



Neutral Citation Number [2023] EWHC 646 (Ch)

Claim No IL-2022-000049

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

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 23 March 2023

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

DONNA MOLAVI

Claimant/Respondent

- and -

(1) VIRGINIA GILBERT
(2) BBC STUDIOS PRODUCTION LIMITED
(3) BRITISH BROADCASTING CORPORATION

Defendants/Applicants

Andrew Norris, KC (instructed by **BBC IP Legal Department** and **Bates Wells**)
appeared on behalf of the **Applicants**.

Martin Howe, KC and **Henry Edwards** (instructed by **Keystone Law Limited**)
appeared on behalf of the **Respondent**.

Hearing date: 2 March 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 am on
Thursday 23 March 2023 by circulation to the parties or their representative by email
and by release to the National Archives

CONTENTS

A. INTRODUCTION2

(1) The parties2

(2) The claim2

(3) The application2

(4) Two other points4

B. DR MOLAVI’S ALLEGATIONS OF SIMILARITY AND MY APPROACH.....5

C. THE WORKS5

(1) C’s Works.....5

(2) Ds’ Works.....9

D. COPYING AND PLOT SIMILARITY12

E. COPYING AND DETAILED SIMILARITIES.....16

F. EVERYTHING IN THE ROUND18

G. DISPOSITION18

Approved Judgment:
Mr Justice Marcus Smith

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The parties

1. Dr Donna Molavi, the Claimant in these proceedings and the Respondent to this application, is a screenplay writer. By these proceedings, she claims that the Defendants, the Applicants in the application, have infringed copyright in certain of her works and have acted in breach of confidence in relation to them. I shall refer to the Defendants, without differentiating between them, as the “BBC”.

(2) The claim

2. Dr Molavi alleges that the BBC infringed her copyright and misused her confidential information in a two-part storyline in the forensic pathology series *Silent Witness*, called *Betrayal*, as well as in the various screenplays and other materials that were written for, and preceded, the two televised episodes of *Betrayal*.

(3) The application

3. There was considerable common ground between the parties as to what Dr Molavi had to show in order to make good her claim to copyright infringement.¹ First, she needed to show that her works (which I shall refer to as “C’s Works”) were original. Secondly, she needed to show that C’s Works had been copied by the BBC. Thirdly, she needed to show that what had been copied was a “substantial part” of the original features of C’s Works.
4. For purposes of the application,² the BBC accepted that C’s Works were original; it was also accepted, for purposes of the application, that if C’s Works had been copied by the BBC, then what had been copied was a “substantial part”. What was disputed by the BBC, and what served as the foundation for the application, was whether the BBC had copied C’s Works in what I shall refer to as “Ds’ Works”.
5. The application was an application for summary judgment against Dr Molavi pursuant to Part 24.2 of the Civil Procedure Rules on the ground that Dr Molavi had no real prospect of succeeding in her claim. That was because, according to the BBC, Dr Molavi had no real prospect of showing that the BBC had had access to C’s Works. Without access to C’s Works, clearly, there can be no

¹ I take this summary from paragraph 87 of Dr Molavi’s written submissions. It is not intended to be comprehensive. Nor should the BBC be taken to agreeing every detail of the legal exposition in Dr Molavi’s written submissions. It is simply that the application, in this case, did not turn on any legal point.

² Again, the BBC’s rights at any substantive trial were fully reserved.

Approved Judgment:
Mr Justice Marcus Smith

copying of them, and the claim was doomed to failure. That much was accepted by Dr Molavi.

6. The question of access to material protected by copyright is very much a factual question, and not an issue in relation to which one would ordinarily expect an application under Part 24.2 to be made. Dr Molavi stressed, in her written submissions, that it was inappropriate to use CPR Part 24 to conduct a mini-trial on the documents, without oral evidence.³ The BBC adduced no less than 13 witness statements in support of their application (albeit some on matters not directly relating to the application for summary judgment). Such a volume of factual material is very suggestive of an issue of fact that ought to go to trial. The BBC, however, contended that this was not such a case, and that the BBC was in no way seeking to conduct a mini-trial. The BBC accepted that this would be inappropriate.
7. The BBC's point was that Dr Molavi's case, as pleaded,⁴ failed to make any averment – no matter how improbable – as to how C's Works had been copied. Rather, an inference of copying was drawn from the similarities between C's Works and Ds' Works. Paragraph 45 of the draft Amended Particulars of Claim pleads:⁵

In the premises, there are substantial similarities between the plots set out in the Claimant's and Defendants' Works that cannot be explained by coincidence. The Claimant infers, and it is properly to be inferred, from the level of similarity...that the [BBC] copied a substantial part of the Claimant's Works and/or has used ideas contained in the Claimant's Works in creating the Defendants' Works.

8. That the claim is based on inference is also clear from Dr Molavi's statement dated 1 February 2023:⁶

63 I do not know how the writers of *Betrayal* obtained access to my works, but I believe it is clear that someone involved in the creation of *Betrayal* did have access to my works from the similarities I have identified above.

