irina's help in convincing Olga that the ending of the relationship is for the best. Irina says that she will leave it up to her mother to decide what is best for her. The meeting ends on unhappy terms, with Irina demanding that Boris should at least meet Olga at the train station, which Boris agrees to do. Boris then watches Irina walk away, regretting what he had said, and wanting to call Irina back to tell her that things would be as they were before. The scene ends with Boris returning to the bench, seeing a new old man feeding the pigeons, and wondering if he will end up doing the same.
264. The narrative in TSWK then reverts to Boris working at his dacha, wondering what Olga will look like, and what Olga will think of him. It is at this point that Boris is described as having lost weight and hair, and feeling his true age for the first time in his life. There is then reference to the one improvement to his appearance which has been made during Olga's absence; namely the getting of "*a set of porcelain veneers*".
265. With this description of the respective scenes in the three works in place, I turn to the question of whether copyright subsists in the selection of the Events which are relied upon by the Claimant in relation to the Bench Scene. In my judgment the general answer to this question is that copyright does subsist in the selection of the Events which are relied upon in relation to the Bench Scene. The Bench Scene seems to me to be an example of the Claimant's work which does not owe that much to ACOT, and is much more the product of the Claimant's own creativity. Although my analysis of the Bench Scene, as it is written in Lara, does demonstrate that the specified Events are only 7 details from the larger selection of events which comprises the Bench Scene, I accept that the selection of the specified Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically in writing the Bench

Scene. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in the Bench Scene. I do not think that the Baigent Point has any merit in this context. I therefore accept that copyright protection extends to the selection of these Events. I again stress that this is a general conclusion. It remains subject to the Selection Copyright Qualification, as that expression is defined earlier in this judgment.

266. This leaves the question of whether the Defendant has copied this selection or part of it in the relevant scene in chapter 6 of TSWK. In cross examination the Defendant accepted that she first wrote her scene in the August 2017 Draft. It follows that the Defendant wrote her scene after she had read Lara, albeit some months later.
267. In terms of similarity, the starting point is that the seven specified Events from the Bench Scene can also be found, albeit expressed in different terms, in TSWK. It is also the case that the bulk of these particular Events cannot, subject to a couple of exceptions, be found in any other source. They are only found in Lara and TSWK.
268. In cross examination the Defendant was taken through other possible sources for the 7 specified Events. So far as ACOT was concerned, the Defendant pointed to the reference to "*a little thinner perhaps*", on page 27 of ACOT, but I read that as a reference to Olga, not Boris. In the Bench Scene it is Boris who is described by Irina as having lost weight. There is also reference to Boris being unable to climb the stairs to Olga's apartment, on page 96 of ACOT, in a scene narrated by Irina where her grandmother brings the news to the apartment of a heart attack suffered by Boris. This detail can therefore be said to match Event 2 in the Bench Scene, although it comes much later in ACOT.
269. Another source which the Defendant said she used was Pasternak A Biography, by Ronald Hingley. This book includes an account of the attempt by Boris to ask Irina to speak to Olga on his behalf, and convey the message that while he still loved Olga, a change might take place in their relations. Irina is described as being sensible enough not to pass on the message. The particular Events relied on in the Bench Scene are not however in this extract. In TZA, at page 79, the same incident appears, but in similar terms to Hingley's work. Boris is described as having qualms about rekindling his affair with Olga, feeling under obligation to Zinaida, who had nursed him back to health following his heart attack. The clumsy attempt to get Irina to tell Olga that the relationship could not continue is then briefly described, concluding with Irina deciding to say nothing to her mother. The seven specified Events are not in TZA, although there is, on page 75 of TZA, an account of Boris' hospitalisation after his heart attack in 1952. The account includes reference to Boris having dental surgery while in hospital, and having his uneven equine teeth replaced with a gleaming set of American dentures.

270. Do the similarities in the specified Events lead to the conclusion that the Defendant has copied the selection of the specified Events from the Bench Scene, or a part of that selection which is itself protected by copyright? In my view they do not. To the contrary I cannot see that the Defendant has made any use of this selection or any part of it in TSWK.
271. The starting point is that I am not satisfied that the Defendant derived her inspiration for this scene from Lara. In cross examination the Defendant was asked from where she had derived her inspiration for this scene. The Defendant's answer was that she could not remember, but said that she knew this scene was in TZA and ACOT, and might also be in De Mallac. The Defendant also mentioned Barnes as a possible inspiration. The reference to Barnes was a reference to the two volumes of Boris Pasternak: A Literary Biography. I have already identified De Mallac in this judgment but, for ease of reference, this was a reference to Boris Pasternak: His Life and Art, by Guy De Mallac. Both works are listed in Amended Annex C to the Defendant's Amended Defence and Counterclaim, as research sources used by the Defendant. The reference to De Mallac was not explored further in cross examination, but Amended Annex B to the Amended Defence and Counterclaim makes reference to Barnes' citation of the description in ACOT of Irina's reaction to the message Boris had wanted her to convey to Olga. So far as TZA and ACOT are concerned, they both refer to the attempt by Boris to use Irina to convey the message to Olga that the relationship would have to change (ACOT) or could not continue (TZA).
272. If the Defendant had derived her inspiration for her scene from Lara, I would have expected the Defendant's scene to resemble much more closely the Bench Scene. There is however no such resemblance. The two scenes are written in completely different ways. One only fully appreciates this when one reads for oneself the two scenes and the surrounding material, but the summary of the two scenes which I have set out above will, I believe, give some idea of how different they are.
273. I am therefore satisfied, and I so find, that the Defendant derived her general inspiration for her scene in TSWK from one or more of ACOT, TZA, and Barnes. I am satisfied, and I so find, that the Defendant did not derive her inspiration for this scene from Lara.
274. It does not necessarily follow from this conclusion that the Defendant has not copied the selection of the specified Events in the Bench Scene which is protected by copyright. Again however I am satisfied, and I so find, that the Defendant has not copied this selection or any part of this selection which is protected by copyright.
275. The reason I say this is, again, that the relevant scene in TSWK is written in a completely different fashion. The selection of events bears no relation to Lara. The points of difference are too numerous to set out individually but,

concentrating on the specified Events, my reasoning on each of the specified Events can be summarised as follows:

- (1) The actual meeting between Boris and Irina in TSWK does not, strictly speaking, take place on a bench at all. Boris waits on a bench in Pushkinskaya Square. When Irina arrives, she suggests that they walk. Boris returns to *“his bench”* once the conversation has finished and Irina has left. In the Bench Scene Boris arranges to meet Irina *“on a bench in a Moscow boulevard”*. The conversation which then takes place is referred to at the end of the Bench Scene as *“the bench conversation”*, which I take to mean that the conversation between Boris and Irina, as narrated in the Bench Scene, takes place on the bench itself. Essentially, the only point of similarity is that in both works, Irina finds Boris sitting on a bench. Benches are a commonplace feature of a city, particularly where one party is waiting to meet another party. I am not satisfied that the Defendant has taken the reference to the bench from Lara. On the evidence, I find that she did not do so. Even if however the Defendant had taken this reference from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would prevent the use by the Defendant of a bench in a city as somewhere Boris chose to sit while waiting for Irina.
- (2) In the Bench Scene the inability of Boris to climb the stairs (Event 2) is used as the reason for meeting on the bench, at the outset of the Bench Scene. In TSWK the inability of Boris to climb the stairs is not mentioned until well into the scene, when it is given as the first excuse for Boris not being able to attend the party to celebrate Olga’s return. I have described above the intervening events in the Defendant’s scene, before one comes to the inability of Boris to climb the stairs. The inability of Boris to climb the stairs is mentioned in ACOT, and both ACOT and TZA record his heart attack in 1952, which might have been expected to interfere with his mobility. I am not satisfied that the Defendant has taken the reference to the inability of Boris to climb the stairs from Lara. On the evidence, I find that she did not do so. Even if however the Defendant had taken this reference from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of the idea of Boris being unable to climb the stairs to Olga’s apartment.
- (3) In the Bench Scene the sense of family connection felt by Irina is in the first paragraph of the Bench Scene, amidst a number of other details about Boris and about Irina’s feelings on seeing Boris. In TSWK the sense of family connection occurs in a different place, is expressed in a different manner, and is used for a different purpose. The relevant passage, which occurs after Boris has recalled his first meeting with Irina and after Boris has felt a stir of passion for Irina, runs as follows:

*“Let’s walk,” Ira had said, taking Boris’s arms. She’d often told him that he was her almost father, a compliment that both delighted him and filled him with apprehension.”*

The point here is of course that what Irina had previously told Boris about his almost being her father fills him with apprehension, given what he has to say to Irina. This bears no resemblance to *“the really vibrant and*

- burning sense of family connection, closeness, tenderness and joy*” felt by Irina at the outset of the Bench Scene, when she first sees Boris sitting on the bench. I am not satisfied that the Defendant has taken the reference to the sense of family connection from Lara. On the evidence, I find that she did not do so. Even if however the Defendant had taken this reference from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of Irina feeling this sense of family connection.
- (4) The reference to Boris having lost weight and had his teeth done in TSWK is not in the equivalent of the bench scene at all. It occurs after the Defendant’s scene is over, and the narrative returns to Boris working in his dacha. The details are given for the purposes of Boris appraising himself in advance of Olga’s return. It is important to note that, at page 75 of TZA, there is a lengthy description of Boris’ heart attack and other medical problems which occurred while Olga was in Potma. The description includes a reference to Boris having dental surgery while in hospital, when *“his uneven equine teeth were replaced with a gleaming set of American dentures, which, Akhmatova said, gave him a new “distinguished” look.”*. This particular passage is marked in the Defendant’s copy of TZA. I am not satisfied that the Defendant has taken these details from Lara. Indeed, it is quite clear to me that the reference, at least, to Boris having his teeth done was a detail taken by the Defendant from TZA. On the evidence, I find that the Defendant did not take any of these details from Lara. Even if however the Defendant had taken these details from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of these details.
- (5) The reference to the new reality in the Bench Scene occurs in the second paragraph, as Boris embarks on his attempt to have Irina tell Olga that the relationship could not continue. In the Defendant’s scene the reference to the new reality comes after Boris has attempted to make excuses for his non-attendance at the party to welcome back Olga. Boris says that *“We must adjust to this new reality”*. In the Bench Scene Boris *“implored Irina that she needed to make her mother see and accept this new reality”*. I can, in this instance, see that the Defendant might have made use of the phrase *“new reality”* as a result of seeing it in Lara. This would be consistent with the Defendant’s use of Lara as a secondary source. The phrase *“new reality”* is however a commonplace phrase, and its use in both Lara and TSWK is not surprising. In both scenes Boris is making a clumsy attempt to use Irina to inform Olga of a change in their relationship. Both scenes share this common feature with ACOT, at page 26, which was a common source for both authors. Ultimately, I am not satisfied that the Defendant took this particular detail (Event 5) from Lara. On the evidence, I find that the Defendant did not do so. Even if however the Defendant had taken this particular detail from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of this detail.
- (6) In the Bench Scene, towards the end of the conversation with Irina, Boris tells Irina that *“Olga must free herself from him and only count on his devotion and faithful friendship.”*. This comes several lines after the reference to the need for Olga to see and accept the new reality. In the



Defendant's scene Irina is told that *"You must tell your mother that we can have a friendship, but only that"*. This comes immediately after Boris says that *"We must adjust to this new reality"*. The context is different. The language is different. The ordering of the conversations is different. The expressions used are commonplace, and are natural expressions to use, in circumstances where Boris is trying to explain the nature of the new relationship he is attempting, through Irina, to impose upon Olga. I am not satisfied that the Defendant has taken this detail of the conversation from Lara. On the evidence, I find that she did not do so. Even if however the Defendant had taken this detail from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of this detail.

- (7) The Bench Scene ends, in the third paragraph, with Irina's thoughts on Boris' behaviour. Irina's ultimate conclusion is that *"They would just have to deal with it themselves. And that's what they did."* The Defendant's scene ends with Boris returning to the bench and wondering about his future. Prior to that, in the conversation between Boris and Irina, Irina says that *"I'll leave it up to my mother to decide what's best for her"*. The conversation then continues, and ends with the following exchange:

*"I don't want to leave things on these terms."*

*"Then you will meet my mother at the train station with us. You will embrace her. After all she's been through - for you. It's the very least you can do. Then you can tell her what you need to yourself."*

*Boris agreed and they parted ways."*

Again, the context is different. The language is different. The ordering of the conversations is different. The expressions used are commonplace, and are natural expressions to use, in circumstances where Irina is conveying to Boris that it is for Boris and her mother to sort things out. I am not satisfied that the Defendant has taken these details of the conversation from Lara. On the evidence, I find that she did not do so. Even if however the Defendant had taken these details from Lara, I cannot see that the copyright in the selection of the specified Events which is relied upon by the Claimant would protect the use by the Defendant of Irina's statement that Boris and Olga would have to deal with these matters for themselves.

276. It seems to me that the Claimant's reliance upon alleged copying of the selection of the specified Events in the Bench Scene is a particularly striking example of what Laddie J referred to as *"similarity by excision"* in *IPC*. In the case of the Bench Scene someone has conducted what looks like a forensic exercise to isolate what are said to be the similarities between the Bench Scene and the Defendant's scene. This can only be achieved by ignoring a raft of differences between the two scenes. As it happens, and as I have just explained in my previous paragraph, the process of excision does not in fact produce two similar sets of events. Even if however the process of excision did produce seven similar events in each scene, it would be very difficult to infer copying from the existence of these similarities, given all the differences between the two scenes. I have already made this point in relation to my consideration of the alleged copying of the selection of Events in chapters 5 and 6 of Lara. The point is however worth stressing in the case of

the Bench Scene, because it is well illustrated by the attempt to rely on the selection of the specified Events in the Bench Scene.

277. I have already stated my overall conclusion on the question of copying of the selection of the specified Events in relation to the Bench Scene. I repeat that overall conclusion for ease of reference. I am satisfied, and I so find, that the Defendant has not copied the selection of the specified Events in the Bench Scene or any part of this selection.
278. In summary therefore, drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to the Bench Scene are as follows:
- (1) The selection of the Events in the Bench Scene, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara.
  - (2) I find that the Defendant has not, either in chapter 6 of TSWK or elsewhere in TSWK, copied this selection of these Events or any part of this selection.
  - (3) I conclude that the Defendant has not, in relation to the Bench Scene, infringed the copyright in Lara.
  - (4) Accordingly, and in relation to the Bench Scene, the claim of infringement of copyright in Lara fails.

#### The Selection Claim – chapter 7 of Lara (A Fairy Tale)

279. The Claimant relies upon sixteen Events in chapter 7 of Lara, the selection of which is said to have been copied, in substantial part, in chapter 7 of TSWK (The Emissary). The Claimant also relies upon the last of these Events (Event 16) as a Supporting Allegation. Event 16 is said to have been copied in chapter 11 of TSWK (also The Emissary). The sixteen specified Events, as described in Annex 2, are as follows:
- (1) Boris and Olga reunite; Boris is weaker; they rekindle their relationship.
  - (2) Report from Collins Harvill on Olga's return from the gulag.
  - (3) Olga inspiring Boris; Boris being inseparable from Olga; huge progress with Doctor Zhivago (inspired by Olga).
  - (4) Olga and Boris only separated when Boris works at Peredelkino; description of improvements to Peredelkino.
  - (5) Olga frustrated that Boris refusing to leave Zinaida.
  - (6) Olga pregnant again.
  - (7) Olga spending time at Peredelkino whilst Zinaida away; Boris reading Doctor Zhivago to others; Boris reciting poetry to depleted audiences.
  - (8) Stillbirth; Olga renting dacha on the other side of Moscow.
  - (9) Olga rents dacha on shore of Izmalkovo.
  - (10) Olga staying when children return to Moscow after summer; moving to the Little House; further progress with Doctor Zhivago; Olga proof reading; Sunday visitors from Moscow.
  - (11) Olga running Boris' literary business.

- (12) Recollections of Irina and Olga of their time at Little House.
  - (13) Difference between the Little House and the Big House; different domains; BP mainly writing at Peredelkino but visiting Olga regularly; living dual lives.
  - (14) Every conversation leading back to Doctor Zhivago; book finished and bound.
  - (15) Olga trying to find publisher, Boris reading to Fedin who is rapt.
  - (16) Irina referring to Doctor Zhivago leading them down a spiral.
280. The first question to be answered, again, is whether copyright subsists in the selection of the Events in chapter 7 of Lara set out in Annex 2. The general answer to this question seems to me, again, to be straightforward. My reasoning, again, is essentially the same as my reasoning on this question in relation to the selection of the specified Events in chapter 5 of Lara. In my judgment copyright clearly subsists in the selection of Events in chapter 7 set out in Annex 2. I am satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapter 7 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapter 7 of Lara. I again reject the Baigent Point, for the reasons I have previously stated. I therefore accept that copyright protection extends to the selection of these Events.
281. I again need to add the further point, on the question of subsistence of copyright, that it is not said that the Defendant has infringed the copyright in the selection of all sixteen specified Events. The Claimant's case is that the Defendant has copied the selection of thirteen of the sixteen specified Events in chapter 7 of TSWK. For the reasons which I have previously set out in my discussion of this question, I accept that the selection of these thirteen Events constitutes a substantial part of the selection of the sixteen specified Events in chapter 7 of Lara, and a substantial part of Lara as a whole. As such, I accept that the selection of the thirteen specified Events is equally protected by copyright.
282. I again stress that the above conclusions relate to the selections of Events referred to in my previous paragraphs. Those conclusions remain subject to the Selection Copyright Qualification.
283. This leaves the question of whether the Defendant has copied the relevant selection of Events, or a part of it in the relevant chapter of TSWK, which is said to be chapter 7. In cross examination the Defendant accepted that she wrote all the relevant material after she received a copy of Lara. I will consider the specified Events first, and then consider the relevant Supporting Allegations, before coming to my conclusions on the question of copying.
284. In the case of the specified Events in chapter 7 of Lara it will be noted that the descriptions of each Event in Annex 2 are generally lengthy, and in some cases

include a number of different events, or topics. In some cases general words of description are used as a general reference to several pages of the book, containing a mass of detail which is not easily described or summarised in a couple of words.

285. An example of this is Event 3. It is described as *“Olga inspiring BP; BP being inseparable from Olga; huge progress with Doctor Zhivago (inspired by Olga)”*. The identified pages of chapter 7 are said to be pages 131-134. The words of description are however not a good summary of the material on pages 131-134. Olga’s inspiration of Boris is described in a single sentence on page 131. This is followed by an account of the passion and gusto with which Boris returned to the writing of Doctor Zhivago. It is explained that while Boris took almost eight years to write the first half of the novel, he completed the second half in twelve months, and completed the final draft of the novel two years later. There is then a lengthy quotation of Yuri’s (Dr Zhivago’s) reunion with Lara in the novel, followed by further references to the reunion and doomed passion of Yuri and Lara. This is followed by a description of how Boris liked to see himself in an heroic light; believing that the influence of his name had secured Olga’s release. The narrative then moves on to the poem (the Fairy Tale) which Boris wrote to celebrate Olga’s release, tying this to a description of how Boris wrote the poem about St George and the Dragon which Yuri is described as writing in Doctor Zhivago. Extracts from this poem are set out, together with a description of Boris seeing himself as the knight riding to the maiden’s rescue. There is then, on page 134, a reference to Boris being inseparable from Olga and only leaving her side to go to work, which is the first element of Event 4. Effectively, the expression *“huge progress with Doctor Zhivago (inspired by Olga)”* is used in Annex 2 to refer to three pages of detailed analysis of Doctor Zhivago and what it reveals about the way Boris saw himself.
286. Another example of the same thing is Event 7, which is described in Annex 2 as occupying pages 136-139 of chapter 7 of Lara, and is described as *“Olga spending time at Peredelkino whilst Zinaida away; BP reading Doctor Zhivago to others; BP reciting poetry to depleted audiences.”*. In fact Boris reciting his poetry to depleted audiences is on page 137. The next Event (Event 8), which commences with the stillbirth, begins at the foot of page 139. In between there is an account of the publication of ten of the poems from Doctor Zhivago and the lukewarm official reaction to their publication. This is followed by an extensive reference to the critical reaction of Varlam Shalamov, a poet and prose writer and a member of Boris’ *“small circle of intimate friends”*, to the manuscript of Doctor Zhivago. The material just mentioned occupies all of page 138 and most of page 139, so my assumption is that it must have been intended to be included in Event 7. This material bears little relation to the earlier material included in Event 7. Indeed, it is only when one reads the relevant pages of Lara that one appreciates the shortcomings in the description of Event 7 in this section of Annex 2.
287. The net result of all this is that the 16 specified Events do, very broadly and subject to some exceptions, cover the entire content of chapter 7 of Lara. This is however achieved, in the case of some of the specified Events, by cramming a

variety of subject matter and detail into a single Event, with a few words of very general description in Annex 2 to identify the Event.

288. Turning to chapter 7 of TSWK, it is very different. The chapter is short, running from pages 127-138. In this context it also needs to be kept in mind that the print in TSWK is materially less dense than it is in Lara. The structure and writing of the chapter are very different to chapter 7 of Lara. It is also important to note that chapter 7 of TSWK is in the first person, narrated by Olga. This contrasts with chapter 6 of TSWK, which is narrated in the third person, but from the perspective of Boris. Of more relevance, this also contrasts with chapter 7 of Lara, which is narrated in the third person, and not from one particular perspective.
289. Working through chapter 7 of TSWK, and comparing its content with the specified Events in chapter 7 of Lara, my analysis is as follows (references to chapter 7 are, unless otherwise indicated, references to chapter 7 of TSWK):
- (1) Chapter 7 opens with the reunion of Boris and Olga, which involves a description of Boris and Olga going to bed together. The short scene includes the reference to Boris and Olga coming together *“like crashing boulders that echoed across Moscow”*. It will be recalled that this was one of the extracts from TSWK which the Claimant did read when she dipped into the book before the drinks party in March 2019. It will also be recalled that this was instrumental in the Claimant’s decision never to read what she considered *“to be a trashy book that Boris and Olga would have hated”*. It is not for me to offer my views on the literary merits of either Lara or TSWK but, if and in so far as the Claimant was saying that this scene in TSWK was utterly different to Lara, I agree with her. The writing of the reunion is completely different in each work.
  - (2) Event 2 is not said to be in chapter 7.
  - (3) The equivalent of the materials assembled under the heading of Event 3 is said to be on pages 128 and 129 of chapter 7. I am not, in this analysis, directly concerned with the points of detail which comprise the Supporting Allegations in relation to chapter 7 of Lara. Subject to that qualification, I am bound to say that, in terms of selection of events, I can see nothing on pages 128 and 129 of chapter 7 which resembles the materials on pages 131-134 of chapter 7 of Lara. The writing is completely different.
  - (4) In relation to Event 4, there is a paragraph on page 128 of chapter 7 which refers to the close relationship between Boris and Olga and improvements to the dacha at Peredelkino. It is true that pages 134 and 135 of chapter 7 of Lara also refer to the inseparable nature of the relationship and improvements to the dacha, but there is no similarity in the writing. By way of example page 134 of Lara has an account of the pleasure Boris took in gardening. This is not referred to in the description of Event 4 in Annex 2, although it is a substantial part of this section of chapter 7 of Lara. There is no corresponding reference to gardening in chapter 7.
  - (5) Event 5 is Olga’s frustration that Boris refuses to leave Zinaida, although this is an incomplete description of what is said about the relationship on page 135 of chapter 7 of Lara, which includes a direct quotation from page

28 of ACOT. The equivalent material is said to be on pages 134 and 135 of chapter 7, after what is said to be the equivalent of Event 10. Pages 134 and 135 of chapter 7 do not however have any such equivalence. They principally contain Olga's musings on Boris' relationship with Zinaida, including her speculation on whether they slept together, and her imagining of them in bed together. This then leads into an account of Olga asking Boris if he did sleep with Zinaida or had slept with anyone else. There is nothing corresponding to this in Lara.

- (6) Event 6, Olga becoming pregnant again, is not said to be in chapter 7. There is a scene where Olga discovers she is pregnant, and informs Boris, in the January 2017 Draft. If the Defendant was copying the selection of the Events in chapter 7 of Lara, this situation would appear, at best, to amount to evidence of a decision by the Defendant not to copy this part of the selection. In reality, if one reads the relevant scene in the January 2017 Draft, it is immediately obvious that it bears no relationship to the scene in chapter 7 of Lara where Olga discovers the pregnancy.
- (7) Event 7, or more accurately the four pages of material in chapter 7 of Lara which are assembled under the heading of Event 7 are not said to be in chapter 7.
- (8) Event 8 is not said to be in chapter 7. In the January 2017 Draft there is a scene where Olga loses the baby. The circumstances in which the stillbirth is brought on are the same as in Lara, but after that the two scenes diverge. As with Event 6, if the Defendant was copying the selection of the Events in chapter 7 of Lara, this situation would appear, at best, to amount to evidence of a decision by the Defendant not to copy this part of the selection.
- (9) Event 9 is in chapter 7, in the limited sense that Olga's renting a house across Lake Izmalkovo is narrated on page 129 of chapter 7. This follows an account of Boris and Olga using a local cemetery to meet at Peredelkino from where, on one occasion, they see Zinaida walking up the main road to their dacha. In chapter 7 of Lara, Olga rents "*half a dacha*" following the tragedy of her stillbirth and following the renting of a dacha to the east of Moscow, which proves a disaster because it made it harder to meet Boris. The writing and context of the renting is very different, as between the two works.
- (10) Event 10 is also in chapter 7, again in the limited sense that, following the account of Olga renting the house, there follows a description of life at the house that summer. This is followed by a description of Irina's unhappiness at the situation and her attempt to return to Moscow, the return of the children to Moscow in the autumn for school, this time with her son Mitia (spelt "*Mitya*" in TSWK) not wishing to return to Moscow. There then follows a description of Olga being left alone in the house until late autumn, and then Olga's move, at Boris' persuasion, to another smaller house, closer to Boris, which is called the Little House. The specified section of chapter 7 ends with winter coming, and readings of Dr Zhivago starting up again. Friends would arrive on Sundays on the train from Moscow, with Irina and Mitya. All of this bears little or no resemblance to the portfolio of material

which is assembled as Event 10. Again, the writing and context are very different.

- (11) Event 11 is, so far as I can see, confined to a brief paragraph on page 142 of chapter 7 of Lara. On page 128 of chapter 7 there is a paragraph which describes how Boris left all business pertaining to his writing to Olga, but this comes before the account of Boris and Olga meeting in the cemetery at Peredelkino and before the events in chapter 7 which are said, incorrectly in my view, to be equivalent to Events 9 and 10. The two respective paragraphs are very differently written. In terms of ordering of events, the placing of Event 11 and the placing of the relevant event in chapter 7 are very different.
- (12) The account of life at the Little House which constitutes Event 12 is not said to be in chapter 7.
- (13) Event 13 comprises a collection of materials, spread over some three pages of chapter 7 of Lara. The collection defies short summary. The description of Event 13 in Annex 2 does not capture the material on these pages. By way of example only, it does not capture the scene where Boris, troubled by "*his old foe*", insomnia, gets up and writes a fresh poem to Olga. Nor does it capture the continuing analysis of Boris' dilemma, in terms of reconciling his relationships with Zinaida and Olga, which includes a lengthy quote from pages 187 and 188 of ACOT. The reference given for chapter 7 in Annex 2, in relation to Event 13, is page 133. I have read page 133 and the surrounding pages several times, trying to understand how they can be said to correspond to the collection of materials assembled as Event 13, and trying to understand how they evidence copying of the selection of the specified Events in Annex 2. I have however been unable to see any relevant relationship between Event 13 and any part of chapter 7.
- (14) Event 14 is the reference to every conversation leading back to Doctor Zhivago and the book being finished and bound, although there is considerably more than this in the materials assembled as Event 14. Turning to TSWK, there is reference to Boris finding a way to bring every conversation back to Doctor Zhivago on page 133 of chapter 7. This however is followed by an account of the Big House and Boris' life and routine there always being on Olga's mind. This is then followed by the scene I have mentioned above, where Olga speculates on whether Boris and Zinaida ever slept together, and her imagining of them in bed together. This then leads into an account of Olga asking Boris if he did sleep with Zinaida or had slept with anyone else. The next scene deals with the completion of Doctor Zhivago and the binding of the manuscript. Olga travels to Moscow to pick up three copies from the printer and brings them back to the Little House, where she and Boris dance in celebration. In terms of writing and selection of events, the section of chapter 7 of Lara which is characterised as Event 14 is very different to what is said to be the equivalent section in chapter 7.
- (15) Event 15 begins with Olga trying to find a publisher for Doctor Zhivago. This is followed by a meeting between Boris and Olga, where Boris predicts that the book will never be seen in print. There is then a long quotation from the letter written by Varlam Shalamov to Boris after reading the

manuscript of the book. There is then reference to An Essay in Autobiography, written by Boris, and the reference to Doctor Zhivago in the Essay. Finally there is the scene where Boris walks in the woods with Fedin, and reads him the book, chapter by chapter. This appears to be the end of the material which is included as Event 15, but before Event 16 there is the following important paragraph, which it is easiest to quote in full:

*“Goslitizdat never published extracts from the book or the poetry. The journal Znamia also turned down the manuscript. By May 1956, the novel, rejected by the three Russian publishing houses who had been sent the bound manuscripts, remained unpublished. Little did Boris, Olga and Irina know that the book was to have the most remarkable life of its own.”*

Turning to TSWK there is reference to Olga trying to find a publisher for Doctor Zhivago on page 136 of chapter 7. There is then a description of Boris waiting to meet Olga in the evenings, when she returns from meetings in Moscow. On one evening, following Olga’s return from another fruitless trip to Moscow, Boris is described as stopping in the middle of the road and announcing that he no longer believes that Zhivago will be published. Chapter 7 then moves on to a description of Boris and Olga becoming aware that they are under surveillance. So far as Event 15 is concerned therefore, there is a coincidence between Lara and TSWK in terms of Olga trying to find a publisher, and Boris expressing his concerns that Doctor Zhivago will never be published. Beyond this however, the relevant sections of each chapter are very different, both in terms of the way they are written and in terms of their context.

(16) Event 16 is not said to be in chapter 7. It is however said to have been copied by the Defendant in chapter 11 of TSWK, and this alleged copying is relied upon as a Supporting Allegation. I will come back to this alleged copying when I come to consider the Supporting Allegations in relation to chapter 7 of Lara.

290. With this analysis of the specified Events in place, I turn to the Supporting Allegations in this section of Annex 2, as they appear in relation to particular Events.

291. Event 4 includes a brief description of works of improvement to Boris’ dacha (the Big House), at page 134 of Lara, before the narrative turns to a description of Boris living at the dacha all year round, at the request of his doctors, and his keen gardening. In chapter 7 of TSWK, at page 128, there is a brief account of the improvements, which lists the same items of improvement work, but not in the same order or the same terms. Olga then comments that while she was living in barracks, Boris was living in a retreat in the woods most Russians could only dream of. On page 79 of TZA the improvements are also described, with the same items, described in identical terms to chapter 7 of Lara; *“with a gas supply, running water, a bath, and three new rooms”*.



292. In cross examination it was put to the Defendant that it was probable that she had obtained her account of the improvements from Lara. The Defendant's response was as follows:

*"A. I recognise the actual details of what the dacha looked like, the three new rooms, gas heat, running water, having come from The Zhivago Affair. Again, I was looking at A Captive of Time, and I was looking at Lara if it had these scene in history in it. So we would have to check."*

293. There then followed an interesting passage of cross examination, which it is useful to set out:

*"Q. You are absolutely right, some of those details are in The Zhivago Affair.*

*A. In order.*

*Q. The strange thing is that The Zhivago Affair is not mentioned in your Annex B as a possible source. You can see that if you go to B1-358.*

*A. Yes.*

*Q. I have been told I might have got that wrong.*

*A. It is in it.*

*Q. Looks like I have got that wrong. It is mentioned in paragraph 190.*

*A. Yes, and almost the exact same passage is in Lara, as The Zhivago Affair.*

*Q. So the question here then would be whether, when you wrote this, you were copying from Lara or whether you were copying from The Zhivago Affair. We will move on. The next - and the only thing I would add to that is ---*

*MR. JUSTICE EDWIN JOHNSON: You stated a question there, Mr. Caddick, but were you putting the question to the witness or---*

*MR. CADDICK: No, I was rather backing away from the fact that my preparation had proved inadequate. I had thought it was not mentioned in the Schedule B. It is always apparent that the references to the three new rooms and the gas heating were in The Zhivago Affair, but the interesting point was I thought, wrongly, that it had not been mentioned in Schedule B and my junior was pointing out I had that wrong. It is mentioned in Schedule B at paragraph 190.*

*THE WITNESS: Yes.*

*MR. CADDICK: So the issue there then, is going to be whether or not when you drafted yours you were looking at Lara or whether you were looking at The Zhivago Affair?*

*A. Or both.*

*Q. Or both, yes. The point I was going to make is the fact is you wrote this scene after you acquired Lara, did you not?*

*A. That is correct. At the time of writing this - what was the date of the first?*

*Q. 18th January 2017.*

*A. 18th January, so it has been a number of months since I acquired it.*

*Q. A considerable amount of time after you had had The Zhivago Affair, because you had had that for about two and a half ....*

*A. Absolutely. but I have read it multiple times since.*

*Q. But you had not written the scene, despite having had it. Let us move to the next thing."*

294. I have set out this passage of cross examination because it is representative of two consistent features of the Defendant's evidence. First, it was a consistent feature of the Defendant's evidence, which evidence I accept, that she was constantly returning to her sources and, in particular, made heavy use of TZA as a source. As such, it did not and does not seem to me that there is any real weight in the point that, by the time the Defendant came to write this scene, she had obtained a copy of Lara more recently than she had obtained a copy of TZA. Second, this was yet another example of the Defendant not being able to recall from where she had obtained particular details in TSWK. As I have already said, I did not find it surprising that the Defendant could not recall a matter of this kind.
295. In terms of my actual finding on this Supporting Allegation it does not seem to me that the evidence establishes that the Defendant copied the details of the work of improvement from Lara. It seems much more likely to me, and I so find, that the Defendant took these details from TZA and re-arranged and re-wrote them to fit into her own narrative in chapter 7 of TSWK. If however the relevant details relied upon in relation to this Supporting Allegation had been taken from Lara, I would not have regarded this as good or any evidence of the Defendant having copied the selection of the specified Events in chapter 7 of Lara, or any part of that selection, or indeed any other relevant selection of Events in Lara. For ease of reference I will, in my discussion of the Supporting Allegations in relation to chapter 7 of Lara, again use the expression "**selection copying**" as shorthand for the copying referred to in my previous sentence.
296. The next Supporting Allegation is concerned with the first "*half dacha*" which Olga rented on Lake Izmalkovo, in the adjacent village to Peredelkino. In chapter 7 of Lara, at page 140, it is said that Olga's proximity was a welcome relief to Boris, who could walk the 20 minutes from his dacha. In chapter 7 of TSWK, at page 129, Olga is described as renting a house across Lake Izmalkovo, "*a thirty-minute walk from his dacha*". The passage continues "*Borya wouldn't live with me, but it would be place of our own, a place for a new start.*". In cross examination there was debate about whether this detail in TSWK had come from TPA (The Pasternak Affair by Sergio D'Angelo), where the distance is given as a 15 minute walk. It was also pointed out to the Defendant that, in her initial draft of this scene, in the January 2017 Draft, the distance was given as a short 20 minute walk. The Defendant accepted that, although she did not remember, she likely had picked up the time of 20 minutes in the early draft from Lara. In the final draft however, the time of the walk became 30 minutes. It was also said that in both Lara and TSWK the proximity was mentioned as a benefit to Boris. This was also accepted by the Defendant in cross examination as a similarity. Reading the two passages in Lara and TSWK I am dubious that the Defendant was right to accept this point. In Lara, Olga's proximity is described as "*a welcome relief for Boris*". There are no equivalent words in TSWK.
297. I am not satisfied that, in the final version of TSWK, the Defendant copied any of the details relied upon in relation to this Supporting Allegation from Lara. At best, the Defendant, in an earlier draft of this part of TSWK, copied the timing of the walk from the Big House to Olga's property, which would be consistent with her use of Lara as a secondary source, but then changed the timing. So far as chapter 7 of the final version of TSWK is concerned I find that the Defendant did

not copy any of the details relied upon in relation to this Supporting Allegation. If however the relevant details in the final version of TSWK had been taken from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

298. On page 130 of TSWK poplar roots are described as making natural steps to the door of Olga's house. On page 140 of Lara there is a description of how "*Gnarled roots provided uneven yet charmingly bucolic steps to the door of the veranda*" of Olga's house. At the outset of her cross examination on this topic the Defendant volunteered the information that she thought that she had got this detail (the roots providing steps) from Lara. I accept this evidence, which is again consistent with the Defendant's use of Lara as a secondary source. I find that the Defendant did take this detail from Lara. I do not however regard this as good or any evidence to support the allegations of selection copying.
299. The next Supporting Allegation concerns the reaction of Boris to the house rented by Olga on the lake. On page 141 of Lara Boris is described as taken aback by the glassed-in veranda and the lack of privacy. On page 130 of TSWK there is reference to Boris scolding Lara on the basis that "*a glass house offered no privacy when the whole point of my moving closer was to afford us more.*". There is a similar scene in ACOT at page 40, where Boris has a similar reaction to the lack of privacy. An attempt was made in cross examination to differentiate the passage in ACOT on the basis that there is no reference to Boris' dislike of the lack of privacy. I found this attempted differentiation unconvincing. It is quite obvious from what is written on page 40 of ACOT that Boris was unhappy with the lack of privacy and that, as a result, Olga hurriedly arranged curtains for the glass, which did not satisfy Boris. I am not satisfied that the Defendant copied the relevant details from Lara. I find that the Defendant took these details from ACOT, and re-wrote them as she wanted them, on page 130 of TSWK. Again however, if these details had been taken from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
300. The next Supporting Allegation (in Event 10) relates to the order of events on pages 129-130 of TSWK, which is said to reflect the order of the same events on page 140 of Lara. The order of events is the same, provided that one ignores the events and details that are not the same in the two passages. Quite apart from this most of the same material is on pages 40 and 41 of ACOT. I am not satisfied that the Defendant copied the relevant order of events from Lara. On the evidence I find that she did not do so. If she had done so, I would not have regarded this as good or any evidence to support the allegations of selection copying.
301. The next Supporting Allegation (also in Event 10) relates to page 133 of TSWK, where there is a description of friends coming to the Little House in winter for readings of Doctor Zhivago. The description is that "*That winter felt so far from my days spent in darkness. Friends came, and the readings of Doctor Zhivago started up again. Every Sunday, Mitya and Ira and our friends would take the train in from Moscow. We'd dine, then Borya would read, I the hostesss at this side once again.*". On page 142 of Lara the relevant paragraph reads as follows:

*“Every Sunday, Irina, Mitia and Olga’s friends from Moscow would visit. Olga and Boris would host these informal Sunday lunches, which soon turned into regular literary gatherings.”*

302. In ACOT, the following appears on page 42:

*“On Sundays we were visited by my mother, Ira, and our friends and acquaintances. It was very agreeable to be able to receive them all in a home of one’s own. These occasions on which we kept open house sometimes turned into regular literary gatherings.”*

303. The point made in cross examination was that the Defendant had chosen to use the words “*Every Sunday*”, and that the friends were described as coming from Moscow. Both these elements were in Lara, but not in ACOT. It was put to the Defendant in cross examination that, in these two elements, she had chosen to follow Lara, not ACOT. The Defendant thought this was likely, although she did not remember. It seems to me pretty obvious that friends would have been coming from Moscow, whether ACOT said that or not. The difference between “*On Sundays*” and “*Every Sunday*” also seems to me to be insignificant. I am however prepared to find, on the basis of the Defendant’s evidence in cross examination, that the Defendant did take these two minor details from Lara. The details seem trivial to me. Taken individually I do not regard them as good or any evidence to support the allegations of selection copying.

304. Moving to Event 13 there is an account, on page 133 of TSWK, of life at the Little House. Then, on page 134 of TSWK, there is an account of the Big House being always on Olga’s mind. In particular, there is a reference to Zinaida only entering Boris’ study to clean, and never interrupting his work. In Lara, at page 145, there is a reference to the contrast between the cosy domesticity of life at the Little House, when Boris was there, and Boris’ state of solitude in his large upstairs study in the Big House, which Zinaida only entered to clean. If I have understood this point correctly, the Supporting Allegation is that the Defendant copied the contrast between the cosy domesticity of life at the Little House and the solitude of the study at the Big House from Lara, which is illustrated by the detail of Zinaida only entering the study to clean, which is not in ACOT at the point where a description is given of how Zinaida managed the Big House. Subject to one exception I am not satisfied that the Defendant copied anything from Lara in relation to her description of life at the Little House and life at the Big House. There are simply too many differences between the two accounts for this to be plausible. The exception is that I can see that the Defendant might have taken the detail of Zinaida only entering the study to clean from Lara. It is the sort of minor detail which the Defendant might well have taken from Lara, using it as a secondary source. I therefore find that the Defendant did take this detail from Lara. Apart from this detail I find, on the evidence, that the Defendant did not copy anything from Lara in relation to her description of life at the Little House and the Big House. As with other small details which I have found to have been taken from Lara, I do not regard the detail which was taken as good or any evidence to support the allegations of selection copying. I also add that if I had found that the Defendant had copied from Lara the other details which are relied

upon in relation to this Supporting Allegation, I would not have regarded this as good or any evidence to support the allegations of selection copying.

305. The next two Supporting Allegations are in Annex 2 and were dealt with in cross examination, but do not seem to be in the list of Supporting Allegations in paragraph 91 of the Claimant's written closing submissions. First, at page 146 of Lara there is a quotation from the Legendes Translation which includes a reference to every conversation coming back to Doctor Zhivago. On page 133 of TSWK there is reference to Zhivago being ever present, and Boris finding a way to bring the conversation, whatever its subject matter, back to Doctor Zhivago. In cross examination no other source was identified for this reference other than Lara, although the cross examination moved on before the point had been explored in detail. The relevant passages in Lara and TSWK are very different in their writing, and I am not satisfied that the Defendant took the idea of Boris bringing every conversation back to Doctor Zhivago from the quotation from the Legendes Translation in Lara. On the evidence I find that the Defendant did not do so. Second, the Defendant includes in TSWK the telephone call Boris makes to Olga, telling her that he has finished Doctor Zhivago. The same scene is on page 208 of ACOT, and pages 146 and 147 in Lara. In Lara, but not in TSWK and ACOT, Olga is described as being in her Moscow apartment. The point made in cross examination was that if one looked at the January 2017 Draft, the Defendant wrote this scene with specific reference to Olga being in her Moscow apartment, and also made reference to Boris signing a contract for Doctor Zhivago to be published by Novy Mir, a Soviet literary journal, but then paid back the advance. The latter detail is also in Lara, at page 147. Neither of these details was included in the final version of TSWK. I am not satisfied that the Defendant did take these details from Lara in the January 2017 Draft. The writing is very different in the January 2017 Draft. On the evidence I find that the Defendant did not take these details from Lara. I do not think however that the point matters much. In the case of both of the Supporting Allegations considered in this paragraph, I do not think they would, even if established as cases of copying, have provided good or any evidence to support the allegations of selection copying.