64 In terms of potential routes by which my works might have been obtained by the writers of *Betrayal*, I have identified the following...

Although Dr Molavi identifies some “potential routes”, none are pleaded; and Mr Howe, KC, on behalf of Dr Molavi, made clear to me that there was no proper basis on which such an averment could be made.

³ See, e.g., *Three Rivers District Council v. Bank of England (No 3)*, [2003] 2 AC 1; *Doncaster Pharmaceuticals Group Ltd v. The Bolton Pharmaceutical Company 100 Ltd*, [2006] EWCA Civ 661 at [13] to [14].

⁴ There was, before me, an application to amend the Particulars of Claim. Both parties agreed that: (i) I should proceed on the basis of the draft Amended Particulars of Claim; (ii) if, on that basis, the application of the BBC failed, then I should permit the amendments; (iii) if, on the other hand, the application succeeded, then the amendments would be academic, because the whole claim would fail.

⁵ Emphasis added.

⁶ Emphasis added.

Approved Judgment:
Mr Justice Marcus Smith

9. The plethora of witness evidence adduced by the BBC is best seen as a challenge to Dr Molavi to plead a positive case, not based on inference from similarity, that there had been copying of C's Works. Dr Molavi has not done so, and the question raised by the application is whether the plea of similarity is sufficient to justify a realistically arguable inference that copying must have taken place.
10. It must be stressed that not every allegation of similarity can or will give rise to an inference of copying. For example, paragraph 43.1 of the Amended Particulars of Claim pleads:⁷

The plot outlined in each of the Defendants' Works bears a striking similarity to the plot outlined in the Claimant's Works. This similarity arises not only from the [BBC's] selection and arrangement of features in this plot, but also from the structure of the [BBC's] plot. In support of the foregoing, [Dr Molavi] relies on the following similarities:

43.1 The setting of the plots in both the Claimant's and the Defendants' Works in a forensic pathology unit...

Accepting, for the sake of argument, that this amounted to an "original feature", it is quite clear that this aspect of similarity between C's Works and Ds' Works can in no way sustain an inference of copying. *Silent Witness* was first broadcast in 1996, decades before C's Works were written, and the setting of the plots of *Silent Witness* is, throughout, in a forensic pathology unit. Taking this instance only, no inference of copying can even arguably be drawn from it.

11. The chief question arising out of the application is therefore this: are the similarities between C's Works and Ds' Works as pleaded sufficient to give rise to a reasonably arguable inference of copying?

(4) Two other points

12. I have been focussing on the claim of copyright infringement of C's Works. Dr Molavi also advances a claim for breach of confidence. It was accepted that if the infringement claim failed for the reason I have articulated, the breach of confidence claim must also fail. But it was the BBC's position that even if the claim to copyright infringement survived summary judgment, the claim to breach of confidence could not. I do not agree: if a sufficiently arguable case permitting an inference of copying emerges, then I consider the inference that such copying was, in some way, improper, and in breach of confidence, arguably arises. More to the point, it seems to me pointless to allow a copyright infringement claim to go forward, whilst giving summary judgment in relation to a breach of confidence claim that covers more or less the same ground. Trying the breach of confidence claim would add little or nothing to the length or complexity of the substantive trial. In short, it is my judgment that the copyright infringement claim and the breach of confidence claim stand or fall together for the purposes of this application.

⁷ Emphasis added.

Approved Judgment:
Mr Justice Marcus Smith

13. There was also an application for a conditional order that Dr Molavi pay a sum of money into court pursuant to Part 3.1(3) of the Civil Procedure Rules. This application was not moved on 2 March 2023, when the application for summary judgment was heard, but the BBC reserved the right to renew the application for a conditional order, if necessary, on a later occasion.

B. DR MOLAVI'S ALLEGATIONS OF SIMILARITY AND MY APPROACH

14. Dr Molavi's allegations of similarity fall into two classes:

- (1) Similarities of overall plot.
- (2) Similar scenes or events.⁸

15. Clearly, the former operate at a higher level of generality than the latter. Equally clearly, it would be wrong to regard each category as "sealed" from the other. When considering whether an arguable inference of copying can be drawn from similarities between C's Works and Ds' Works, I should consider the question in the round, and not in a technical or granular way.

16. My approach is as follows:

- (1) Section C describes the relevant works themselves, namely C's Works and Ds' Works.
- (2) Section D considers the question of plot similarity, specifically whether it is possible arguably to infer that copying of C's Works in Ds' Works took place.
- (3) Section E considers the question of similar scenes or events.
- (4) Section F considers the cumulative effect of the points considered in Sections D and E.

Finally, Section G states how I dispose of this application (and the related application for permission to amend).

C. THE WORKS

(1) C's Works

17. C's Works comprise five distinct works:

⁸ See paragraph 64 of Dr Molavi's written submissions.