306. The next Supporting Allegation in the list at paragraph 91 of the Claimant's closing submissions is concerned with the efforts to get Doctor Zhivago published in the Soviet Union. I am not sure what the relevant detail or details are which were said to have been copied by the Defendant from Lara in this context. This Supporting Allegation was not pursued in cross examination. I therefore move on to the next Supporting Allegation, which is a specific scene in TSWK, on page 136, where Olga is described as returning from another fruitless trip to Moscow trying to find a publisher. Boris meets her and stops in the middle of the road to announce that he no longer believes Doctor Zhivago will be published. The conversation between Boris and Olga is as follows, with Boris speaking first:

*"You mark my words. They will not publish this novel for anything in the world."*

*"You must be patient. You don't know that yet."*

*"They'll never allow it." He scratched his eyebrows. "Never."*

307. On page 147 of Lara there is a scene where Boris meets Olga from the Peredelkino station and walks with her back to the Little House. As they cross the bridge spanning the lake, Boris makes the following statement:

*“You mark my words, they will not publish this novel for anything in the world. I don’t believe that they will ever publish it. I have come to the conclusion that I should pass it round ready to be read by all and sundry – it should be given to anyone who asks for it, because I do not believe it will ever appear in print.”*

308. At page 210 of ACOT the scene is described in the following terms:

*“On a warm evening that autumn of 1955, after one of my regular trips to Moscow, Boria and I were walking over the long bridge across the Izmalkovo lake, when he said to me: “You mark my words - they will not publish this novel for anything in the world. I don’t believe they will ever publish it. I have come to the conclusion that I should pass it round to be read by all and sundry - it should be given to anyone who asks for it, because I do not believe it will ever appear in print.”*

309. The scene is described in the following terms in TZA, at page 82:

*“As Pasternak and Ivinskaya walked over the footbridge across Izmalkovo Pond one evening that fall, he said: “You mark my words – they will not publish this novel for anything in the world. I don’t believe they will ever publish it. I have come to the conclusion that I should pass it around to be read by all and sundry.”*

310. The point put in cross examination was that neither ACOT nor TZA had the details of (i) Boris meeting Olga at the train station and (ii) Boris and Olga walking back to the Little House. These details are not in the scene I have quoted from TSWK above, but the point made in cross examination, which seems to me a fair one, was that the previous paragraph on page 136 of TSWK established that Boris would wait to meet Olga at the train station on many nights when she returned from her meetings in Moscow, and would walk back to the Little House with Olga. I therefore treat these details as part of the scene from TSWK which I am considering. I cannot however see that these details demonstrate any copying of Lara. These details are obvious parts of a scene involving Boris meeting Olga on her return to Peredelkino to Moscow. I would not expect the Defendant, or any writer for that matter to have to derive these details from another source. If Olga was coming back from Moscow to Peredelkino, the train station was the obvious place for Boris to meet Olga. Equally obvious is that Boris would walk back to the Little House with Olga. I find that the Defendant did not take these details or any part of this scene from Lara. I find that the Defendant’s inspiration for this scene was what she had read in ACOT and TZA, as quoted above. I add that if the Defendant had taken these details or any part of this scene from Lara I would not have regarded this as good or any evidence to support the allegations of selection copying.

311. I also add that this particular Supporting Allegation is a good example of the debt owed by the Claimant to ACOT. It will have been noted, from the quotations of this scene which I have set out above, that the scene as written in Lara is, in substantial part, a verbatim copy of the same scene in ACOT.

312. The final Supporting Allegation concerns a reference on page 193 of TSWK (in chapter 11) to Doctor Zhivago taking “us” (here meaning Boris and Olga) “*down a spiral from which there will be no return*”. At the end of chapter 7 of Lara there is a statement that “*The book was going to take us down a spiral*”, which is given as a statement written by Irina, and is quoted from the Legendes Translation. This point was pursued in cross examination in the context of chapter 8 of Lara. The Defendant thought that she had gleaned the phrase “*down a spiral*” from Lara, but pointed out that she had Olga saying this to Boris, after they had had a row, and that the phrase was used at a very different point in time in the narrative. In cross examination the Defendant explained what she thought had happened in the following terms:

*“A. Yes, I think I did glean the phrase “downward spiral” [I assume that this phrase, which appears in the transcript, is a reference to “down a spiral” – the transcription may have been inaccurate at this point] from Lara, although, as you said, I use it in a different person, Olga saying it to Boris, after they are having a fight about him giving it to D'Angelo. Mine is also at a very different point in time in the narrative. When Irina is saying this, they are already ready for publication. When I am saying this, it is just when he hands to D'Angelo and they are having an argument. So the chronology is different. But, yes, I think that word, I think I like it, I think it stuck in my head. I do not remember looking at that sentence and thinking, like, “I am writing this down”, but it probably stuck in my head, and used in a different way.”*

313. I accept the Defendant’s evidence. I find that she did take from Lara the reference to the book taking (in her narrative) Boris and Olga down a spiral. I also accept the Defendant’s evidence as to how this would have come about; that is to say from her recollection of a detail she had read in Lara. The detail is the same, but the context in which the detail is used is very different in TSWK. I do not regard the Defendant’s use of this detail as good or any evidence to support the allegations of selection copying.

314. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapter 7 of Lara or a part of that selection.

315. So far as the Events themselves are concerned, the comparison exercise which I have conducted above seems to me to offer no evidence of the Defendant having copied the selection of the specified Events in chapter 7 of Lara, or any part of that selection. The selection of events in chapter 7 and (so far as relevant) in chapter 11 of TSWK is very different to the selection of events in chapter 7 of Lara. Beyond that, my concluding comments are essentially the same as those I

have made in relation to the allegations of copying of selection in relation to chapters 5 and 6 of Lara.

316. Turning to the Supporting Allegations the position, on the basis of my analysis set out above, seems to me to be similar to the position in relation to chapters 5 and 6 of Lara. The Supporting Allegations offer some, limited evidence of the Defendant making use of details picked up from Lara. They offer no evidence of selection copying. At best, some of the Supporting Allegations serve to corroborate the Defendant's evidence that she used Lara as a secondary source. On my findings the Supporting Allegations demonstrate only a few instances of the Defendant making use of details picked up from Lara. Those instances do not, in my view, support the allegations of selection copying. In the case of the bulk of the Supporting Allegations I have found that the Defendant did not copy the relevant details from Lara. I have also however gone on to make the point that, if I had found such copying, I would not have regarded the relevant Supporting Allegation as providing good or any evidence to support the allegation of selection copying. I again reiterate this point. If my findings had been different in relation to this group of Supporting Allegations, and if I had found that the Defendant had copied further particular details from Lara as alleged, I would not have regarded this as good or any evidence of selection copying. My reasons for saying this are the same as I have set out in relation to chapters 5 and 6 of Lara. I repeat those reasons for ease of reference. In relation to each such Supporting Allegation, it seems to me that the relevant details, even if assumed (contrary to my findings) to have been copied from Lara, are too trivial to support the allegations of selection copying. It also seems to that the differences between the relevant parts of the two works, in terms of the selection of events, are too great for a finding of selection copying to be possible on the basis of the relevant Supporting Allegations, even if the same had been established as instances of copying.
317. In terms of providing support for the claim that the Defendant copied the selection of the specified Events in chapter 7 of Lara or part of that selection, I have considered this question in the case of each individual Supporting Allegation, and found no such support. There is however the question of whether the Supporting Allegations in relation to chapter 7 of Lara, if taken cumulatively, provide support for the allegation of selection copying. Given my findings on the question of whether copying took place in relation to each Supporting Allegation, this question does not arise. On my findings, it seems to me that there is no such accumulation of Supporting Events to support the allegations of selection copying. I should however say that even if I had found all or a material number of the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara, this would not have caused me to conclude that the Defendant had copied the selection of the specified Events or a part of it. I say this for the same reasons as I have just expressed in relation to the Supporting Allegations when taken individually. Those reasons seem to me equally to apply if the Supporting Allegations are taken cumulatively. I also repeat, from my discussion of the Supporting Allegations in relation to chapter 5 of Lara, the Consistency Problem. The Consistency Problem seems to me to apply equally to the Supporting Allegations in relation to chapter 7 of Lara.



318. On the basis of the above discussion, and taking into account all the evidence which I have received and heard, and reviewing my analyses of the specified Events in chapter 7 of Lara and the Supporting Allegations, the position seems clear to me. I find that the Defendant has not copied the selection of the specified Events in chapter 7 of Lara, or any part of it.
319. In summary therefore, drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to chapter 7 of Lara are as follows:
- (1) The selection of the Events in chapter 7 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara. The same is true of the selection of these Events which is alleged to have been copied.
  - (2) I find that the Defendant has not, either in chapter 7 of TSWK or elsewhere in TSWK, copied the relevant selection of these Events or any part of this selection.
  - (3) I conclude that the Defendant has not, in relation to chapter 7 of Lara, infringed the copyright in Lara.
  - (4) Accordingly, and in relation to chapter 7 of Lara, the claim of infringement of copyright in Lara fails.

#### The Selection Claim – chapter 8 of Lara (The Italian Angel)

320. The Claimant relies upon thirteen Events in chapter 8 of Lara, the selection of which is said to have been copied, in substantial part, in chapter 11 of TSWK (The Emissary). The thirteen specified Events, as described in Annex 2, are as follows:
- (1) Olga returns from Moscow; argues with Boris.
  - (2) Olga and Zinaida united.
  - (3) Details of other copies of Doctor Zhivago smuggled out.
  - (4) Olga pleading with Bannikov in Moscow; Writers' Union disquiet.
  - (5) Olga visiting D'Angelo; pleading for publication to be delayed; Boris signing contract with Feltrinelli.
  - (6) Olga back in Moscow trying to publish; visiting Polikarpov; possibility of edited version being published but Boris not interested.
  - (7) Olga negotiating with Feltrinelli; Boris giving copies to further visitors (including Isaiah Berlin); Boris writing to family about Berlin.
  - (8) D'Angelo meeting at Radio Moscow and with Boris.
  - (9) Attack on novel in Novy Mir; Goslitizdat asking Feltrinelli to delay publication; Boris signing contract with Goslitizdat.
  - (10) Boris ill and writing to Olga from hospital.
  - (11) Boris summonsed to Writers' Union; sending Olga with a note instead.

- (12) Olga taking note from Boris to Polikarpov; Polikarpov drafting telegram for Boris to send; Boris eventually sending in Russian knowing Feltrinelli will ignore.
- (13) Boris writing to his sister, Lydia, in English; referring to Olga being Lara; and to Feltrinelli to thank him.

321. The first question to be answered, again, is whether copyright subsists in the selection of the Events in chapter 8 set out in Annex 2. I can take this question shortly, because my reasoning is effectively the same as that set out in my previous answers to this question, in relation to the earlier chapters in Lara. In my judgment copyright clearly subsists in this selection of Events. I am satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapter 8 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapter 8 of Lara. I again reject the Baigent Point, for the reasons which I have already stated in relation to chapter 5 of Lara. I therefore accept that copyright protection extends to the selection of these Events.

322. I again add the further point, on the question of subsistence of copyright, that it is not said that the Defendant has infringed the copyright in the selection of all thirteen specified Events. In the case of chapter 8 of Lara this further point needs a little more attention than it has received in relation to the Claimant's case on chapters 5, 6, and 7 of Lara. I say this because it is a remarkable feature of this part of the Claimant's case that the Defendant is alleged to have copied the selection of only five of the thirteen specified Events in chapter 11 of TSWK. This does seem to me to raise, in a rather more acute form than before, whether the selection of five out of thirteen specified Events can qualify for copyright protection as a substantial part of Lara, and of the selection of the thirteen specified Events. Ultimately however I cannot see a distinction in principle, in terms of the subsistence of copyright, as between the claim in respect of chapter 8 of Lara, involving a selection of five out of thirteen events, and the claims in respect of chapters 5, 6, and 7 of Lara, which involve the selection of a higher proportion of events relative to the total number of specified events. I accept that my reasoning on this point in relation to chapter 5 of Lara still applies. I therefore accept that the selection of the relevant five Events constitutes a substantial part of the selection of the thirteen specified Events, and a substantial part of Lara as a whole. As such, I accept that the selection of the five specified Events is equally protected by copyright.

323. I again stress that the above conclusions relate to the selections of Events referred to in my previous paragraphs. Those conclusions remain subject to the Selection Copyright Qualification.

324. This leaves the question of whether the Defendant has copied the relevant selection of the specified Events, or a part of it in the relevant chapter of TSWK, which is said to be chapter 11. I will consider the specified Events first, and then consider the relevant Supporting Allegations, before coming to my conclusions on the question of copying. Before conducting my analysis of the selection of events in chapter 8 of Lara and in chapter 11 of TSWK, there are two preliminary points to make.
325. The first preliminary point is that the list of Events in chapter 8 of Lara, in common with the list of Events in chapter 5 of Lara, is a pruned version of the list of events in Schedule B (the predecessor of Annex 2), as attached the Claimant's skeleton argument for trial. The first Event now listed in Annex 2 (Olga returns from Moscow; argues with Boris) was originally event 5 of the events listed from chapter 8. Events 1-4, as originally listed, were said to have been copied in their selection by the Defendant in chapter 10 of TSWK. The Defendant had however already written most of what became chapter 10 of TSWK in the August 2016 Draft. As a result the references to chapter 10 of TSWK did not appear in Annex 2. This pruning was not as substantial as that which took place in relation to chapter 5 of Lara, but I still consider the pruning to be significant, for essentially the same reasons as I have set out in my discussion of this point in relation to chapter 5 of Lara.
326. The second preliminary point is that this section of Annex 2 opens with the claim that the Defendant accepted "*in broad terms that Lara and TSWK share the elements listed below and that she "definitely looked at Lara": T280/721*". This claim needs to be treated with some caution, for two reasons.
327. First, this claim might lead one to think that there is a high level of similarity between the thirteen Events listed in this section of Annex 2, and events in chapter 11 of TSWK. In fact, and as I have just pointed out, it is a remarkable feature of this part of Annex 2 that only five of the specified Events are said to be reflected by events in chapter 11 of TSWK. I have already accepted that copyright subsists in this selection of five Events. It follows, in principle, that copying of selection, amounting to an infringement of copyright, could have taken place in relation to the relevant five Events. I also accept the need to go through the relevant Events in order to determine whether copying of selection has taken place. All that said, the actual selection which is said to have been copied comprises five out of thirteen Events.
328. Second, the relevant section of the Defendant's cross examination, which is too lengthy to set out in full, requires careful reading. The relevant five Events were put to the Defendant in cross examination. It was put to the Defendant that, in broad terms, similarities existed between these Events and events in chapter 11 of TSWK. The Defendant accepted the existence of similarities, in "*Very broad terms, because there is a lot missing that my book does not include in this chapter, which is in our Schedule B*". There then followed these exchanges:

*“Q. Given what we have seen throughout about the extent to which you were using Lara at this time, is it not likely that the reason for that similarity is because you were using Lara as a source as your material?”*

*A. As a source? It was likely I looked at Lara, but I definitely was looking at the The Zhivago Affair, which I believe outlines almost all of these things as well, and many of them are in A Captive of Time too.”*

*“MR. JUSTICE EDWIN JOHNSON: So the question, Ms. Prescott, was is the reason for the similarity in these points because you were copying from Lara?”*

*A. I definitely looked at Lara, I am sure, but these elements are also in the The Zhivago Affair as well and A Captive of Time.”*

329. These answers were consistent with the Defendant’s evidence, throughout her cross examination, that she did use Lara as a source, albeit as a secondary source, but that she was also using TZA and ACOT. It seems to me therefore that the claim made at the outset of this section of Annex 2, as to the effect of the Defendant’s evidence in cross examination, does not give the complete picture of this part of her evidence.
330. Turning specifically to the structure and content of chapter 8 of Lara, it is another lengthy chapter, occupying pages 150-175. My analysis of the structure and content of the Events specified is as follows:
- (1) Event 1 does not occur until page 153, following the pruning of this section in Schedule B. It may be said to run to the top of page 155, where the argument ends and Olga reflects on the desire of Boris to see the book published, in the West if publication was not possible in the Soviet Union. There then follows a separate paragraph, describing how other copies of Doctor Zhivago were smuggled out of the Soviet Union.
  - (2) Event 2 is a short paragraph in the middle of page 155.
  - (3) Event 3 is described as following Event 2, and is described as details of other copies of Doctor Zhivago being smuggled out. This is not accurate. The details of other smuggling begin in the paragraph before Event 2. There then follows an account of Boris giving another copy of the manuscript to Fedeki, over the objections of Zinaida, which are described in relation to this incident and in relation to another incident. The narrative then moves to an account of D’Angelo flying to Berlin, meeting with Feltrinelli, and the passing of the manuscript to Feltrinelli, who returns to Italy with the manuscript, which is sent for translation into Italian.
  - (4) It is only after this that Event 4 occurs. It is described as *“Olga pleading with Bannikov; Writers’ Union disquiet”*. This description does not however capture all the different events which occur, on pages 156 and 157, before Boris suggests that Olga try to get the manuscript back from D’Angelo.
  - (5) This then leads into Event 5, which is described as being on pages 157-159. This is not accurate. The disquiet of the Writers’ Union, which is part of Event 4, is described on page 157. At the foot of page 157 Olga returns to

Peredelkino to see Boris, and Boris suggests, in view of her reaction and the reaction of their friends to his handing over the manuscript, that she should try to recover the manuscript from D'Angelo. Olga's visit to D'Angelo to try to recover the manuscript is then described, on page 158. At the top of page 159, Event 5 ends, with an account of how Boris had signed the contract with Feltrinelli, with no regard for the consequences.

- (6) Event 5 is not followed by Event 6. Instead there is a good deal of intervening material. In the first full paragraph on page 159 there is a description of Boris' attitude to publication, and an account of how Feltrinelli struck literary gold with Doctor Zhivago. This is followed by the recollections of Charles Pasternak (Boris' nephew) of Feltrinelli and his third wife, the German photographer, Inge Schoenthal. The next events are an account of KGB surveillance of Boris, and the commencement of state sponsored criticism of Doctor Zhivago. It is only after all of this material that Event 6 is reached, at the foot of page 160.
- (7) Event 7 is a collection of materials, which runs from the foot of page 161 to page 163. Events 8 and 9 then follow, with Event 9 ending halfway down page 166.
- (8) Event 10 is said to run from pages 166-170. It is described as "*BP ill and writing to Olga from hospital*". This description is not accurate. The description is a summary of what can be found on pages 166, 167, and part of 168. Thereafter there is an account of Zinaida's daily visits to the hospital, including one visit which ends in embarrassment when Zinaida, on presenting her identification papers, is told that a blonde woman had already visited an hour before, who had said that she was Boris' wife. This is followed by an account of Boris being moved to the Uzkoye Sanatorium. This includes the quotation of an account by Evgeny Pasternak of a visit to Boris by his sons. The narrative then moves to Boris returning to Peredelkino, where he is described as taking a long gentle walk with his friend Alexander Gladkov. The conversation on this walk is recounted in detail. Event 11 is finally reached on page 170.
- (9) Event 12 then follows. Event 12 ends on page 172. It is followed by Boris sending a letter to Irina, who is on holiday at a resort in Georgia. A letter from Olga is included in this letter. This is followed by an account of an Italian paper reporting on a press conference in Milan, where Surkov had claimed that the manuscript of Doctor Zhivago was being publishing against the will of Boris. Only after this is Event 13 reached, which comprises Boris writing to his sister, Lydia, and to Feltrinelli.
- (10) Event 13 does not conclude the chapter. The chapter concludes with the publication of Doctor Zhivago in Italy, both in serial form in L'Espresso, and in its first edition. The closing words of the chapter are as follows:

*"Doctor Zhivago was a controversial bestseller. Its progress around the world had begun."*

331. It will be noted from the above analysis that chapter 8 of Lara includes a good deal of material which is not part of the specified Events. It will also be noted

that some of the Events include a large collection of disparate material, which is not captured by the description of the relevant Event.

332. Turning to the structure and content of chapter 11 of TSWK it is, again, very different. The chapter is, again, short. The chapter runs from pages 189-200, with the less dense print I have already mentioned. The structure, content, and writing of the chapter are very different to chapter 8 of Lara. In contrast to chapter 8 of Lara, chapter 11 of TSWK is, again, in the first person, narrated by Olga.
333. Working through chapter 11 of TSWK, and comparing its structure and content with the structure and content of the specified Events in chapter 8 of Lara, my analysis is as follows (references to chapter 11 are, unless otherwise indicated, references to chapter 11 of TSWK):
- (1) Chapter 11 opens with Olga's train pulling into Peredelkino after four fruitless days in Moscow, trying to persuade publishers to print Doctor Zhivago. After a description of the surroundings and Olga's reaction to seeing Boris, Boris tells Olga about his two visitors. At the end of this account Boris reveals that he has given the manuscript of Doctor Zhivago to D'Angelo. Olga is annoyed (*"I tried to keep my voice down, but it came out like steam escaping a kettle"*) and castigates Boris, who tries to reassure her. The scene ends with Olga saying that she will ask for the return of the manuscript. Also at the end of this scene is the statement by Olga that the book *"will take us down a spiral from which there will be no return"*. The Defendant acknowledged that she had taken this expression from Lara; see my discussion of the relevant Supporting Allegation in the previous section of this judgment. The scene resembles Event 1, in the sense that Olga returns from Moscow, meets Boris, and an altercation ensues over the handing over of the manuscript. Beyond this, the two scenes are written very differently in the two works. The same basic scene can be found in ACOT (pages 212-213) and in TZA (page 90).
  - (2) Event 2 is separated from Event 1 in chapter 8 of Lara by a paragraph which deals with the smuggling of copies of Doctor Zhivago out of the Soviet Union. In chapter 11 the agreement between Zinaida and Olga (page 195) does not come until after Olga has been to see D'Angelo, realises that the situation cannot be retrieved, and conceives her plan of trying to get the book published in the Soviet Union first. The writing of the relevant paragraph in each work is very different. In cross examination it was put to the Defendant that she must have taken the reference to Zinaida and Olga being in agreement for the first time from Lara, because there is no such reference in any other source. This strikes me as doubtful. In TZA, at page 90, there is reference to the negative reaction of both Zinaida and Olga to the news that Boris had handed over the manuscript. In the August 2016 Draft the Defendant wrote a scene where both Olga and Zinaida are described as giving no peace of mind to Boris for his decision to give the book to D'Angelo. The idea that this should have been the only time when Olga and Zinaida were in agreement strikes me as a fairly obvious one, given the respective positions of Olga and Zinaida. While this is more a

point of detail than a selection point, I am not satisfied that the Defendant's reference to Zinaida and Olga being in agreement for the first time was taken from Lara, and I find that this reference was not taken from Lara.

- (3) Events 3 and 4 are not said to be in chapter 11.
- (4) In relation to Event 5, the visit to D'Angelo is on pages 193-195 of chapter 11, following immediately from Olga's announcement that she will ask for the manuscript back. The signing of the contract is referred to on page 195, and leads into this closing remark by Olga:

*"You haven't signed a contract," I said. "You have signed a death warrant."*

The visit and its aftermath, as described in chapter 11, bear little relation to the account of the visit in chapter 8 of Lara. The account of the visit in Lara follows fairly closely the account of the visit in ACOT, at pages 216-217. The Defendant's account is rather different, and very plainly her own creation of the scene.

- (5) In relation to Event 6, chapter 11 does include Olga's efforts to find a publisher, her visit to Polikarpov (there is only one visit, as opposed to two visits in Lara), and the possibility of an edited version being produced. These events are on pages 195 and 196 of chapter 11, which are the pages identified in Annex 2 as the equivalent of Event 6. This however is not a full account of this section of chapter 11. On page 197 of chapter 11 the scene with Polikarpov continues, and the possibility of Boris signing a telegram to Feltrinelli is raised, which would indicate that a new manuscript was being produced, so that the original manuscript should be returned. Olga then takes this proposal to Boris. In the ensuing lengthy conversation between Olga and Boris, Boris recounts a telephone conversation he had with Stalin years before, where he failed to stand up for a fellow writer. Boris then vows not to be a coward again. This leads into a further argument with Olga, in which Olga points out that she was sent to the Gulag because of Boris. This silences Boris, and he agrees to sign the telegram. This leads into the closing of chapter 8, where Olga records that Feltrinelli ignored the telegram, as they had known he would, and proceeded with publication. The chapter closes with the following words:

*"I had tried my best, but my best was not enough. Doctor Zhivago was a speeding train that could not be stopped."*

Pages 197-200 of chapter 11, as I have just summarised them, effectively amount to one scene. A comparison with Event 6 can only be got off the ground if one ignores the bulk of this scene. Even where there is an overlap in events, the scenes are very differently written.

- (6) Events 7-11 are not said to be in chapter 11.
- (7) Event 12 starts with Olga taking a note to Polikarpov and Surkov which defends his writing of Doctor Zhivago and enrages Polikarpov. This leads to a meeting between Polikarpov, Surkov, Olga, and Boris, in which it is demanded that Boris sign the telegram to Feltrinelli. Boris initially refuses, but Olga recruits D'Angelo to persuade Boris to sign the telegram. The telegram is sent, in Russian, to Feltrinelli, and is ignored by Feltrinelli, who

had previously been warned by Boris only to heed correspondence written in French. The equivalent of all this is said to be on pages 196-200 in chapter 11. I have already described the content of these pages, which is written in completely different terms to the material which constitutes Event 12.

(8) Event 13 is not said to be in chapter 11.

334. There are some additional points to note, in relation to my analysis of the structure and content of chapter 11 of TSWK:

- (1) As part of her Master of Fine Arts programme at Michener, the Defendant was required to take a course secondary to her primary course, which was fiction writing. The Defendant opted to take a screenwriting course, which she studied between January and May 2016. As part of this course the Defendant was required to produce the outline of a screenplay, with a certain number of pages of screenplay. Given the Defendant's self-confessed obsession with writing about Doctor Zhivago, which resulted in her choosing classes at Michener which had some connection with this subject, the Defendant produced an outline of a screenplay about Boris and Olga. The timing of this course meant that the outline was produced in the early part of 2016, before the Defendant first obtained a copy of Lara. The outline, as written in March 2016, has a summary of a scene where Boris confesses to Olga that he has handed over the manuscript to an Italian publisher via D'Angelo. Olga tells Boris that it will be the death of him, and asks him to get the manuscript back. Boris says that it is too late. There is then a summary of a scene where Olga meets D'Angelo to try to recover the manuscript, but is told that it is too late. The outline of the screenplay is a good example of the organic way in which the Defendant developed the material which would ultimately become the final version of TSWK. It also demonstrates that significant elements of chapter 11 of TSWK were in place well before the Defendant had seen Lara.
- (2) The Defendant's disclosure includes a notebook in which appear notes made by the Defendant in the spring of 2016. The notes include, amongst many other elements of what would become TSWK, reference to (i) Boris giving the manuscript to D'Angelo, (ii) Olga and Zinaida being horrified that the manuscript has been given to a Western publisher, (iii) Olga trying to get the manuscript back from D'Angelo, (iv) Boris being forced to write a telegram to Feltrinelli, asking for publication to be delayed, (v) the telegram being written in Russian, not French, and (vi) Feltrinelli ignoring the forced message.
- (3) Chapter 8 of the Defendant's copy of Lara is unmarked. By contrast the scenes in ACOT which deal with the same subject matter as chapter 11 of TSWK bear substantial markings by the Defendant. The same is true of TZA. The contrast in marking is, in my view, a significant guide to the extent of the use that the Defendant was making of each of these works.



335. With the above analysis of the specified Events and the structure and content of each chapter in place, I turn to the Supporting Allegations in this section of Annex 2, as they appear in relation to particular Events.
336. I have already discussed the reference to “*down a spiral*” in the previous section of this judgment. I have found that the Defendant did take this reference from Lara, and I have accepted the Defendant’s evidence as to how this would have come about. As I have noted, the detail is the same, but the context in which the detail is used is very different in TSWK. As I have also said, I do not regard the Defendant’s use of this detail as good or any evidence to support the allegations of selection copying. As in previous sections of this judgment I use the expression “**selection copying**”, in my discussion of the Supporting Allegations, as shorthand for the copying of the selection of the specified Events in chapter 8 of Lara, or any part of that selection, or any other relevant selection of Events in Lara.
337. In relation to Event 2 the concept that Zinaida and Olga were in agreement for the first time is characterised as a Supporting Allegation. I have already discussed the Defendant’s use of this concept, in my analysis of chapter 11 of TSWK. I have already found that that this reference was not taken from Lara. I also repeat the point that if I had found that the Defendant had taken this detail from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
338. My understanding, from paragraph 91 of the Claimant’s closing submissions and from the cross examination of the Defendant, is that there is an additional Supporting Allegation, in relation to Event 5, where Olga visits D’Angelo in an attempt to recover the manuscript. My understanding of this point is that the Defendant’s selection of the elements of this scene could not have been derived from TZA because this scene is not in TZA. As for ACOT, I understood the point to be that the Defendant could not have been using ACOT because the reference to Zinaida and Olga being in agreement for the first time, which is in Lara and TSWK, is not in ACOT. As such, by a process of elimination, it should be inferred that the Defendant’s selection of the elements of this scene was derived from Lara. If I have understood correctly the edifice which was constructed in this part of the cross examination, it seems to me too flimsy to establish any copying of Lara. The scene where Olga visits D’Angelo to try to recover the manuscript is in ACOT, Lara, and TSWK. As I have noted, in my analysis of chapter 11 of TSWK, the Defendant’s writing of this scene is very much her own creation. I do not detect any evidence of the Defendant having copied the writing of this scene, either in terms of selection or language, from Lara. I do not therefore find any copying in respect. I again add that if I had found that the Defendant had taken particular details of this scene from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

339. By reference to the cross examination, the above appears to be the limit of the Supporting Allegations relied upon by the Claimant in relation to chapter 8 of Lara.
340. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapter 8 of Lara or a part of that selection.
341. So far as the Events themselves are concerned, the comparison exercise which I have conducted above seems to me to offer no evidence of the Defendant having copied the selection of the specified Events in chapter 8 of Lara, or any part of that selection. The selection of events in chapter 11 of TSWK is very different to the selection of events in chapter 8 of Lara. Beyond that, my concluding comments are essentially the same as those I have made in relation to the allegations of copying of selection in respect of chapters 5, 6 and 7 of Lara.
342. In terms of providing support for the allegations of selection copying, the Supporting Allegations are very limited in relation to chapter 8 of Lara. On my findings the Supporting Allegations offer one instance of the Defendant making use of a detail picked up from Lara. They offer no evidence to support the allegations of selection copying. Given the very limited nature of the Supporting Allegations, it is not really necessary to consider what the position would have been if, contrary to my findings, I had found that the Defendant had copied from Lara all the details which are the subject of the Supporting Allegations relied on in relation to chapter 8 of Lara. On this hypothesis, I would still not have regarded the relevant Supporting Allegations as providing support for the allegations of selection copying. The details are too trivial, and the selection of events too different, as between the two works, for the relevant Supporting Allegations to support the allegations of selection copying. I have considered the Supporting Allegations separately, so in theory the question arises as to whether the Supporting Allegations in relation to chapter 8 of Lara, if taken cumulatively, provide support for the allegation of selection copying. In reality, and independent of the findings which I have made on the Supporting Allegations relied upon in relation to chapter 8 of Lara, the limited nature of the Supporting Allegations renders this question much less material than in relation to the other chapters of Lara which are relied upon in the Selection Claim. In relation to chapter 8 of Lara, it seems to me that there is no sufficient accumulation of Supporting Events to support the allegation of selection copying, even if I had found all the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara. Again, the details are too trivial, and the selection of events in each work is simply too different for the Supporting Allegations to be sufficient to establish such selection copying. I also repeat, for what it is worth given the limited nature of the Supporting Allegations, the Consistency Problem from my discussion of the Supporting Allegations in relation to chapter 5 of Lara.

343. On the basis of the above discussion, and taking into account all the evidence which I have received and heard, and reviewing my analyses of the specified Events in chapter 8 of Lara and the Supporting Allegations, the position seems clear to me. I find that the Defendant has not copied the selection of the specified Events in chapter 8 of Lara, or any part of it.
344. In summary therefore, drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to chapter 8 of Lara are as follows:
- (1) The selection of the Events in chapter 8 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara. The same is true of the selection of these Events which is alleged to have been copied.
  - (2) I find that the Defendant has not, either in chapter 11 of TSWK or elsewhere in TSWK, copied the relevant selection of these Events or any part of this selection.
  - (3) I conclude that the Defendant has not, in relation to chapter 8 of Lara, infringed the copyright in Lara.
  - (4) Accordingly, and in relation to chapter 8 of Lara, the claim of infringement of copyright in Lara fails.

The Selection Claim – chapter 9 of Lara (The Fat is in the Fire) and chapter 10 of Lara (The Pasternak Affair)

345. The Claimant relies upon six Events in chapters 9 and 10 of Lara, the selection of which is said to have been copied, in chapter 24 of TSWK (The Emissary). The six specified Events, as described in Annex 2, are as follows:
- (1) Rumours that BP will win Nobel Prize followed by receipt; BP sending telegram to accept.
  - (2) Kremlin calls emergency meeting of Writers' Union; Radio Moscow denounces BP; "spontaneous" protests; students' letter; placards; "Judas".
  - (3) Newspapers publish attack on BP and Doctor Zhivago; Irina glad BP does not read newspapers; BP advising Irina's friends to denounce him.
  - (4) Writers' Union meets; BP does not attend but sends letter; meeting lasts hours but expulsion unanimous.
  - (5) KGB tightening grip; BP talking to microphone; Olga decides to burn papers; BP suggests suicide; Mitia sent to collect wood chips; Olga talks BP out of suicide.
  - (6) Olga asking Fedin what he wants; Fedin arranging meeting with Polikarpov; Olga arguing with BP; BP announcing he has sent telegrams to Sweden and Moscow rejecting Nobel Prize.
346. The first question to be answered, again, is whether copyright subsists in the selection of the Events in chapters 9 and 10 set out in Annex 2. I can, again, take this question shortly, because my reasoning is effectively the same as that set out in my previous answers to this question, in relation to the earlier chapters in Lara. In my judgment copyright clearly subsists in this selection of Events. While the

six specified Events are only part of two lengthy chapters of Lara, I am satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapters 9 and 10 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapters 9 and 10 of Lara. I reject the Baigent Point, for the reasons which I have already stated in relation to chapter 5 of Lara. I therefore accept that copyright protection extends to the selection of these Events.

347. The Claimant's case is that the Defendant has copied the selection of all six specified Events. Accordingly, and so far as the Claimant's case is concerned, it is not necessary, at this stage of the analysis, to consider whether the Claimant is right in saying that copyright subsists in a part of this selection. It follows that it is only necessary for me to stress, at this stage of the analysis, that the conclusion in my previous paragraph is a general conclusion, which is subject to the Selection Copyright Qualification.

348. This leaves the question of whether the Defendant has copied this selection, or a part of it in the relevant chapter of TSWK, which is said to be chapter 24. I will, again, consider the specified Events first, and then consider the relevant Supporting Allegations, before coming to my conclusions on the question of copying.

349. I start with the structure and content of the two chapters in Lara. It is convenient to take the two chapters separately, so I start with chapter 9 of Lara. My analysis of the structure and content of the Events specified in chapter 9 is as follows:

(1) Chapter 9 runs from pages 176-193. Event 1 does not however come until page 185. Pages 176-185 are not easy to summarise because they contain a mass of detail. The chapter opens with an account of the huge success of Doctor Zhivago around the world, following its publication in Italy. There is then an account of the process of finding the right translators to translate the book into English. This is followed by an account of the CIA Operation and its results. The narrative then reverts to Boris and a recurrence of his medical problems. This is combined with a description of Boris' life at that time, which was an uneasy combination of international fame and his increasingly isolated position in his own country.

(2) Event 1 begins on page 185, in the summer of 1958, when rumours are mounting that Boris will win the Nobel Prize for Literature. This is followed by Boris writing to Kurt Wolff, his American editor at Pantheon Books, and to his sister, Josephine. The announcement is then made that Boris has won, but this is combined with an account of the equivocal reaction of Boris to the news, and Zinaida's hostile reaction to the news. This is followed by a visit from Fedin, the new secretary of the Soviet Writers' Union, who has come to tell Boris that if he does not renounce the prize, a public campaign will be launched against him. Boris refuses, and then faints. When he revives he goes to talk to his neighbour, another

writer, to ask his advice, which is that he should do what he thinks right. There is then an account of a visit by Kornei Chukovsky to congratulate Boris. Boris then sends a telegram of acceptance to the Nobel Academy. The narrative then shifts to the Little House, where Boris tells Olga what has happened, and speaks to Irina.

- (3) The summoning of the meeting of the Writers' Union which is referred to in Event 2 can be found on the second half of page 188. The narrative up to that point, from page 185, is summarised, as best I can, in my previous sub-paragraph. The important point is that the pages said to be covered by Event 1 (pages 185-187) contain a number of different scenes and events which are not captured by the description of Event 1 in Annex 2. In addition to this, Boris' visit to the Little House, his conversation with Irina, and Irina's own reflections on the conversation separate Event 1 from Event 2.
- (4) Event 2 itself is said to occupy pages 188-191, but the description of Event 2 does not do justice to the detailed account of the state sponsored campaign against Boris.
- (5) The same applies Event 3. The words of description in Annex 2 do not do justice to the detail of the scenes described. In particular, the description does not capture the account of an incident in a barber's shop, which demonstrates the public reaction to the campaign, or the detail of the visit by Irina and two student writer friends to see Boris.
- (6) Event 3 does not appear to extend to the conclusion of chapter 9. Chapter 9 concludes with a quotation from Mark Twain that a man is admitted to the Church for what he believes, and is expelled from it for what he knows. Boris is described as being in a similar situation with the Soviet authorities. The same quotation from Mark Twain, used to make the same point, is in ACOT at page 243.

350. Turning to chapter 10 of Lara, my analysis of the structure and content of the Events specified in chapter 10 is as follows:

- (1) Chapter 10 runs from pages 194-212. The events within Event 4 are fairly summarised in Annex 2 and starts from the beginning of the chapter. Pages 194-196 recount the sequence of events relating to the meeting of the Writers' Union.
- (2) Event 5 is more of a portfolio of events. It opens with the KGB tightening its grip, in terms of surveillance, and moves on to Olga's decision to burn papers. This is followed by Boris' suggestion of a suicide pact, which upsets Mitia. Mitia runs outside, where he is followed by Boris. A conversation ensues, which ends with Mitia agreeing that Olga must do what Boris does. Mitia is then sent to collect wood chips for the fire to burn the papers. Olga then soothes Boris, and says that she will see Fedin, to find out what the authorities want from Boris. Event 5 is said to end on page 198, but at the top of page 198 Olga and Mitia accompany Boris back to the Big House, and eventually persuade him to go inside. The conversation about suicide ends in the previous paragraph.

- (3) Event 6 is also a portfolio of events, which are not properly captured by the description in Annex 2. This section of chapter 10 opens with Olga and Mitia trudging through deep slush to Fedin's house, and arriving soaking wet, with their shoes covered with mud. There is then the conversation with Fedin, which results in Fedin arranging a meeting with Polikarpov in Moscow. Olga and Mitia then leave for Moscow. This is followed by Irina's recollection of Olga returning, completely distraught, to the apartment in Moscow. The next morning Olga has an argument with Boris on the telephone, in the course of which Olga accuses Boris of being selfish. Later that day Boris appears in the apartment, to make an announcement. After getting everyone together, he informs them that he has sent telegrams to the Academy, rejecting the prize, and that he has sent a second telegram to the Central Committee informing the Kremlin of his renunciation of the prize and requesting that Olga be allowed to work again, so that she could earn money for her translation work. At this point the portfolio of events which is Event 6 comes to an end.
- (4) Chapter 10 then continues, from pages 199-212, with a lengthy account of the continuing persecution by the Soviet authorities, and its effect on Boris, including his consideration of whether to leave the Soviet Union. The chapter concludes with an account of how the authorities orchestrated the sending of a letter by Boris to Krushchev, explaining why he did not wish to leave Russia. There is then further description of events during this period. The chapter ends with Olga's regret over the sending of the letter to Krushchev.
351. It will, again, be noted from the above analyses that chapters 9 and 10 of Lara include a good deal of material which is not part of the specified Events. Some of the Events themselves include a large collection or portfolio of events, which are not properly captured by the description of the relevant Event.
352. There is a further point which is worth making, before coming to the specific structure and content of chapter 24 of TSWK. The further point is that Events 1-6 can all be found in both ACOT and TZA. The specific references for each work are listed in this section of Annex 2. There are differences of detail and ordering, but the basic elements of Events 1-6 can be found in both works.
353. Turning specifically to the structure and content of chapter 24 of TSWK it is, again, very different to the specified chapters in Lara. Working through chapter 24 of TSWK, and comparing its structure and content with the specified Events in chapters 9 and 10 of Lara, my analysis is as follows (references to chapter 24 are, unless otherwise indicated, references to chapter 24 of TSWK):
- (1) Chapter 24 opens, on page 379, with Boris having won the Nobel Prize. The narrative then moves to Olga's concerns over the embarrassment which would be caused to the state by this event, and the consequences for herself and Boris. Olga goes out to her garden, where she meets Boris. Boris informs her that he has sent a telegram accepting the prize. Olga asks if Boris will go to Stockholm, and dreams of what the visit would be like if

she could accompany him. Boris replies that this is impossible. Boris and Olga then go to bed together. This section of the chapter ends, on page 381, with Olga looking at herself and Boris in the early morning light, and being hit with the knowledge of their increasing age. Annex 2 identifies pages 279-381 of chapter 24 as containing the equivalent of Event 1. Beyond the basic facts of Boris winning the prize, and sending a telegram of acceptance I have to say that I struggle to see any similarity between these sections of, respectively, chapter 9 of Lara and chapter 24. The writing could not be more different.

- (2) The equivalent of Event 2 is said to be on pages 381-383 of chapter 24. The relevant section of chapter 24 opens with the Kremlin making its official response to the Academy, denouncing the award. This is followed by the summoning of the meeting of the Writers' Union, and the differing reactions of writers to the situation; some hostile to Boris and hurling insults at him, others keeping silent and falling into line out of concern for their own position. This section of chapter 24 ends with Irina returning from school with an account of a student demonstration in Moscow, which she had been required to attend but had managed to avoid. Some of the basic facts within Event 2 and within the specified section of chapter 24 are the same, but their arrangement and writing are different. The events which separate Event 1 and Event 2 in chapter 9 of Lara are not in chapter 24.
- (3) The equivalent of Event 3 is said to be on pages 383-384 of chapter 24. This section of chapter 24 opens with a reference to the photograph of a spontaneous demonstration against Boris in *Literaturnaya Gazeta*, and the accompanying article. The narrative then moves to a conversation between Olga and her children about the article, with the children asking whether they are now rich on the basis that Boris can now provide additional money to the family. This conversation closes this section of chapter 24. Apart from the basic common fact of Boris being attacked in the Soviet press, I struggle to see any similarity between this section of chapter 24 and the collection of materials which comprise Event 3. By way of just one example, the visit of Irina and her student friends to the Little House and Boris advising the students to sign the letter demanding his expulsion from the country, which comprise a substantial part of Event 3, are not in chapter 24. Nor does the Mark Twain quotation, which is used to create what I am bound to say is an effective ending to chapter 9 of Lara, appear in chapter 24.
- (4) Moving to chapter 10 of Lara the meeting of the Writers' Union is shortly described on pages 384-385 of TSWK. It is only the meeting which is described on these pages of chapter 24. The writing of Event 4 in Chapter 10 of Lara is very different. There is a lengthy description of the meeting at Olga's apartment, and the preparation and reading of the letter which Boris was to send to the meeting. The meeting itself is then described, in far more detail than in chapter 24. Both sections of each work are concerned with the meeting of the Writers' Union, but the description of this event is different, and Event 4 includes the preamble to the meeting, none of which is in chapter 24.

- (5) The equivalent of Event 5 is said to be on pages 385-389 of TSWK. These pages of chapter 24 comprise a substantial part of what is a short chapter. This part of the narrative in chapter 24 commences, on the second half of page 385, with Olga's decision to burn all her papers from her Moscow apartment. She and Mitia take the papers to the Little House to burn. Boris arrives as the fire is being prepared, and Olga is pouring petrol on the leaves of the fire. A conversation ensues with Boris. The conversation starts with Boris agonising over what he has done in allowing Doctor Zhivago to be published in the West, and thereby bringing disaster on them. The conversation then turns to the proposal from Boris that he and Olga each take an overdose of Nembutal. Olga recalls that Boris had threatened to kill himself before, when his wife, Zinaida, had (before their marriage) refused him. Mitia intervenes to challenge Boris, but Olga gives him money and sends him to get more petrol for the fire. With Mitia's departure the conversation about suicide continues. The conversation ends with Olga asking Boris to wait one more day, ostensibly so that Olga can say goodbye to her family and see one more day, but in reality because Olga has one last plan to retrieve the situation and because Olga knows that, if the plan does not work, "*he might still be talked off the ledge*". The increasing surveillance which is the first element of Event 5 is not in chapter 24. The scene with Mitia and Boris and the joint suicide proposal from Boris are differently written and differently arranged. The scene ends differently in chapter 10 of Lara. The conversation ends with Olga reassuring Boris that she will go to visit Fedin, and find out what the authorities wanted. There is then the scene where Olga and Mitia accompany Boris back to the Big House, which is not in chapter 24.
- (6) The equivalent of Event 6 is said to be on pages 389-391 of chapter 24. This section starts with Olga finding Mitia at the tavern near the train station. Mitia has a small can of petrol. They then go to see Fedin at his dacha. The meeting between Olga and Fedin is then described. The meeting ends with Fedin saying that he will arrange a meeting with Polikarpov. Olga agrees to this, but then discovers from Boris that he has sent two telegrams; one to Stockholm declining the prize, and the other to the Kremlin letting them know of this action. Chapter 24 ends at this point, with Boris expressing his fear that "*they*" are watching him and will come for him. I accept that there is, in these respective sections of the two works, more similarity with Event 6. In the case of both works the conversation about suicide is followed by the visit to Fedin. The meeting with Fedin includes the arranging of the meeting with Polikarpov. Following the meeting, Boris sends the two telegrams. There are however also many points of difference. In Lara there is no collection of Mitia from the tavern. In Lara the muddy journey to Fedin's house is described in detail. In Lara the terms of the meeting with Fedin are different. In Lara Olga returns to the apartment in Moscow in a distraught condition. In Lara the argument with Boris takes place the next morning on the telephone, which is followed by Boris turning up at the apartment and announcing that he has sent the two telegrams. Event 6 is followed by the remainder of chapter 10 of Lara, starting with the meeting between Olga and Polikarpov. None of this material is in chapter 24. As a result the respective sections of each work read very differently.



354. With the above analysis of the specified Events and the structure and content of the relevant chapters in place, I turn to the Supporting Allegations in this section of Annex 2, as they appear in relation to particular Events. I again use the expression “**selection copying**”, in my discussion of the Supporting Allegations, as shorthand for the copying of the selection of the specified Events in chapters 9 and 10 of Lara, or any part of that selection, or any other relevant selection of Events in Lara.
355. The first two Supporting Allegations are conveniently dealt with together. They concern omissions from chapter 24 of TSWK. In TZA, at page 168, there is an account of a Le Monde reporter visiting Boris after the announcement of his winning the Nobel Prize. Boris tries to speak French to him, not very well, but enjoying the effort. Also in TZA, at page 166, reference is made to an editorial in Literaturnaya Gazeta (a Soviet literary journal) which quoted negative Western reviews of Doctor Zhivago. The point made is that both of these details are missing from TSWK and Lara, from which one can infer that the Defendant made these omissions because she was copying the selection of events in Lara. I find this point unconvincing. There is also a particular problem with this allegation of copying. At page 168 of TZA, where the meeting with the French journalist is described, Boris tells journalists that the prize is not only a joy, but a moral support, but that the joy is a solitary joy. In chapter 22 of TSWK, at page 363, Boris returns from a walk to find a group of journalists waiting for him. The Pravda reporter tells him that he has won the prize, and asks if he has any comment. Another reporter asks if he will accept the prize. Boris replies that he did not want all the noise to happen, but that he was filled with a great joy, “*But my joy today is a lonely joy.*”. In writing this scene the Defendant was clearly adapting for her own use the words used on paragraph 168 of TZA. It strikes me as implausible that the Defendant would use these words, but then decide to omit the scene with the French journalist because it did not appear in Lara. It is much more likely, and I so find, that the Defendant made her own independent editorial decision in relation to the omission of the scene with the French journalist.
356. I am not satisfied that the Defendant, in omitting the above details from TSWK, was copying Lara. I find that the Defendant did not copy Lara in omitting these details. Even if I had been satisfied that these omissions were copying Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
357. The next Supporting Allegation is that TSWK, on page 385, describes the meeting of the Writers’ Union as lasting hours. At page 196 of Lara the meeting is described as going on for hours. In ACOT, at pages 246-247, the meeting is described by reference to a report, in the Literary Gazette, of the resolution passed at the meeting. There is no reference to how long the meeting lasted, although no one reading the report of the resolution could think that the meeting was a short one. In TZA, at page 173, the meeting is described as dragging on for hours. It was put to the Defendant in cross examination that she and the Claimant had effectively done the same thing, omitting much of the detail about the meeting which can be found in ACOT and TZA, instead contenting themselves with

simply saying that the meeting went on for hours. I assume the point behind the way the matter was put to the Defendant, although this was not spelt out, was that the Defendant copied the Claimant, in cutting short the details of the meeting and copied the Claimant's technique of referring to the meeting going on for hours. Whether or not I have understood correctly the point being put in cross examination, I find no evidence of the Defendant copying Lara in relation to this detail. I am quite satisfied that the Defendant either took this reference to the meeting lasting for hours from TZA or, more likely, simply chose this wording independently, as her way of describing the meeting. I add that if I had found that the Defendant had copied this detail from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

358. The next Supporting Allegation relates to the order of events, as between the conversation between Boris and Olga concerning Boris' proposal of suicide, and Boris sending the two telegrams to Stockholm and the Kremlin. In both Lara and TSWK the conversation about suicide comes before the sending of the two telegrams. In ACOT Boris sends off the two telegrams, on page 250, but then has the conversation about suicide afterwards, at pages 251-252. In TZA the order of these events is the same as in Lara and TSWK. I had some difficulty during the relevant passage of cross examination, and I continue to have some difficulty in seeing how this situation can give rise to any inference of copying. As the Defendant pointed out in cross examination, the order of events in TSWK is not the same, in the sense that the conversation about suicide is followed by Olga finding Mitia at the tavern, and going off to the meeting with Fedin. The meeting with Fedin results in a meeting being arranged with Polikarpov, but in the meantime it turns out that Boris has sent the two telegrams. In Lara the conversation about suicide is written in different terms. There is no confrontation with Mitia, who is sent to collect wood chips. The conversation about suicide ends and Olga and Mitia accompany Boris back to within sight of the Big House. Olga and Mitia then make their wet and muddy journey to see Fedin. Once the meeting is over Olga is described as arriving back at her Moscow apartment in a distraught condition. The next morning there is the argument with Boris, and the scene where Boris arrives at the apartment with his announcement of the two telegrams.

359. The point on the ordering of the suicide conversation and the sending of the two telegrams only works if one ignores all the various events which differentiate the sequence of events in this section of chapter 24 of TSWK and the sequence of events in this section of chapter 10 of Lara. In other words, the point only works if one carries out the exercise, identified by Laddie J in *IPC* as illegitimate, of achieving similarity by excision. If one carries out a fair and thorough comparison, one can see that the differences are too great to justify any inference of copying. I find that the Defendant did not copy from Lara either the ordering of the suicide conversation or the sending of the two telegrams. I again add that if I had found that the Defendant had copied this ordering of these two events from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

360. The final Supporting Allegation relates to chapter 26 of TSWK. On page 216 there is a scene where Boris and Olga are taken by Polikarpov to see Krushchev at the Central Committee building. They are described as arriving “*at Entrance No. 5 of the Central Committee building*”, where a guard “*waved*” them through after Boris announces that he has no proper identification following the revocation of his membership of the Writers’ Union. The visit to see Krushchev at the Central Committee building is also in chapter 10 of Lara, at page 209, where the party is described as arriving “*at Entrance No 5 of the Central Committee, Staraya Square*”. When Boris explains to the guard that he has no documents on him part from his writer’s card, “*you know, the Writers’ Union you and your colleagues have just thrown me out of*”, the guard “*waved*” them through. The allegation was that the Defendant copied from Lara the details of Entrance No. 5 and the guard waving them through.
361. In Annex 2 it is asserted that the Defendant appeared to accept that she had copied these details from Lara, and reference is given to the relevant passage of cross examination. I do not think that the relevant passage of cross examination, fairly read, does contain any admission of copying. What I understood the Defendant to accept was that both TSWK and Lara have these details. Indeed, this is what happened repeatedly in the course of the Defendant’s cross examination. It would be put to the Defendant that there was some similarity of detail between TSWK and Lara. Where appropriate, the Defendant accepted this. In some cases the Defendant did also admit that she had taken the relevant detail from Lara. In most cases the Defendant did not make this admission.
362. The same scene is in ACOT, at page 286. The party is described as driving to “*the fifth entrance of the Central Committee on Old Square*”. There is then the conversation Boris has with the guard, concerning his lack of identification papers. The writing of this conversation in Lara has been taken, almost verbatim, from the equivalent conversation in ACOT. In ACOT the guard is described as being “*friendly enough*”; “*It’s all right, it’s all right*”, he said, “*it doesn’t matter, it’s quite all right*”.
363. The reference to the fifth entrance in ACOT is plainly significant, as it undermines the argument that the Defendant must have derived her reference to Entrance No. 5 from Lara. So far as the guard “*waving*” the party through is concerned, this is a commonplace expression. I see no good reason for thinking that the Defendant copied this detail from Lara.
364. In the case of this Supporting Allegation I find that the Defendant did not take the two details from Lara. I find that the reference to Entrance No. 5 was derived from ACOT, and that the reference to the guard waving them through was the Defendant’s own independent use of a commonplace expression. I again add that if I had found that the Defendant had copied these details from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
365. Finally, I should mention that this part of the cross examination of the Defendant did include the putting of a general suggestion to the Defendant that, where there are omissions from other sources in both Lara and TSWK, this was because the

Defendant had copied the Claimant's approach in making those omissions in Lara. The Defendant denied this. Both the question and the answer were too general to be of much assistance to me in considering the question of whether copying had occurred in relation to any particular omission.

366. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapters 9 and 10 of Lara or a part of that selection.
367. So far as the Events themselves are concerned, the comparison exercise which I have conducted above seems to me to offer no evidence of the Defendant having copied the selection of the specified Events in chapters 9 and 10 of Lara, or any part of that selection. The selection of events in chapter 24 of TSWK is very different to the selection of events in the two chapters of Lara. Beyond that, my concluding comments are essentially the same as those I have made in relation to the allegations of copying of selection in respect of chapters 5, 6, 7, and 8 of Lara.
368. The Supporting Allegations are limited in relation to chapters 9 and 10 of Lara. On my findings the Supporting Allegations do not demonstrate any instances of the Defendant making use of details picked up from Lara. I should however again add the point that if my findings had been different in relation to this group of Supporting Allegations, and if I had found that the Defendant had copied any particular details from Lara as alleged, I would not have regarded this as good or evidence to support the allegations of selection copying. I again regard the relevant details as too trivial to support the allegations of selection copying. It also seems to me, again, that the differences between the relevant parts of the two works, in terms of the selection of events, are too great for a finding of selection copying to be possible on the basis of the relevant Supporting Allegations, even if the same had been established as instances of copying. I also repeat my reference to the Consistency Problem, as identified earlier in this judgment.
369. I have considered the Supporting Allegations separately, so in theory the question again arises as to whether the Supporting Allegations in relation to chapters 9 and 10 of Lara, if taken cumulatively, provide support for the allegation of selection copying. Given my findings on the question of whether copying took place in relation to each Supporting Allegation, this question does not arise. I should add however that, leaving aside the Consistency Problem, it seems to me that there is no sufficient accumulation of Supporting Allegations in relation to chapters 9 and 10 of Lara to support the allegations of selection copying, even if I had found the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara. I say this for the same reasons as I have just expressed in relation to the Supporting Allegations when taken individually. Those reasons seem to me equally to apply if the Supporting Allegations are taken cumulatively.
370. On the basis of the above discussion, and taking into account all the evidence which I have received and heard, and reviewing my analyses of the specified Events in chapters 9 and 10 of Lara and the Supporting Allegations, the position

seems clear to me. I find that the Defendant has not copied the selection of the specified Events in chapters 9 and 10 of Lara, or any part of it.

371. In summary therefore, drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to chapters 9 and 10 of Lara are as follows:
- (1) The selection of the Events in chapters 9 and 10 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara.
  - (2) I find that the Defendant has not, either in chapter 24 of TSWK or elsewhere in TSWK, copied this selection of these Events or any part of this selection.
  - (3) I conclude that the Defendant has not, in relation to chapters 9 and 10 of Lara, infringed the copyright in Lara.
  - (4) Accordingly, and in relation to chapters 9 and 10 of Lara, the claim of infringement of copyright in Lara fails.

#### The Selection Claim – chapter 12 of Lara (The Truth of Their Agony)

372. The Claimant relies upon fifteen Events in chapter 12 of Lara, the selection of which is said to have been copied, in substantial part, in chapter 28 of TSWK (The Almost Widow). The fifteen specified Events, as described in Annex 2, are as follows:
- (1) Celebrating Boris' 70<sup>th</sup> birthday at the Little House.
  - (2) Boris not well; pain in chest; trouble with leg.
  - (3) Olga accident; cash from Feltrinelli.
  - (4) Irina's and Olga's last meetings with Boris.
  - (5) Boris turn for the worse; angina suspected; handing over Blind Beauty to Olga.
  - (6) Irina's last conversation with Boris.
  - (7) Boris diagnosed with angina; Olga excluded from the Big House; Olga keeping vigil; nurse providing updates.
  - (8) Foreign reporters arrive.
  - (9) Olga not allowed to visit because of Boris' vanity (false teeth removed); Boris diagnosed with cancer; Boris asks sons to look after Olga; Boris dies.
  - (10) Details surrounding death; Olga supported by family; international press coverage; limited Russian press coverage.
  - (11) Funeral of Boris.
  - (12) KGB come for Blind Beauty.
  - (13) Olga arrested again.
  - (14) Olga accused of writing Doctor Zhivago herself; tried by peoples' court; sent, with Irina, to various camps.
  - (15) Ends with ending from Doctor Zhivago.

373. The first question to be answered is whether copyright subsists in the selection of the Events in chapter 12 set out in Annex 2. I can, again, take this question shortly, because my reasoning is effectively the same as that set out in my previous answers to this question, in relation to the earlier chapters in Lara. In my judgment copyright clearly subsists in this selection of Events. I am satisfied that the selection of these Events constitutes the expression of the intellectual creation of the Claimant or, perhaps more accurately, a substantial part of the intellectual creation of the Claimant in writing Lara, and specifically chapter 12 of Lara. I accept that the Claimant has exercised her own skill and labour in her arrangement and presentation of these Events in chapter 12. I therefore accept that copyright protection extends to the selection of these Events. I again reject the Baigent Point, for the reasons which I have already stated in relation to chapter 5 of Lara.
374. In relation to chapter 12 of Lara, the Claimant's case is that the Defendant has copied the selection of nine of the fifteen specified Events in chapter 12. For the reasons which I have previously set out in my discussion of this question, I accept that the selection of these nine Events constitutes a substantial part of the selection of the fifteen specified Events in chapter 7 of Lara, and a substantial part of Lara as a whole. As such, I accept that the selection of the nine specified Events is equally protected by copyright.
375. I again stress that the above conclusions relate to the selections of Events referred to in my previous paragraphs. Those conclusions remain subject to the Selection Copyright Qualification.
376. This leaves the question of whether the Defendant has copied this selection, or a part of it in the relevant chapter of TSWK, which is said to be chapter 28. I will consider the specified Events first, and then consider the relevant Supporting Allegations, before coming to my conclusions on the question of copying.
377. I should start by saying that chapter 12 is the last full chapter in Lara; being followed by the epilogue. Chapter 12 is another lengthy chapter, running from pages 230-254.
378. Turning specifically to the structure and content of chapter 12 of Lara, my analysis of the Events specified in chapter 12 is as follows:
- (1) Chapter 12 opens with an account of life for Boris and Olga during the early months of 1960. This is followed by Event 1, which is Boris' 70<sup>th</sup> birthday, and the party at the Little House. This is followed by an account of Boris working furiously on his play, the Blind Beauty.
  - (2) Events 2 and 3 then follow.
  - (3) Pages 232-234 of chapter 12 are said to contain Event 4, which is described as Irina's and Olga's last meetings with Boris. This not accurate. On page 232 there is a description of Irina meeting with Boris, including their last meeting in March 1960. The narrative then shifts to Olga, who describes

how blissful April was, and that Boris looked to be well and in good heart. This is followed by Boris writing to Feltrinelli with a document which was intended to be a power of attorney in favour of Olga. This is followed by Olga noticing a decline in Boris' condition. Boris is described as taking a turn for the worse on 20<sup>th</sup> April. A doctor is called, and Boris has to spend time in bed at the Big House, struggling to continue work on his play. Olga sees him again on 23<sup>rd</sup> April, when Boris comes to see her at the Little House. When they part, outside the Big House, Boris gives Olga the manuscript of the *Blind Beauty*. It is this meeting which is the last meeting between Boris and Olga. There is then an account of Irina's last conversation on the telephone with Boris, which is Event 6, but this is followed by Irina going to Peredelkino, to be closer to Boris.

- (4) Event 5 is said to be on page 234 and to comprise Boris taking a turn for the worse, with angina suspected and handing over *Blind Beauty* to Olga. Again, this is not accurate. Boris is described as taking a turn for the worse, and angina is suspected, on page 233, before the description of Boris' visit to Olga, which is their last meeting and is categorised as part of Event 4. Only the handing over the manuscript of *Blind Beauty*, at the end of their last meeting, is on page 234. Event 6 then follows.
- (5) Event 7 is described as being on pages 234-238. Event 7 is another example of a collection of events. These events are too numerous to set out individually. The description of Event 7 in Annex 2 is not an accurate, let alone a complete summary of these events.
- (6) Event 8, which is the arrival of foreign reporters, comprises a single sentence on page 238. The first element of Event 9, which is Olga not being allowed to visit because of Boris' concern over his appearance, comes before this, at the top of page 238. The second element of Event 9, which is Boris being diagnosed with cancer, comes after the arrival of foreign reporters, but also comes after an exchange of telegrams between members of the Pasternak family in Oxford and Moscow. The narrative then shifts to Olga's recollections and Irina's recollections of these final days. There is then an account of further exchanges of telegrams, and the efforts of Lydia Pasternak to get a visa to visit Boris. There is also reference to an older nurse being brought in to treat Boris, who also begins to provide updates to Olga and Irina. There is then, on page 240, a lengthy description of Boris' final days. It is only at the top of page 241 that the third and fourth elements of Event 9 are reached, which are Boris asking his sons to look after Olga, and then the death of Boris. Event 9 is said to occupy pages 238-242, but the last element of Event 9 (the death of Boris) occurs on page 241.
- (7) The death of Boris is followed by Olga being told the news of his death, and rushing round to the Big House. No one stops Olga entering the Big House, and she is able to see Boris, laid out in the music room. The scene is powerfully written, and continues to the foot of page 242, when Olga is helped back to the Little House by Mitia and the younger nurse, Marina. Olga and Mitia then return to Irina's apartment in Moscow. This part of the narrative ends at the top of page 243. It may be that all of this material is intended to be included in the first two elements of Event 10, which are

*“Details surrounding death; Olga supported by family”*. If so, this seems to me to be an inapt description of what I take to be one of the most important scenes in the book, where Olga loses the great love of her life. It is only on page 243 that one reaches the paragraph which refers to the differing international and Russian press coverage.

- (8) Event 11 is described as occupying pages 243-249, and is referred to as the funeral of Boris. This is correct, in the sense that these pages deal with the funeral. The words of description do not however do justice to the detailed description of the sequence of events at and concerning the funeral on these pages.
  - (9) Events 12 and 13 then follow. Again the words of description do not capture all of the events described. By way of illustration there is, on page 250, a lengthy quotation from an article in Newsweek, on 30<sup>th</sup> January 1961, reporting on Olga’s arrest.
  - (10) Event 14 is a collection of events which comprise the remainder of chapter 12, on pages 250-254. These events are too numerous to set out individually. The description of Event 14 in Annex 2 is not an accurate, let alone a complete summary of these events.
  - (11) Event 15 is the Claimant’s use of the famous quotation from the end of Doctor Zhivago (recounting Lara’s fate), which is described by the Claimant as a grim prophecy of how the Soviet state would treat Olga.
379. The overriding point which emerges from the above analysis is that the list of the specified Events in this section of Annex 2 falls far short of being a complete, or even an adequate summary of the sequence of numerous individual events which go to make up chapter 12 of Lara. It will also be noted that the sequence of the specified Events, as set out in this section of Annex 2, is not entirely accurate, even if one concentrates only upon the elements of the description of each specified Event and ignores the events which are not captured by those words of description.
380. Turning specifically to the structure and content of chapter 28 of TSWK it is, again, a much shorter chapter than chapter 12 of Lara. Working through chapter 24 of TSWK, and comparing its structure and content with the specified Events in chapters 9 and 10 of Lara, my analysis is as follows (references to chapter 28 are, unless otherwise indicated, references to chapter 28 of TSWK):
- (1) Chapter 28 opens, on page 431, with Boris arriving at the Little House for his 70<sup>th</sup> birthday party. The party is described in very different terms to the description of the same party in Lara. Chapter 28 goes straight into the party. There is no first paragraph, as in chapter 12 of Lara, describing life for Boris and Olga in the early part of 1960.
  - (2) Chapter 28 then moves straight to Boris’ declining health. There is no account of Boris working furiously on Blind Beauty. The health problems are described as loss of appetite, leg spasms and a numbness in the lower back. In chapter 12 of Lara Boris complains of a pain in his chest and trouble with his leg.



- (3) Events 3 and 4 are not said to be in chapter 28.
- (4) The equivalent of Event 5 is said to be on pages 432-433. There is however no reference to Boris taking a turn for the worse. Nor is there any reference to suspected angina. The account of Boris' medical condition, which is said to be the equivalent of Event 2, is followed by Boris visiting Olga with the unfinished manuscript of *Blind Beauty*. In *Lara* there is a conversation between Boris and Olga, and then Olga walks with him part of the way back to the Big House. In chapter 28 there is a bedroom scene. Boris and Olga go to bed together but Olga, not knowing that it will be their last time, rushes matters because she can hear the soup boiling over on the stove. When they have finished, Boris dresses and goes home, leaving Olga to dine on her own. It is hard to see how the same event could have been written in more different terms, as between the two works.
- (5) Event 6 is not said to be in chapter 28.
- (6) The equivalent of Event 7 is said to be on pages 434-437 of chapter 28. There is no reference to a diagnosis of angina. These pages do include Boris being excluded from the Big House, Olga keeping vigil, and Olga getting updates from the young nurse. These pages also include various other events which are not in chapter 12 of *Lara*. The overall result is that these pages of chapter 28, in their structure and content, bear very little resemblance to the collection of events which is said to comprise Event 7 in chapter 12 of *Lara*. The point is made in Annex 2 that there is reference to a diagnosis of angina in the predecessor of chapter 28 in the January 2017 Draft. This is a point of detail, but not one which seems to me to help the case of copying or selection. The omission of this detail in the final version of TSWK, even if it originally came from *Lara*, suggests the reverse of copying of *Lara*.
- (7) So far as Event 8 is concerned, there is a reference on page 437 of chapter 28 to journalists and photographers arriving outside the Big House, where Olga is maintaining a vigil. They are not described as foreign newsmen, in contrast to Event 8. The point made in this respect in Annex 2 is that there is reference to the foreign press joining Olga in her vigil outside the Big House in the January 2017 Draft. The omission of this detail in the final version of TSWK seems to me, again, to suggest the reverse of copying, if it demonstrates anything. There is however a more important point to be made, which is that this kind of close textual analysis misses a much more important point. On page 437 of TSWK the arrival of the press occurs in a context which bears no relation to the relevant part of chapter 12 of *Lara*. In chapter 12 of *Lara* Event 8 is sandwiched between the different elements of Event 9. I have already set out my analysis of Event 9. It includes a number of events which are not in the description of Event 9 in Annex 2. By way of example Event 8 is immediately followed, in chapter 12 of *Lara*, by an exchange of telegrams. There is then an account of Olga getting further updates on Boris' deteriorating condition, which is further described. It should be noted that although Olga is earlier described, on page 236, as staying outside the fence of the Big House, the older nurse who provides the further updates on Boris' condition (page 238) is described as visiting Olga after coming off duty. There is then an account

of a further exchange of telegrams. The sequence and arrangement of events in the relevant part of chapter 28 is completely different. Olga maintains a vigil outside the gate of the Big House. The nurse reports to her on Boris's condition. Journalists and photographers arrive. Olga leaves her vigil to put on a black dress and veil. She returns, but still cannot get into the Big House. A full listing of all the differences in the sequences of events in each work would take too long to set out. The important point is that the respective sequences of events, when fully analysed, bear no relation to each other.

- (8) The equivalent of Event 9, which is said to occupy pages 238-242 of chapter 12 of Lara, is said to be on page 437 of chapter 28. There is a single sentence on page 437 which refers to Olga still not being let into the Big House from her place of vigil. On the previous page Olga has a first conversation with the nurse looking after Boris, outside the Big House. The nurse tells Olga that Boris does not want to see her because of his physical condition. Returning to page 437 the single sentence referring to Olga not being let into the Big House is followed by this paragraph:

*“Only after he was gone was I allowed inside the Big House. Zinaida opened the door without a word and I rushed past her to his still-warm body. They'd just cleaned him and replaced the bedsheet, but the room still smelled like antiseptic and shit.”*

As can be seen, there is no actual express reference to Boris dying. Nor is there any reference to a diagnosis of cancer. Nor is there a scene between Boris and his sons, where Boris asks his sons to look after Olga. Nor is there anything much else which resembles the narrative of events which occupies pages 238-242 of chapter 12 of Lara.

- (9) Event 10 is not said to be in chapter 28.
- (10) The funeral is described on pages 438-440 of chapter 28. The description does not have the same wealth of detail as in chapter 12 of Lara. The two accounts of the funeral read very differently, but both authors are describing the same event, and there is a certain amount of overlap in the two descriptions.
- (11) Event 12 is not said to be in chapter 28.
- (12) Event 13 is identified as being on page 250 of chapter 12 of Lara. What however is given prominence on page 250 is the article in Newsweek reporting on Olga's imprisonment. Prior to that there is an account of the way in which, following the death of Boris, the state turned on Olga while Boris was rehabilitated. The narrative then moves to Olga's interrogation at the Lubyanka. In chapter 28 the focus is different. The arrest is described in considerable detail, at pages 440-444, and includes an account of the search of the Little House, and Mitia arriving in the middle of the search, showing the effects of the previous night's drinking. The scene concludes with the Lubyanka joke, used for a second time.
- (13) Event 14 is not said to be in chapter 28. I do not entirely agree with this analysis, if one is following the methodology in Annex 2. Event 14 includes Olga and Irina being sent to various camps; specifically Taishet in Eastern Siberia and then Potma. At the end of chapter 28 the Defendant redeploys

the literary device which she used in chapter 5; that is to say Olga writing an imagined letter to Anatoli Semionov, her interrogator on the occasion of her first arrest. As previously, the letter to Semionov describes the situation of Olga and Irina in the prison camp. The prison camp is not identified but, by reference to the time when the letter is said to be written, the camp would appear to be Potma. In this sense therefore, there is a minor overlap with Event 14. Both works make reference to Olga in a prison camp. This however only serves to bring out the differences between the two works. In chapter 12 of Lara there is a fairly short and straightforward narrative of what happened to Olga and Irina following their sentencing. In chapter 28 the Defendant redeploys the device of an imagined letter to Semionov, which plunges the reader straight from the arrest into life at the prison camp.

- (14) This in turn leads to the differences between the ending of chapter 12 of Lara and the ending of chapter 28. In chapter 12 of Lara the concluding paragraph stands on its own. The end of Doctor Zhivago is identified as a grim prophecy of Olga's fate, and is then quoted. In chapter 28 the ending of Doctor Zhivago is quoted at the end of, but as part of the letter to Semionov. There then follow these words, which conclude the letter and chapter 28:

*“But Anatoli, I am no nameless number. I will not disappear.”*

It is true that both authors use the same quotation from Doctor Zhivago, and that both authors use this quotation to end their respective works (save for the epilogue in each work). Beyond that, the endings are different, in their writing and in the message which is conveyed.

381. Before leaving the above analysis it should be noted that the specified Events which are said to be present in chapter 28 of TSWK are Events 1, 2, 5, 7, 8, 9, 11, 13, and 15. These same Events are also identified in Annex 2, subject to certain exceptions and certain differences of detail, as being present in ACOT, TZA, and De Mallac.
382. With the above analysis of the specified Events and the structure and content of each chapter in place, I turn to the Supporting Allegations in this section of Annex 2, as they appear in relation to particular Events. I again use the expression “**selection copying**”, in my discussion of the Supporting Allegations, as shorthand for the copying of the selection of the specified Events in chapter 12 of Lara, or any part of that selection, or any other relevant selection of Events in Lara.
383. Paragraph 91 of the Claimant's closing submissions records Boris arriving at the Little House to celebrate his 70 birthday party as the first Supporting Allegation. I understand the point to be that Boris is described as arriving at “*the Little House*” in both TSWK and Lara, while it is said that ACOT, TZA, and De Mallac have no reference to the Little House. As with other Supporting Allegations however, the point does not stand up to scrutiny. At page 336 of ACOT Olga describes drinking brandy with Boris and exchanging kisses by “*the crackling stove*”. It is obvious from the context that these celebrations took place at the

Little House. Olga was not permitted into the Big House, and it is clear that the venue was Peredelkino, not Moscow. Similarly, on page 227 of TZA, Boris is described as arriving at “*Ivinskaya’s*” to celebrate his 70<sup>th</sup> birthday. Again, it is clear from the context that this was not a reference to Olga’s Moscow apartment. In De Mallac there is only general reference to the 70<sup>th</sup> birthday, with no specific reference to a celebration.

384. It follows that, while it is true to say that there is no express reference to the Little House in ACOT and TZA, it is quite clear in both works that Boris went to the Little House to celebrate his 70<sup>th</sup> birthday with Olga. Quite apart from this, I find it somewhat hard to think of a reason why Boris would not have arrived at the Little House to celebrate his 70<sup>th</sup> birthday with Olga. It was the obvious venue for the celebration. I can see no good reason for thinking that the Defendant copied this detail from Lara. It seems to me much more likely, on the evidence, that this was part of what the Defendant derived from ACOT and TZA, with the Defendant choosing to identify the Little House by its name. I find that the Defendant did not copy from Lara the detail of Boris arriving at the Little House to celebrate his birthday with Olga. I add that if my finding had been that the Defendant had copied this detail from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

385. The next Supporting Allegation is included in this section of Annex 2 as part of Event 5. It seems to me to relate to Event 7, but this may not matter as the point is one of detail, rather than the selection of the Events. The point is that on page 234 of chapter 12 of Lara there is a paragraph which begins with the doctor’s diagnosis of angina. In the same paragraph the following five events can be found:

- (1) Boris being moved downstairs.
- (2) Boris in terrible pain.
- (3) The description of the third event in Annex 2 is “*BP thinking about Blind Beauty*”. This is not accurate. What happens is that Boris writes to Olga, looking forward to hearing her reaction to *Blind Beauty* and saying that the play still needs a lot of work.
- (4) Boris expecting to recover.
- (5) The description of the fifth event in Annex 2 is “*BP asking Olga not to visit because Zinaida will make a scene*”. Again, this is not accurate. Boris gives a strict warning to Olga not to visit because “*The waves of alarm set off by it would impinge on me and at the moment with my heart in this condition, it would kill me. Z in her foolishness would not have the wit to spare me.*”.

386. The Claimant’s case is that all these five events can be found in TSWK. My analysis of the relevant section of TSWK is as follows:

- (1) There is, on page 435 of chapter 28 of TSWK reference to Boris being moved downstairs. Boris provides this information in a letter to Olga written after their last meeting.
- (2) I cannot find a reference to Boris being in terrible pain.

- (3) There is a reference to Boris writing to Olga to say that he would be up and finishing the play any day, but this comes before the subsequent letter conveying the information that Boris had been moved downstairs.
- (4) The same letter to Olga, referring to the finishing of the play, also states that the setback will pass. So, this also comes before the subsequent letter conveying the information that Boris had been moved downstairs.
- (5) The subsequent letter to Olga does ask her not to come, in the following terms:

*“He also asked that I not come, saying his wife had warned against it. Z, in her foolishness, would not have the wit to spare me. But if things worsen, I’ll send for you.”*

387. As will be apparent from the above analysis, I find it difficult to accept that the above five events, as they appear in Lara, can all be found in TSWK. The two narratives are very different. The context and the writing are different. Beyond this, and when one comes to consider other sources, four of the five events identified in Annex 2 can be found in TZA, at page 230. On the previous page of TZA there is reference to Boris noting in a journal, which he had started to keep, that he had had to stop work on his play. Looking at all the evidence I do not find it plausible that the Defendant copied from Lara the five specified events, if and in so far as it is actually correct to say that those events also appear in TSWK. I find that the Defendant did not copy the five specified events or any of them from Lara. I again add that if my finding had been that the Defendant had copied these events or some of them from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

388. The next Supporting Allegation relates to the Defendant’s use of the word “*vigil*”. On page 436 of TSWK Olga is described as keeping a vigil outside the gate of the Big House for days. On the next page journalists and photographers turn up at the Big House, and Olga is described as knowing that her vigil had turned into “*a death watch*”. On page 236 of Lara there is reference to the elusive silhouette of Olga in front of the fence at the Big House. Olga is described as remaining there until the last day, “*staying on the steps of the house shrivelled in front of the door, stubbornly closed behind*”. The word “*vigil*” is not used here, but the description is of Olga maintaining a vigil. On page 238 of Lara there is a description of foreign newsmen who “*stood vigil at the gates of his dacha*”.

389. In cross examination it was put to the Defendant that she had written this scene, where Olga maintains a vigil outside the gate of the Big House, in January 2017 and that the word “*vigil*” had come to her because she had been inspired to use it by reading Lara. I quote the Defendant’s answer in cross examination, which seemed to me to sum up the difficulties with the Supporting Allegations, both in terms of the factual question of whether the Defendant actually copied the relevant detail from Lara, and in terms of whether, if and in so far as such copying did occur, this provided any evidence to support the allegations of selection copying:

*“As I said before, I do not remember how I wrote each individual sentence of my novel, of thousands of pages of my novel over the years it took me to*

*write it. I honestly do not think I got it from there, but there is obviously a possibility that one word stuck in my brain.”*

390. There is also this additional point, in relation to this Supporting Allegation, which serves to bring out the important differences generated by the use of different sources. It will have been noted that, on page 236 of Lara, Olga is described as maintaining her vigil on the steps of the Big House. On page 240 of Lara, Olga is described as spending the day of Boris’ death crying on the veranda of the Big House. In TSWK, at page 436, Olga maintains her vigil outside the gates of the Big House. In TZA, at page 232, Olga is similarly described as weeping at the gate of the Big House. The explanation for the difference in this detail between Lara, on the one side, and TSWK and TZA, on the other side, is an interesting one. The Claimant explained, in cross examination, that this detail came from Natasha Pasternak, who was effectively living in the Big House at that time, and was there when Boris died. The Claimant spoke directly to Natasha Pasternak (widow of Boris’ second son, Leonid), who told her that it was really embarrassing that Olga sat on the balcony weeping, because she was *persona non grata* in the Big House. The Claimant used this eye witness information in Lara. The authors of TZA did not, because they did not have this information. The Defendant also made no use of this information. In the case of the Defendant the obvious explanation for the non-use of this information was that the Defendant was not copying Lara. This is of course one point of detail, but in my view it is both significant and odd, if the Defendant was copying Lara to the extent alleged and, in particular, if the Defendant was taking her references to a vigil from Lara, that this particular detail was not taken up by the Defendant.
391. Beyond the points already made, the word “*vigil*” is a commonplace and obvious word to use in describing attendance upon a person’s final hours. I find that the Defendant did not copy the use of this word from Lara. I again add that if my finding had been that the Defendant did copy the use of this word from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
392. The account of the funeral in chapter 12 of Lara includes a reference, on page 243, to Boris’ “*beloved garden*”. On page 438 of TSWK there is a description of Boris’ coffin being carried out and a pause near his “*beloved garden*”. The Defendant did in fact describe Boris’ garden as his “*beloved garden*” in the September 2016 Draft, which predated her obtaining a copy of Lara. The context is different, as the description is used, in the September 2016 Draft, in the scene when D’Angelo first visits Boris. While the context is different it is clear, as the Defendant pointed out in cross examination, that the Defendant had these words of description in mind before she wrote Lara. The point is one of detail, but it seems much more likely to me that the Defendant, when writing about Boris’ garden in the funeral scene, drew the phrase “*beloved garden*” from her own earlier writing, rather than Lara. I find that the Defendant did not copy this detail from Lara. I again add that if my finding had been that the Defendant had copied this phrase from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.

393. The next Supporting Allegation concerns the sequence of events after the funeral. In chapter 12 of Lara, at page 249, the conclusion of the funeral is immediately followed by the first KGB visit to the Little House, when Olga is forced to hand over the manuscript of *The Blind Beauty*. This is then immediately followed by the second KGB visit, the ransacking of the Little House, and Olga being taken away to the Lubyanka. On page 440 of TSWK the funeral is followed by a paragraph about how Zinaida and other members of the Pasternak family sought to erase Olga from the history of Boris, after his death. This paragraph is then followed by the scene where “*they*” arrive at the Little House, search the Little House, and take Olga away to the Lubyanka. I have given some more detail of this scene above. The persons who search the Little House and take Olga away are not identified specifically as KGB or police. The point put to the Defendant in cross examination was that the sequencing of events was very similar in Lara and TSWK and, in both cases, very different to the treatment of these events in ACOT. At pages 242-243 of TZA chapter 15 ends with the funeral, and chapter 16 begins with Olga’s arrest. So the sequencing of these events in TZA is that the funeral is immediately followed by Olga’s arrest, although it should be added that the account of the arrival of the KGB at the Little House to arrest Olga is immediately followed by a lengthy account of the KGB surveillance of the flow of money to Boris, from royalties earned in the West, and the difficulties which arose after Boris died. The account of the arrest then resumes on page 247 of TZA.
394. In terms of copying Lara I do not think that this Supporting Allegation stands up to scrutiny. The actual chronology of these events was that the funeral was followed by Olga’s arrest a few months later. There is therefore nothing to be inferred from the events being narrated in that order. In terms of the move from the funeral to the arrest, there is of course an important difference between Lara and TSWK, which is that TSWK moves straight to the arrest scene, which is written in some detail, and with numerous features which were clearly original to the Defendant. In Lara the funeral is followed by a visit from the KGB, demanding the manuscript of *The Blind Beauty*. The arrest and ransacking of the Little House then follow, and are dealt with fairly shortly. The scene bears no relation to the arrest scene in TSWK. The evidence seems to me to point clearly away from the conclusion that the Defendant copied the sequencing of the funeral and the arrest from Lara. I find that the Defendant did not copy this sequencing from Lara. I again add that if my finding had been that the Defendant had copied this sequencing from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
395. The final Supporting Allegation is that chapter 12 of Lara, and chapter 28 of TSWK end with the quotation from Doctor Zhivago, which is not present in ACOT or TZA. I am not satisfied that the Defendant copied the use of the quotation from Lara, essentially for three reasons. First, the Defendant did not originally have this quotation as the end of chapter 28 of TSWK. There was further narrative thereafter, which the Defendant removed on the advice of her editors. Second, the use made of the quotation is different. Chapter 28 ends on an upbeat note, with Olga distinguishing herself from Lara. Chapter 12 of Lara

ends on a downbeat note, reflecting the historical reality that Olga's fate was grimly similar to that of Lara. Third, the quotation from Doctor Zhivago is world famous. It ends Doctor Zhivago, before the epilogue to the book. It is also quoted, by Alec Guinness, in the closing scene before the epilogue to the film. Its use, by way of ending a story about Olga's life, is obvious.

396. Putting all of the above together I find that the Defendant did not copy from Lara the use and/or arrangement of this quotation. I again add that if my finding had been that the Defendant had copied the use and/or arrangement of this quotation from Lara, I would not have regarded this as good or any evidence to support the allegations of selection copying.
397. There is one point which I would add in relation to this last Supporting Allegation and Event 15. The point is concerned with the selection of Event 15 in chapter 12 of Lara, rather than with the Supporting Allegation itself. In expressing my earlier conclusions on the question of whether the selection of the specified Events in chapter 12 of Lara is protected by copyright, I expressed those conclusions as being subject to the Selection Copyright Qualification. Event 15 is, in my view, an example of the application of the Selection Copyright Qualification becoming relevant. In my discussion of the question of whether the Defendant copied from Lara the use and/or arrangement of the quotation from Doctor Zhivago, I made the point that its use, by way of ending a story about Olga's life, is obvious. While I relied on this point as one of the reasons why I am satisfied that the Defendant did not copy from Lara the use and/or arrangement of this quotation, I think that the point is also important in considering whether the copyright which, I accept, subsists in the selection of the specified Events in chapter 12 of Lara actually extends to the placing of the quotation from Doctor Zhivago as the conclusion to chapter 12 and as the conclusion to Olga's story. I do not think that copyright subsists in this selection of Event 15, independent of the question of whether the Defendant copied the selection of Event 15. It seems to me that the use of this world famous quotation by way of conclusion to an account of Olga's life is not something which the Claimant can claim as her own original creation. The concept or idea seems to me too obvious to qualify for such protection. In my view the Claimant is not entitled to claim the selection of Event 15 as part of the AOIC which I accept she otherwise exercised in relation to the selection of the specified Events.
398. I now come to my conclusions on the question of whether the Defendant has copied the selection of the specified Events in chapter 12 of Lara or a part of that selection.
399. So far as the Events themselves are concerned, the comparison exercise which I have conducted above seems to me to offer no evidence of the Defendant having copied the selection of the specified Events in chapter 12 of Lara, or any part of that selection. The selection of events in chapter 28 of TSWK is very different to the selection of events in chapter 12 of Lara. Beyond that, my concluding comments are essentially the same as those I have made in relation to the allegations of copying of selection in respect of chapters 5-10 of Lara.



400. Turning to the Supporting Allegations they do not, on my findings, demonstrate any instances of the Defendant making use of details picked up from Lara. I should however again add the point that if my findings had been different in relation to this group of Supporting Allegations, and if I had found that the Defendant had copied any particular details from Lara as alleged, I would not have regarded this as good or evidence to support the allegations of selection copying. My reasons for saying this are the same as those I have set out previously in this context. In relation to each such Supporting Allegation, it seems to me that the relevant details, even if assumed (contrary to my findings) to have been copied from Lara, are too trivial to support the allegations of selection copying. It also seems to that the differences between the relevant parts of the two works, in terms of the selection of events, are too great for a finding of selection copying to be possible on the basis of the relevant Supporting Allegations, even if the same had been established as instances of copying. I also repeat my reference to the Consistency Problem, as identified earlier in this judgment.
401. I have considered the Supporting Allegations separately, so in theory the question arises as to whether the Supporting Allegations in relation to chapter 12 of Lara, if taken cumulatively, provide support for the allegation of selection copying. On my findings this question does not arise. None of the Supporting Allegations have been established. It seems to me however, even if one leaves the Consistency Problem to one side, that there is no sufficient accumulation of Supporting Allegations to support the allegations of selection copying, even if I had found all or a material number of the Supporting Allegations to be established, so that in each such case the Defendant had copied the relevant details from Lara. I say this for the same reasons as I have just expressed in relation to the Supporting Allegations when taken individually. Those reasons seem to me equally to apply if the Supporting Allegations are taken cumulatively.
402. On the basis of the above discussion, and taking into account all the evidence which I have received and heard, and reviewing my analyses of the specified Events in chapter 12 of Lara and the Supporting Allegations, the position seems clear to me. I find that the Defendant has not copied the selection of the specified Events in chapter 12 of Lara, or any part of it. I should make it clear that this conclusion holds good whether or not I am right in expressing my earlier conclusion that the selection of Event 15 is not protected by copyright.
403. In summary therefore, drawing together all of the discussion in this section of this judgment, my overall conclusions in relation to chapter 12 of Lara are as follows:
- (1) The selection of the Events in chapter 12 of Lara, as set out in Annex 2, is protected by copyright as a substantial part of the literary work that is Lara. The same is true of the selection of these Events which is alleged to have been copied.
  - (2) I find that the Defendant has not, either in chapter 28 of TSWK or elsewhere in TSWK, copied the relevant selection of these Events or any part of this selection.

- (3) I conclude that the Defendant has not, in relation to chapter 12 of Lara, infringed the copyright in Lara.
- (4) Accordingly, and in relation to chapter 12 of Lara, the claim of infringement of copyright in Lara fails.

#### The Defendant's use of Lara as a source

404. In the earlier section of this judgment where I have dealt with the writing of TSWK, I left outstanding the evidential questions of (i) the use made by the Defendant of ACOT and TZA, and (ii) the extent of the use which the Defendant made of Lara, and her initial reaction on reading Lara. I took this course because it seemed to me appropriate to state my findings on these questions after I had gone through the detail of the allegations of copying, both in relation to the selection of the Events and in relation to the Supporting Allegations. I say this because it seems to me that the answers to these evidential questions emerge from a consideration of the mass of evidence relevant to the question of whether copying took place. I do not think that these evidential questions can or should appropriately be answered before going through all the evidence relevant to the allegations of copying.
405. On the basis of my consideration of all the evidence relevant to the allegations of copying I can take the evidential questions shortly:
  - (1) I am satisfied that the Defendant used ACOT and TZA as her primary resources in writing TSWK, and I so find. I accept the Defendant's evidence in this respect. It is obvious, when one goes through the detail of the allegations of copying and, in particular, when one goes through the evidence as to how the Defendant created the work which became TSWK, that the Defendant was using ACOT and TZA as her primary resources.
  - (2) I am also satisfied that the Defendant used Lara only as a secondary source, and I so find. I accept the Defendant's evidence in this respect. This is, again, obvious when one goes through the detail of the allegations of copying. I should however highlight the point, which I have made a number of times in the discussion of the Selection Claim above, that the Defendant's evidence that she used Lara as a secondary source is entirely consistent with the way one finds, in TSWK, the odd detail which has been taken from Lara.
  - (3) I am also satisfied, and I find that the Defendant did find Lara a disappointment, when she read the work in late 2016. I am also satisfied, and I find that the reason for that disappointment was because she did not consider the work to contain anything new. I accept the Defendant's evidence in this respect. Given the extent to which the Claimant drew on ACOT and TZA in writing Lara, and given that the Defendant was using ACOT and TZA as her primary sources, I would have expected the Defendant to have experienced some disappointment when first reading Lara. In terms of source material, I would have expected the Defendant to have concluded that Lara did not contain anything new. This was not of course what the Defendant said to the Claimant, either at the drinks party in March 2019 or in the subsequent email exchange. I have however

already explained how neither the Claimant nor the Defendant expressed their true feelings in those exchanges.

The Selection Claim – looking at the claim generally

406. The way in which the Selection Claim has been formulated and pursued has required me to go through the individual allegations of copying, both in relation to the selection of Events and in relation to the Supporting Allegations, on a chapter by chapter basis. In the course of this lengthy exercise, I have stated my conclusions on the same chapter by chapter basis. The overall result of this exercise is that the Selection Claim fails, in relation to each of the chapters of Lara which is said to have been the subject of copying of selection.
407. It is however important to stress that I reach the same result by adopting the shorter route of considering, as a whole, all of the material which is said to have been the subject of copying of selection. If one stands back, and takes the relevant chapters of Lara as a whole, I do not think that this changes the evidential position; namely that it is clear that the Defendant did not copy from Lara the selection of events in the relevant chapters of TSWK or any part of that selection.
408. The essential reason for this is that Lara and TSWK are fundamentally different works. Lara is a non-fictional historical work. The Claimant stressed in her evidence that while it was her object to tell the story in an accessible and readable manner, reading more like fiction, the book is not a work of fiction and describes actual events. TSWK is a work of historical fiction. It is based on real events, but those real events have been woven into the story devised by the Defendant, and have themselves been adapted to suit the story. TSWK has been described as a spy thriller. I am not sure that this is quite how I would describe the book, but this description does bring out the essential difference with Lara; namely that TSWK is a work of fiction, loosely based on real events. This fundamental difference between the two works is apparent on a first reading of the two works.
409. Beyond this, and as will have been apparent from the detailed analyses set out in the previous sections of this judgment, the two works are written in very different styles, with different content and different arrangement.
410. A comparison between the two works, taken as a whole, is not of course the relevant comparison in the present case, where the Selection Claim is confined to certain chapters of Lara and certain chapters of TSWK. The differences in style, content and arrangement which I have identified are however equally apparent if one concentrates on the chapters of each work which are the subject of the Selection Claim.
411. The relevant chapters of each work are of course concerned with the same basic historical events in the lives of Boris and Olga. Both authors were using the same principal source materials; namely ACOT and TZA. The Defendant, on her own evidence, did use Lara as a secondary source. In these circumstances it is not

surprising that the sequence of events, in each work, follows the same basic chronology, although I stress the reference to basic chronology; given the differences in events and their ordering as between the two works. Equally, it is not surprising that one finds some of the same details in each work. None of these areas of similarity or overlap seem to me to come anywhere near establishing that the Defendant copied the selection of events in the relevant chapters of Lara, or any part of that selection. This is so whether one considers the Selection Claim on a chapter by chapter basis, or as a whole. The evidence demonstrates that the Defendant took no more from Lara than odd details which, quite correctly, are not said to have been protected by copyright.

#### The Selection Claim – overall conclusions

412. For the reasons which I have set out, the Selection Claim fails. The Defendant has not infringed the Claimant's copyright in Lara in all or any of the ways alleged in the Selection Claim. Accordingly, the Selection Claim falls to be dismissed.

#### The Translation Claim - discussion

413. I turn to the Translation Claim, which is concerned with the alleged infringement of copyright in the Legendes Translation. As I have explained earlier in this judgment, no English edition of Legendes exists. There is the original work, written in Russian by Irina and published in 1997. There is the French translation of Legendes, translated into French by Gerard Abensour, and published in 2002.

414. In her first witness statement the Claimant explained that she realised, in the course of her researches, that Legendes had never been translated into English. In June 2014 the Claimant privately commissioned and paid for the Legendes Translation by Ms Hervey. The Claimant's instruction to Ms Hervey was to read Legendes, in the French translation, and then translate all the pages relevant to Olga, Irina and Boris. The result (the Legendes Translation) is a series of translations of pages from the French version of Legendes, running to about 50 pages of translation. I have seen a copy of the invoice rendered by Ms Hervey (who is referred to as Marlene Pearce on the invoice), which records the fee paid for the Legendes Translation as £600. The invoice is dated 20<sup>th</sup> August 2014.

415. I have also seen a copy of the agreement by which Ms Hervey assigned such copyright, as subsists in the Legendes Translation to the Claimant. The assignment agreement was entered into between Ms Hervey and the Claimant and is dated 27<sup>th</sup> October 2020; that is to say some time after the commencement of this action.

416. There were, originally, four allegations of infringement by the Defendant of copyright in the Legendes Translation. Three of these allegations were not however pursued by the Claimant at trial as allegations of infringement in their own right. They were instead pursued as instances of copying items, originally from the Legendes Translation, which appeared in Lara. Two of the allegations

were relied upon in support of the allegation of copying of the selection of Events in the Bench Scene. One of the allegations was relied upon in support of the allegation of copying of the selection of Events in chapter 7 of Lara. I have dealt with these three allegations earlier in this judgment, in the sections dealing with the allegations of infringement of copyright in relation to the Bench Scene and in relation to chapter 7 of Lara.

417. The net result of all this is that the allegation of infringement of copyright in relation to the Legendes Translation now relates only to one part of the Legendes Translation. The relevant part of the Legendes Translation contains the English translation of the statement of the crimes which Olga was said to have committed, on the occasion of her sentencing to her first term of imprisonment in Potma. The wording of the English translation of this statement is quoted in chapter 5 of Lara, on page 107. I have already defined this statement, which was translated into English in the Legendes Translation and which was quoted in Lara, as “**the Accusation Act**”. I shall continue to use this definition.

418. For ease of reference I repeat the wording of the Accusation Act, as quoted in Lara, which is as follows:

*“The witnesses’ statements have enabled us to uncover your actions: you have continued to denigrate our regime and the Soviet Union. You have listened to the “voice of America”. You have slandered Soviet writers who had patriotic views and you have praised to the skies Pasternak’s work, a writer with anti-establishment opinions.”*

419. This is a direct quotation from the statement of the Accusation Act in the Legendes Translation, save that the word “*enabled*” is “*enable*” in the Legendes Translation, and the words “*Soviet writers*” in Lara are “*soviet writers*” in the Legendes Translation. These features, which the Claimant has tidied up in the quotation in Lara, are examples of the fairly basic nature of the translated text in the Legendes Translation. The statement of the Accusation Act in the Legendes Translation also carries the heading “**Accusation act**” (the bold print is in the Legendes Translation).

420. The statement of the Accusation Act also appears in TSWK, at the end of chapter 1, on page 23. The statement of the Accusation Act has some minor changes from the language of the Accusation Act in the Legendes Translation and in Lara. The Accusation Act, as it appears in TSWK, is in the following terms (the changes from the Legendes Translation are shown by marking in the text):

*“The witnesses’ statements have enabled us to uncover your actions: you have continued to denigrate our regime and the Soviet Union. You have listened to ~~the “voice of America”~~ Voice of America. You have slandered Ssoviet writers with ~~who had~~ patriotic views and you have praised to the skies the work of Pasternak’s ~~work~~, a writer with anti-~~establishment~~ antiestablishment opinions.”*

421. It is not in dispute that the Claimant, by the assignment agreement mentioned above, has taken a valid assignment from Ms Hervey of such copyright as subsists in the Legendes Translation. It follows that such copyright in the Legendes Translation as was vested in Ms Hervey is now vested in the Claimant.
422. This leads into the first question to be answered in relation to the Translation Claim, which is whether there is any copyright subsisting in that part of the Legendes Translation which comprises the English translation of the Accusation Act. This is not an easy question to answer.
423. The starting point is that, in principle, copyright can exist in a translation. While, in most cases, the translator will not have exercised their own intellectual creativity in creating the subject matter of the translation, the translator will normally have exercised their own creativity in choosing how to express, in translation, the original subject matter. The work of translation can often be a highly skilled business, calling for a high degree of intellectual creation. Some literary translators can become famous in their own right, in recognition of their ability to produce translations of difficult foreign works which read naturally in the language of translation. A good example of this is the work which Boris did to translate foreign works into Russian. As previously recorded in this judgment, Boris depended upon this translation work for his basic income as a writer and was, by way of example, a famous translator of Shakespeare into Russian. Another example of the high degree of intellectual creation which may be required in translation is the translation of humorous works. Jokes and puns which work in the original language may not work as well, or at all in the language of translation. A key part of the translator's creative skill is to find ways of conveying the humour in the language of translation. In situations of this kind it was not in dispute between the parties that copyright can subsist in an English translation of a foreign language work.
424. This position is explained in the following terms in Volume One of Copinger and Skone James on Copyright (Eighteenth Edition), at 3-205:
- "It is often said that changing the expression of a work from one medium or form to another will entitle the new work to copyright. As a generalisation, this is true but it is no more than another way of saying that skill and labour expended on the creation of a work confer originality. The work of a reporter in faithfully reporting a speech delivered orally is an example of the expenditure of skill and labour in connection with a change of medium which has been held to entitle a work to protection." An example of a change of form is the work of a translator, which has long been entitled to protection."*
425. As a footnote to this text explains, translations are required to be protected by copyright under Article 2(3) of the Berne Convention. They are protected as original works in their own right.

426. In principle therefore I accept Mr Caddick's argument that translations are governed by the same rules as other forms of authors' works. Copyright will protect a translation, so far as the translation reflects the intellectual creation (AOIC) of the translator.
427. Applying this discussion to the present case it seems to me that, in principle, copyright does subsist in Ms Hervey's translation of extracts from *Legendes*, in the form of the *Legendes Translation*. Such copyright subsists by reason of the creative skill which Ms Hervey exercised in choosing how to convey, in English, the language of the relevant parts of the French edition of *Legendes*. While the *Legendes Translation* may be a fairly basic translation, it does not seem to me that this alters the fact that Ms Hervey will necessarily have had to bring her creative skills to bear in choosing what words to use in English in order best to capture and convey the meaning of the French text.
428. As I understood the Defendant's position, it was not disputed that copyright subsisted in the *Legendes Translation*. The Defendant's essential argument was that the *Accusation Act* is incapable of qualifying as a substantial part of the *Legendes Translation*, either quantitatively or qualitatively. The *Accusation Act* constitutes a tiny part of the *Legendes Translation*; comprising a few lines from some 50 pages of translation. The Defendant also argued that, because the wording of the *Accusation Act* is different in *TSWK*, the Defendant could not have taken the intellectual creation of the translator.
429. I had some difficulty in understanding what role the second of these arguments played, in relation to the question of whether copyright subsists in the translation of the *Accusation Act* in the *Legendes Translation*. The argument does not seem to me to be relevant to the question of whether copyright subsists in the translation of the *Accusation Act* in the *Legendes Translation*. Rather, it seems to me to be relevant to the question of whether the Defendant has infringed such copyright, if such copyright subsists.
430. So far as the first argument of these arguments of the Defendant is concerned, I have come to the conclusion that it cannot be accepted. My reasons for this conclusion are as follows.
431. It is true that the translation of the *Accusation Act*, as it appears in the *Legendes Translation* constitutes only a very small part of the *Legendes Translation*. On the Defendant's figures, the translation of the *Accusation Act* (including the heading) comprises 55 words in a translation totalling 23,484 words (0.23% of the total). It seems to me however that this is not the correct test. The test is qualitative, not quantitative. Applying *Infopaq* it is clear that, in principle, a sequence of 11 words is capable of qualifying for copyright protection, if it contains elements which are the expression of the intellectual creation of the author of the work; see Lewison LJ in *SAS Institute* at [38]. It seems to me to follow that the translation of the *Accusation Act* is not disqualified from copyright protection, as a substantial part of the *Legendes Translation*, simply because it comprises only a few lines of text.

432. Applying a qualitative test I can see the argument that the translation of the Accusation Act does not contain any expression of the intellectual creation of the author. The translation does not tell a story. The translation does not convey humour from French into English. The translation does not convey any particular concept from French into English. All that the translation does is to turn French words into English words. By reference to what Lewison LJ said in *SAS Institute*, at [31], it might be said that the creative choices which Ms Hervey had to make, in translating the wording of the Accusation Act from French into English, were too limited to qualify as the intellectual creation of the author.
433. I can see considerable force in this argument, but ultimately I am not persuaded by this argument. As Mr Caddick pointed out in his closing submissions, the process of rendering the French text into English did require creative choices, albeit at a fairly low level of originality. Ms Hervey had to decide, at various points, what English words should be used to convey the meaning of the French words. Ms Hervey also had to decide how to arrange the English words, in terms of grammar and structure. An example of this is provided by one of the changes made by the Defendant to the language of the Accusation Act. In TSWK the Defendant wrote "*the work of Pasternak*". In the Legendes Translation the translation selected by Ms Hervey was "*Pasternak's work*". Ms Hervey could have rendered this part of the translation as "*the work of Pasternak*", but opted for a different form of words.
434. In the case of the Accusation Act, and as illustrated by the example given in my previous paragraph, the intellectual creation of the author was taking place at a fairly low level. It will be understood that I intend no disrespect to Ms Hervey in saying this. It is simply a reflection of the task she was asked to carry out. In terms of copyright protection however it seems to me Ms Hervey's translation is not disqualified from such protection simply because the intellectual creation was taking place at a low level. Applying, in particular, what was said by the Court of Appeal in *Martin v Kogan* as to the required threshold for establishing AOIC, it seems to me that the exercise of translating the wording of the Accusation Act from French to English can be said to have involved a sufficient degree of intellectual creation to qualify for copyright protection. Putting the matter another way, and applying what was said by Lewison LJ in *SAS Institute* at [31], it seems to me that the choices which Ms Hervey had to make, in carrying out her work of translation of the Accusation Act, were not so limited as to disqualify the translation from constituting the intellectual creation of the author.
435. I therefore conclude that copyright does subsist in the translation of the Accusation Act in the Legendes Translation, as a substantial part of the Legendes Translation.
436. The next question is whether the Defendant copied the translation of the Accusation Act in the Legendes Translation. In closing submissions Mr Lykiardopoulos stated that it was admitted that the Defendant had copied the text of the Accusation Act from Lara, and had therefore indirectly copied the



Legendes Translation in that regard. This reflected the admission of the Defendant in cross examination that she did take this quotation from Lara.

437. In fact, the position is not quite as straightforward as this, and needs a little more analysis. The statement of the Accusation Act appears in the October 2016 Draft, and is a verbatim version of the Accusation Act as it appears on page 107 of Lara. The Defendant admitted that she took this quotation directly from Lara. Her evidence, which I accept, was that she thought that this was an actual quotation from history, as someone would quote George Washington or Thomas Jefferson or any speech. The Defendant thought that this was an actual quotation of what the Soviet court had said, in sentencing Olga. In passing, I should mention that the Defendant did not, in her evidence in cross examination, identify that the quotation in Lara would have been a translation, of some kind, of the actual statement of the Accusation Act by the Soviet court. The original statement of the Accusation Act would, I assume, have been written or spoken in Russian by the Soviet court. It appears, and I so infer, that this was not a particular point which the Defendant had in mind in this context.
438. In the statement of the Accusation Act in the final version of TSWK, at page 23, the Defendant made the minor changes which are set out above. It follows that the Defendant did not, either in the October 2016 Draft or in the final version of TSWK, exactly copy the translation of the Accusation Act in the Legendes Translation. In the October 2016 Draft the Defendant followed the wording in Lara, which has minor differences from the translation in the Legendes Translation. In the final version of TSWK the Defendant made some further minor changes of her own.
439. I did not however understand the Defendant to argue that the minor differences between the statement of the Accusation Act in the final version of TSWK and the translation of the Accusation Act in the Legendes Translation had the effect that the Defendant could not be said to have copied the Legendes Translation in this respect. As I have explained above, an argument of this kind was deployed in relation to the question of whether copyright subsisted in the translation of the Accusation Act in the Legendes Translation, but I did not understand the argument to be extended to the question of whether the Defendant copied the translation. In case I have misunderstood the position, I should make it clear that I do not think that the minor differences to which I have referred can be relied upon to argue that the Defendant did not copy the translation of the Accusation Act in the Legendes Translation. The differences seem to me to be too minor to be relied upon for that purpose.
440. It is of course the case that the Defendant did not directly copy the translation of the Accusation Act from the Legendes Translation. The Defendant copied the translation of the Accusation Act from Lara. As such, the copying was indirect. I understood it to be common ground however that infringement of copyright can occur as a result of this kind of indirect copying, in addition to direct copying; see Section 16(3)(b).

441. I therefore conclude that the Defendant, in her statement of the Accusation Act on page 23 of TSWK, did copy, indirectly, the translation of the Accusation Act in the Legendes Translation.

442. In the absence of some other defence it would follow, from my conclusions thus far, that the Defendant did infringe the copyright in the Legendes Translation by her use, in TSWK, of the translation of the Accusation Act in the Legendes Translation. The Defendant contends however that her use of this quotation was not an infringement of copyright, by virtue of the provisions of Section 30(1ZA).

443. Section 30(1ZA) provides as follows:

*“Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that-*

- (a) the work has been made available to the public,*
- (b) the use of the quotation is fair dealing with the work,*
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and*
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).”*

444. In the present case the Defendant did make use of a quotation from the Legendes Translation for the purposes of her writing of TSWK. Section 30(1ZA) provides that copyright in the Legendes Translation will not have been infringed by the use of this quotation, provided that the conditions in paragraphs (a) to (d) of the subsection are satisfied. It seems to me that the burden of demonstrating that these conditions were satisfied in the present case rests upon the Defendant, as the party seeking to rely upon the exonerating provisions of Section 30(1ZA).

445. The Defendant’s case on Section 30(1ZA) was not originally pleaded and was only raised in the Defendant’s skeleton argument for the trial. It was then formally pleaded as part of the re-amendments of the statements of case of the parties for which I granted permission in the course of the trial. In the course of opening the trial Mr Caddick, both sensibly and helpfully, indicated that he did not object to the Section 30(1ZA) defence being relied on by the Defendant, notwithstanding that it had not been pleaded or, I assume, raised before the arrival of the Defendant’s skeleton argument for trial.

446. The Claimant’s pleaded response to the Section 30(1ZA) defence is to be found in her Re-Re-Amended Reply and Defence to Counterclaim, as part of the amendments for which I granted permission in the course of the trial. In paragraph 19AA of this Re-Re-Amended Reply and Defence to Counterclaim the Claimant admits that the conditions in paragraphs (a) and (c) of Section 30(1ZA) were satisfied in the present case. The Claimant does not admit that the condition in paragraph (b) was satisfied, and denies that the condition in paragraph (d) was satisfied. I therefore have to consider paragraphs (b) and (d) of Section 30(1ZA).

I will take these two paragraphs in turn. Before doing so, there is an important preliminary point which I must make.

447. The arguments and evidence in this trial which were directly related to the Translation Claim were limited. This no doubt reflected the fact that the Translation Claim is, by comparison with the Selection Claim, a minor part of this action. For reasons which I can entirely understand, the parties concentrated the bulk of their evidence, cross examination and arguments upon the Selection Claim. One result of this was that I received only limited argument, both written and oral, on the legal issues in the Translation Claim. I stress that this is not a criticism. In terms of proportionality and appropriate use of trial time, this was an entirely legitimate course for the parties to take. In the case of the Section 30(1ZA) defence, the Claimant can also point out, legitimately, that the defence was not originally pleaded and was only raised at trial. The relevant point is this. In terms of the question of whether copyright subsists in the translation of the Accusation Act which appears in the Legendes Translation, I have had the benefit of all the parties' submissions and authorities on subsistence of copyright in relation to the Selection Claim. Those submissions and authorities have provided me with ample assistance in resolving the question of subsistence of copyright in relation to the Translation Claim. In terms of the question of whether the Defendant copied the translation of the Accusation Act, this is the subject of an admission by the Defendant, as I have explained above.
448. In relation to the Section 30(1ZA) defence the position is not the same. As is often the way with minor points in a trial, the Section 30(1ZA) defence does actually raise some quite difficult points on the interpretation and application of this subsection. In another case, where much more turned on the availability or otherwise of this defence, I can see that these points might have engaged much more argument and analysis of the 1988 Act. I repeat that this is not a criticism of the parties' approach to the Translation Claim. I am making this preliminary point in order to explain the context of my decision on the Section 30(1ZA) defence.
449. Returning to Section 30(1ZA) itself, and starting with paragraph (b), my attention was drawn to the guidance on what is meant by fair dealing which can be found in *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 [2002] Ch. 149. The judgment of the Court of Appeal in that case was given by Lord Phillips MR. At [70] the Court of Appeal quoted the following summary of the test for fair dealing in the general context of Section 30, provided by the authors of Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs*, 3<sup>rd</sup> Edition (2000), at paragraph 20.16. The Court of Appeal described this as an accurate and helpful summary. In setting out this summary from Laddie, Prescott & Vitoria, as quoted by the Court of Appeal, I have followed the Defendant's written closing submissions in adding numbers and paragraphing:

*"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression."*

[1] *However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on.*

[2] *The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information.*

[3] *The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."*

450. Applying the guidance approved in *Ashdown*, the Defendant was plainly not seeking to engage in any form of commercial competition. The *Legendes Translation* was privately commissioned by the Claimant, to assist in the writing of *Lara*. It had no other independent function. The use by the Defendant of the quotation did not trespass at all on the dealings which Ms Hervey had with the *Legendes Translation*, which appear to have been confined to the performance of the Claimant's commission in any event. Nor was it suggested that the Defendant's use of the quotation has interfered or interferes with any dealings of the Claimant with the *Legendes Translation*, in her capacity as owner by assignment of the copyright in the *Legendes Translation*. The quotation itself is short, and a small part of the *Legendes Translation*. The Defendant made use of the quotation only for the purposes of its use in *TSWK*, and only for the purposes of setting out the terms in which Olga was sentenced on the occasion of her first imprisonment.

451. I have already accepted the Defendant's evidence that she made use of the quotation, which she thought she was taking from *Lara*, because she thought it was an actual historical quote, recording what was said by the Soviet court, and falling into the same category as a quote from an historical figure such as George Washington or Thomas Jefferson. The Defendant did not act in any underhand manner, or obtain the quotation by any disreputable means. It is clear, and I so find, that the Defendant acted in good faith. As I have already noted, a point which appears not to have occurred to the Defendant, or at least was not articulated in her evidence, is that even if she was dealing with an historical quotation of the kind to which she referred, that quotation must have been translated by someone, given that the original version of the *Accusation Act*, if

what appears in Legendes is an actual record of what was said by the Soviet court, would have been spoken or written in Russian. As I have said, I infer that this was not something which occurred to the Defendant, and I so find. I do not however regard this finding as affecting my finding of good faith. This particular point has some relevance at a later stage of the analysis.

452. The Claimant submitted that the burden of establishing fair dealing rested on the Defendant. The Claimant submitted that the Defendant must fail on this point because, and as a result of the Section 30(1ZA) defence only having been added at trial, there was no evidence one way or the other to address the issue of fair dealing. I accept that the burden is on the Defendant to establish fair dealing, within the terms of paragraph (b) of Section 30(1ZA). It seems to me however that there is a considerable quantity of evidence available which is relevant to the issue of fair dealing, and which supports the findings on this issue which I have set out above.
453. Putting all of the above factors together, and applying the guidance in *Ashdown*, it seems to me quite clear that the Defendant's use of the quotation of the Accusation Act was fair dealing with the relevant work, namely the Legendes Translation, within the meaning of paragraph (b). Accordingly, I conclude that the condition in paragraph (b) is satisfied in the present case.
454. The bulk of the argument between the parties in closing submissions, so far as the Section 30(1ZA) defence was concerned, was concentrated upon paragraph (d). Paragraph (d) engages two broad questions. The first question is whether the quotation of the Accusation Act, as it appeared in TSWK, was accompanied by a sufficient acknowledgment. The second question, assuming no such sufficient acknowledgment, is whether it was impossible, for reasons of practicality or otherwise, for the quotation to have been accompanied by such a sufficient acknowledgment.
455. Starting with the first of these questions, Section 178 contains a list of minor definitions which apply in Part I of the 1988 Act. They include the following definition of sufficient acknowledgment:
- "sufficient acknowledgement" means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-*
- (a) *in the case of a published work, it is published anonymously;*
- (b) *in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry;"*
456. TSWK contained no acknowledgment identifying the Legendes Translation by its title or other description or identifying Ms Hervey as its author. The closest one gets to anything of this kind is to be found in the TSWK Note which appears at the end of TSWK, after the epilogue. As I have noted in an earlier section of this judgment, Lara is referenced within the TSWK Note, but within a list of books which are introduced as *"Some of the other books I consulted"*.

Independent of the fact that the reference to Lara was not a reference to the correct work, which was the Legendes Translation, this general reference plainly falls well short of what would have been required to satisfy the first part of the definition of sufficient acknowledgment in Section 178.

457. This leaves paragraphs (a) and (b) of the definition in Section 178. If I have understood the operation of these paragraphs correctly, they have the effect that an acknowledgment is not required if either paragraph applies.
458. It seems to me that paragraph (a) of the definition cannot apply in the present case. The Legendes Translation was not, and is not a published work. So far as I am aware it has never been published. It was privately commissioned by the Claimant. The Defendant argued that the Legendes Translation had, in effect, been published anonymously. The argument was that the translation of the Accusation Act had been published in Lara. As I have noted, earlier in this judgment, the quotation of the Accusation Act is attributed, in Lara, to “*Légendes*”; see the Lara Notes at page 274. The relevant note identifies Irina as the author. The presence of the acute accent on “*Légendes*” suggests a reference to the French edition of Legendes; namely *Légendes de la Rue Potapov*. In the context of a claim for infringement of copyright in the Legendes Translation, this attribution may be said to be incomplete, given that the quotation came directly from the Legendes Translation, of which the author was Ms Hervey. As such, so it was contended by the Defendant, there was an anonymous publishing of the quotation from the Legendes Translation, sufficient to constitute an anonymous publishing within the meaning of paragraph (a).
459. I am unable to accept this argument. Paragraph (a) of the definition in Section 178, if it is to apply at all, requires that the relevant work be a published work. I cannot see that the publication, in Lara, of a quotation which comprises only a small part of the Legendes Translation, is capable of qualifying the Legendes Translation as a published work. Even if, which is an open question in itself, the reference to a published work in paragraph (a) is assumed to be capable of referring to or encompassing the publication of the quotation used in Lara, I find it difficult to see how the use of this quotation in Lara qualifies the quotation as a published work. On the hypothesis that the quotation, taken in isolation, is capable of being treated as a published work, within the meaning of paragraph (a), it seems to me that what is required is publication of that quotation, as publication is defined in the 1988 Act, not its use as a quotation in a different published work. In summary, it seems to me that the Legendes Translation is correctly described as an unpublished work. The position seems to me to be the same if, which I do not decide, the reference to “*the work*” in paragraph (a) can be taken to refer only to the translation of the Accusation Act in the Legendes Translation. I therefore conclude that paragraph (a) of the definition does not apply in the present case.
460. This leaves paragraph (b) of the definition in Section 178, given my conclusion that I am concerned with an unpublished work. In relation to paragraph (b) the question becomes whether it was not possible for the Defendant to ascertain the identity of the author by reasonable inquiry.

461. In terms of what inquiries were made, the factual position is clear. The Defendant accepted in cross examination that she made no inquiries of the Claimant to ascertain the identity of the author. There is no evidence of any such inquiries having been made by her publishers or literary agents or anyone else acting on behalf of the Defendant.
462. The arguments of the parties in this context were principally directed to paragraph (d) of Section 30(1ZA), and not to paragraph (b) of the definition in Section 178. Subject to this point, the rival arguments of the parties on the question of what inquiries could reasonably and/or practically have been made, can be summarised as follows.
463. The Defendant's argument concentrated on the point that the quotation of the Accusation Act, as it appears in Lara, is attributed to "*Légendes*". As I have already noted, this attribution, as it appears in the Lara Notes at page 274, appears to be a reference to the French edition of *Legendes*. The author is identified in the same attribution in the Lara Notes as "*Emelianova*"; that is to say Irina. Given that the quotation actually came, at least in direct terms, from the *Legendes* Translation, of which the author was Ms Hervey, the Defendant did not know and could not reasonably have known, so the argument went, either of the *Legendes* Translation or of its author. As such, so it was argued, it was neither possible nor practical for the Defendant to acknowledge either the *Legendes* Translation or Ms Hervey. It was true that the Defendant could have acknowledged the quotation as coming from "*Légendes*", by reference to the information in the Lara Notes, but that was irrelevant in circumstances where the Claimant has no standing to pursue a claim in respect of "*Légendes*".
464. The Claimant argued that the present case could not be an example of impossibility or impracticality. The Defendant had admitted, so it was contended, that she had the means by which she could have established whom she should acknowledge as the author of any words quoted. The Defendant could have made inquiries of the Claimant. Instead she did nothing. The same applied to her publishers.
465. It seems to me that it is essential, for the purposes of analysis, to separate out paragraph (b) of the definition in Section 178, and paragraph (d) of Section 30(1ZA). Concentrating on paragraph (b) the question is whether it was not possible for the relevant person, in this case the Defendant, to ascertain the identity of the relevant author, in this case Ms Hervey, by reasonable inquiry. It will be noted that the reference in paragraph (b) is to "*reasonable inquiry*", not "*inquiry*". It seems to me therefore that in order to apply the test of impossibility in paragraph (b), it is necessary to identify what constituted reasonable inquiry in the present case.
466. The obvious answer to that question, in the circumstance of the present case, seems to me to be that it was reasonable to expect the Defendant to make inquiry by looking at the information which was available in Lara itself. There is no footnote to the quotation of the Accusation Act on page 107 of Lara, but if one goes to the Lara Notes, the attribution can be found at page 274. The author is

identified as “*Emelianova*”. Any doubts about who Emelianova was, or what was meant by the reference to “*Légendes*”, could be resolved by going to the Select Bibliography and/or to the Acknowledgements and Note on Sources. In both of these locations “*Emelianova*” was identified as Irina, and “*Légendes*” was identified as “*Légendes de la rue Potapov*”.

467. If this was all that was required, by way of reasonable inquiry, then it seems to me that there is a difficulty with the Claimant’s case, so far as paragraph (b) is concerned. The complaint in the Translation Claim is that the Defendant infringed Ms Hervey’s copyright in the translation of the Accusation Act which appeared in the Legendes Translation. As I understood the Claimant’s case, there was no sufficient acknowledgment, within the meaning of the first part of the definition in Section 178, because, in using this quotation in TSWK, the Defendant failed to include any acknowledgment identifying either (i) the work in question, namely the Legendes Translation, by its title or description, or (ii) the author, namely Ms Hervey. If however a reasonable inquiry was confined to looking at the information available in Lara, it was not possible to obtain the identity of either this work or this author from the information in Lara. Neither the Legendes Translation nor Ms Hervey were identified, either in the Lara Notes, or in the Select Bibliography, or in the Acknowledgements and Note on Sources, or, so far as I can see, anywhere else in Lara. The only qualification to this is that there is, on page 293 of Lara in the Acknowledgements and Note on Sources, a list of persons to whom the Claimant expresses her gratitude. The list includes Marlene Brand-Meyer, who I understand to be Ms Hervey, but this was not an identification of Ms Hervey as the author of the Legendes Translation.
468. The analysis in my previous paragraph assumes however that a reasonable inquiry was confined to looking at the information available in Lara, and that the Defendant was not required to take any further steps. This is not necessarily correct. As I have said, paragraph (b) requires the identification of what was not possible by reasonable inquiry. In the application of paragraph (b) in any particular case it seems to me that it is wrong to conclude that paragraph (b) is satisfied simply because a reasonable line of inquiry can be identified, by which it would have been impossible to ascertain the identity of the relevant author. It seems to me that it is necessary to identify all the reasonable inquiries which could have been made in the relevant case, and then to consider whether, if all those reasonable inquiries had been made, it would still not have been possible to ascertain the identity of the author by those reasonable inquiries. The answer to that question in any particular case will, of course, be particularly fact sensitive.
469. Was it reasonable, on the facts of this case, to expect the Defendant to make further inquiries by approaching the Claimant or her publishers for information about the author of the quotation? I have not found this an easy question to answer, but in my judgment it was reasonable to expect the Defendant to make such further inquiries. I say this for the following reasons.
470. The starting point is that the Defendant should have looked at the information available in Lara itself, and should have appreciated that she was using a quotation which, at the least, might be protected by copyright. As such, the Defendant ought to have appreciated that an acknowledgment of the author might



be required. This necessitated looking at the information available in Lara to identify the author of the quotation. The information available in Lara would have informed the Defendant that the quotation came from a work entitled *Légendes de la Rue Potapov*, written by Irina Emelianova, who was identified as the daughter of Olga. At this point in her inquiries the Defendant should have appreciated, if she had considered this information, (i) that she was dealing with a work with a French title, which meant that the work had been written, or at least might have been written in French, and (ii) that she was dealing with an author who was Russian, which also suggested that the original version of *Legendes* had not been written in English.

471. The quotation of the Accusation Act, as it appears in Lara, was however written in English, which should have alerted the Defendant to the fact that she was, or might have been dealing with a translation, which might be the subject of its own copyright protection.
472. In my judgment the way to resolve the uncertainty identified in my previous paragraph was to make the required inquiries of the Claimant or her publishers, in order to identify the authorship of the quotation of the Accusation Act in Lara. The Defendant did not however make any inquiries of this kind.
473. I can see two possible objections to the chain of reasoning which I have just set out.
474. The first objection might be that it would be unreasonable, and is unreasonable in the present case to expect an author to carry out the kind of detective work set out in my previous paragraphs, in circumstances where the identity of the author can apparently be ascertained from the book in which the quotation appears. Why, in the present case, was it reasonable to expect the Defendant to make inquiries going beyond the information provided in Lara? There is undoubtedly force in this argument, but ultimately it seems to me that the burden lies on the author who wishes to use a quotation from another work, and to take advantage of the exemption from copyright protection provided by Section 30(1ZA). It seems to me that the burden is on that author to make sure that there is proper identification of the authorship of the relevant quotation. If the information provided in the relevant work, in which the quotation appears, is ambiguous and/or suggests that the quotation appears or may appear in a translation which enjoys its own protection, I do not think that it is unreasonable to expect the author who wishes to use the quotation to make inquiries in order to resolve the ambiguity or uncertainty. In the present case the position seems to me to be somewhat distorted, because one is dealing with only a few lines of quotation and a claim, namely the Translation Claim, which is, in my view, only a minor part of this action. Nevertheless I have decided that the Accusation Act, as translated in the *Légendes* Translation, qualifies for copyright protection. As such, it seems to me that my reasoning in this paragraph should apply in the same way as it would apply in a case involving a lack of acknowledgment of a more substantial quotation.
475. The second objection might be that if the Defendant had made further inquiries, she would have been given the same incomplete information as appeared in Lara

as to the identity of the relevant author. It seems to me however that there are two problems with this objection. The first problem is the obvious one that, in circumstances where the Defendant made no inquiries, this requires speculation on what information would have been provided, if inquiries had been made. It seems to me that the burden is on the Defendant to satisfy me that, if she had made such inquiries, she would still have been given incomplete information. I do not think that I am able to make this finding on the available evidence. The second problem is that all this begs the question of the nature of the inquiry made by the Defendant, if the Defendant had made inquiries. If the Defendant had simply inquired whether the information given in Lara in this respect was correct, I can see the argument that I should find that the Defendant would, in response to this inquiry, have been given the same incomplete information as was contained in Lara. It follows however from my earlier reasoning that the Defendant was on notice that she might be dealing with a translation, which was subject to its own copyright protection. As such, it seems to me that the Defendant's further inquiries should have been specific in asking about the authorship of the translation of the Accusation Act which appeared in Lara. It seems to me reasonable to assume, and I so find, that an inquiry of this kind would have produced the information that the author of the English translation of the Accusation Act was Ms Hervey.

476. Drawing together all of the above discussion, I conclude that the Defendant has failed to discharge the burden of demonstrating that it was not possible for her to ascertain the identity of Ms Hervey by reasonable inquiry. It follows that the test in paragraph (b) of the definition in Section 178 is not satisfied, and that paragraph (b) does not apply in the present case.

477. For completeness I should deal with the Claimant's argument that the Defendant had admitted that she had the means by which she could have established whom she should acknowledge as the author of any words quoted. I assume that this is a reference to the Defendant's cross examination on her Section 30(1ZA) defence and, in particular, to the following exchange in the cross examination:

*Q. You saw the quotation, you used it, you did not see or did not take any steps at all, not even looking in the same book you had taken it from?*

*A. No, I looked at the same book, just not at the immediate time that I read and probably put it in.*

*Q. The same book tells you where the quotation came from?*

*A. Yes, Légendes.*

*Q. You did not pick up on that and try and acknowledge Legendes as a source of that?*

*A. Are you saying I should have acknowledged Légendes because that is where it came from?*

*Q. Well, that is going to be a matter of legal submission for your counsel to make.*

*A. Yes, I will leave it up to them.*

*Q. Factually, you did not acknowledge it. Factually, I am putting to you that you had the means by which you could have I could not have changed my acknowledgments from the past. acknowledged it?*

*A. Yes."*

478. The relevance of this passage of cross examination seems to me to depend upon what type of acknowledgment was required. If the relevant acknowledgment which was required was an identification of Irina as the relevant author, then plainly this was possible by reasonable inquiry; namely by looking at the information provided in Lara. This was what I understood the Defendant to accept in cross examination, and she was plainly right to do so. On this hypothesis, paragraph (b) of the definition in Section 178 could not have applied and did not apply. This hypothesis assumes however that the sufficient acknowledgment, within the meaning of the first part of the definition in Section 178, which was required in the present case was an acknowledgment of Irina as the relevant author. In the context of the Translation Claim however, the relevant author was not Irina, but Ms Hervey, just as the relevant work was the Legendes Translation, and not Legendes (either in the Russian or French versions). As I understand the basis of the Translation Claim, Ms Hervey had the (now assigned) copyright in the Legendes Translation because she was the author of the Legendes Translation.
479. Accordingly, I do not read this passage of cross examination as constituting an acceptance by the Defendant that she had the means by which she could have established that Ms Hervey was the person whom she should acknowledge as the author of the quotation of the Accusation Act which appeared in Lara. This however does not affect the conclusion which I have reached on paragraph (b) of the definition in Section 178. On the basis of the reasoning set out above, I have reached my own independent conclusion that it would have been possible, by reasonable inquiry, for the Defendant to have ascertained the identity of Ms Hervey as the author of the English translation of the Accusation Act.
480. Ultimately, the Defendant's problem is that she did not make any inquiries. If she had made inquiries, in the appropriate terms, but had been met with a refusal to provide any information, or had been provided with the same incomplete information as appeared in Lara, it seems to me that the Defendant could rely on paragraph (b) of the definition. These hypotheses were never however put to the test. In the result, it seems to me that the Defendant cannot escape from the analysis of the position which I have set out above in concluding that paragraph (b) is not available to the Defendant.
481. It follows, from my discussion of the definition in Section 178, that the Defendant's use, in TSWK, of the quotation of the Accusation Act from the Legendes Translation was not accompanied by a sufficient acknowledgment, within the meaning of the definition. As such, the condition in paragraph (d) of Section 30(1ZA) is engaged.
482. It is a peculiarity of this part of the 1988 Act that the legislation effectively provides, in this context, a double layer of protection for an author who has failed to provide an acknowledgement of a quotation. First, the author may be able to rely upon paragraph (a) or paragraph (b) of the definition in Section 178, so as to argue that a sufficient acknowledgment was not required, with the consequence that the condition in paragraph (d) of Section 30(1ZA) does not have to be

satisfied. Second, and if paragraph (d) is not so disapplied, a sufficient acknowledgement, within the meaning of the definition, is still not required if this would have been *“impossible for reasons of practicality or otherwise”*.

483. By way of reminder, the definition of a sufficient acknowledgment in Section 178 means *“an acknowledgement identifying the work in question by its title or other description, and identifying the author”*. In the present case there was no acknowledgment in TSWK, of any kind, of the quotation of the Accusation Act which appeared in Lara. It follows that, in terms of considering the question of whether the condition in paragraph (d) was satisfied in the present case, the question becomes whether the Defendant can rely upon the words of the exception in paragraph (d). Specifically, the question becomes whether the provision of a sufficient acknowledgment to accompany the use of the quotation in TSWK would have been *“impossible for reasons of practicality or otherwise”*.
484. In the present case the sufficient acknowledgment which was required was identification of the Legendes Translation and identification of Ms Hervey as the author of the Legendes Translation. The Defendant’s argument in this context is essentially the same as the argument I have already set out and considered in the context of paragraph (b) of the definition in Section 178. The Defendant’s argument is that it was neither possible nor practical for the Defendant to acknowledge either the Legendes Translation or Ms Hervey. Neither was identified in Lara.
485. The test here however is whether it was impossible, for reasons of practicality or otherwise, for the Defendant to acknowledge either the Legendes Translation or Ms Hervey. As I have already pointed out, it is possible to hypothesise a situation, in the present case, where the Defendant did make an inquiry of the Claimant as to the identity of the author, and was either met with an outright refusal or was given the information that the author was Irina, or the translator of the French edition, Gerard Abensour. In these situations I can see the argument that it was impossible to obtain the information required for the acknowledgment, because the inquiry was made, and incorrectly answered.
486. In the present case however no such inquiry was made. For the reasons which I have already explained. I am not able to find that an inquiry, if it had been made, would have produced a response of the kind hypothesised in my previous paragraph. This leaves the argument that it was impossible to obtain the information required for the sufficient acknowledgment because incomplete information had been given in Lara. I have already decided, in my discussion of paragraph (b) of the definition in Section 178, that it was in fact possible to ascertain the identity of Ms Hervey, as the author of the Legendes Translation, by reasonable inquiry. Applying the same reasoning, and again bearing in mind that the test is one of impossibility, I cannot see that it was impossible, either for reasons of practicality or otherwise, for the Defendant to obtain the information which would have been required to accompany her use, from Lara, of the quotation of the Accusation Act with an acknowledgment of the Legendes Translation and of Ms Hervey as the author of the Legendes Translation. If this was possible by reasonable inquiry, as I have decided it was, I cannot see that it was impossible for reasons of practicality or otherwise.

487. I therefore conclude that the condition in paragraph (d) of Section 30(1ZA) is not satisfied in the present case, with the consequence that the Defendant cannot rely upon Section 30(1ZA).

#### The Translation Claim - conclusions

488. Given its status as what I regard as a minor part of this action, I have had to spend longer, in an already lengthy judgment, on the Translation Claim than I would have wished. As will be apparent from my discussion in the previous section of this judgment the Translation Claim does raise some issues which are not easy to resolve.

489. In any event the conclusion which follows from my discussion of the Translation Claim is that the Defendant has infringed the copyright in the translation of the Accusation Act which appears in the Legendes Translation. I have decided that copyright does subsist in the translation of the Accusation Act in the Legendes Translation. It is not in dispute that the Claimant took a valid assignment of that copyright. It is not in dispute that the Defendant did indirectly copy the translation of the Accusation Act, by her use of the quotation which she took from Lara. I have decided that the Defendant cannot rely upon the defence in Section 30(1ZA). Accordingly, the Translation Claim succeeds.

#### Overall outcome

490. The overall outcome of the trial is as follows:

- (1) The Selection Claim fails, and falls to be dismissed.
- (2) The Translation Claim succeeds. I will hear the parties on the question of what relief should be granted in respect of the Translation Claim.

491. I will also need to hear the parties on the question of what should happen with respect to the counterclaim, given the failure of the Selection Claim and the success of the Translation Claim. Mr Caddick accepted in opening that the relief counterclaimed should be granted, if the claim failed. I do not know if that acceptance still holds good in circumstances where a part of the claim, albeit what I regard as a minor part of the claim and one which does not involve infringement of copyright in Lara, has succeeded.

492. I will also hear the parties on all other matters consequential upon this judgment, to the extent that the same cannot (subject to my approval) be agreed between the parties.