Approved Judgment:
Mr Justice Marcus Smith

- (1) “*C’s Work #1*”. A synopsis detailing a plot as follows:⁹

When A woman is shot by a hit man from a roof, and is gun down in the street of London.....Joe is a pathologist, and does the PM.¹⁰

When Joe realized that results of PM has been changed in the documents. He is upset, but it has been changed in the data records in a mysterious way and it’s not possible to put a finger on anything and anybody. He only has his handwritten notes of PM by accident.

He secretly tries to find out more info about the body. He finds out that the body has not been taken by the relatives and is buried.

Also he, secretly, finds a number in the belonging of the dead woman – he contacts the number – He finds out that the body is an Iranian, and his family do not know about his death in London.

The substance of *C’s Work #1* is described in the draft Amended Particulars of Claim as follows:¹¹

A synopsis detailing the plot of an episode in the proposed series...The episode would concern the protagonist investigating a conspiracy to alter the results of a post-mortem examination and featured a sub-plot concerning Iranian politics...

I am not persuaded that this precisely captures the nature of *C’s Work #1*. For instance, there is no suggestion, from *C’s Work #1*, that this was to be an “episode in the proposed series”. I will base myself mainly on the synopsis itself, since it is short enough to be quoted in full.

- (2) “*C’s Work #2*”. This is pleaded as a “more detailed synopsis of the same plot...”.¹² Again, the synopsis is very short, and can be set out in full:

Character:

PATHOLOGIST: JOE (40) – his unique job has made him to have very unique believes about life ... Something sinister in his everyday activity has been turned into a positive idea about life ... he deals with dead bodies every day which made him shake off the worst human fear --- “death”.

When a woman (30) is shot by a hit man from a roof and as she’s gunned down in the street of London, a passing car hits her – Joes does the PM. His report confirms that a bullet in her head killed the woman.

⁹ I am quoting the entirety of *C’s Work #1*, and I am retaining typographical and other errors. Such errors, whilst they might not be “original” could easily generate material to support an inference of copying. Although Dr Molavi’s case was not pleaded in this way, I have not excluded such matters from my consideration. I am, after all, concerned with the extent to which an inference of copying can arguably be drawn.

¹⁰ I.e., *post mortem*.

¹¹ Paragraph 5.1.

¹² Paragraph 5.2 of the draft Amended Particulars of Claim.

Approved Judgment:
Mr Justice Marcus Smith

When Joe realized that results of PM has been changed in the documents, and the cause of the death is a car accident, he is upset, but it has been changed in the records in a mysterious way so it's not possible to put a finger on anything and anybody. He only has his hand written notes of PM by accident.

He secretly tries to find out more info about the body. He finds out that the body has not been taken by the relatives and is cremated.

He secretly, finds a number in the belonging of the dead woman – he contacts the number – He finds out that the body is an Iranian, and her family does not know about her death in London.

The family comes to London. Joe tries to get some info from them to find an answer for why his PM report is tampered.

After a long series of dynamic search and unexpected events.....

They find out that she has got access to some evidence against the Iranian government – and was going to expose them when the Iranian prime minister is about to come to London and how she could get hold of such secret info

But who has got access to the most confidential information in the hospital?

This incident opens a new chapter in Joe's life...

(3) “*C's Work #3*”. This is pleaded as a 7-page treatment of the same story in *C's Work #1* and *C's Work #2*, “providing a detailed account of the plot of this proposed episode”. The treatment is simply titled “September 2014 – London”, and it would be wrong to call it a “proposed episode” (although that may have been the intention). *C's Work #3* is too long to set out in full, but a reasonably detailed articulation of the plot is as follows:

- (i) In a Central London street, outside a massive building and amid tight security, a demonstration is going on. The subject-matter is the treatment of female political prisoners in Iran. The Prime Minister (named as David Cameron) is planned to arrive, hence the demonstration, to persuade him (Cameron) to raise the matter with the Iranian President at a meeting in New York the following week.
- (ii) In a nearby underground car park, a Mr Max King arrives, immaculately dressed, with a designer carry-on suitcase. He proceeds to the seventh floor offices of a London law firm, where he has an appointment with a solicitor, a Mr Rad. He is shown into a conference room, where he is told to await Mr Rad. When he arrives, Mr Rad takes Mr King through various transactional documents, which Mr King signs, until (on what later becomes clear is a pretext) Mr King asks for some privacy in order to consult about a specific clause in one of the agreements he is

being asked to sign. Mr Rad leaves Mr King alone in the conference room.

- (iii) In the conference room, alone, Mr King takes out a “shotgun”, assembles it, and goes to the window (opening it) preparing to shoot. The Prime Minister arrives (by car), and the demonstrators push forward. Two young women (Shadi and Sara) break the police barricades and the police try to stop them.
- (iv) More or less simultaneously: the Prime Minister is approaching the massive building under cover of an umbrella (it is raining); Shadi and Sara are running onto the street pursued by police; a motorbike is approaching; and Mr King prepares to shoot. At the same moment, Mr King shoots and Sara is hit by the motorcycle. Mr King then shoots again. Both times, the Prime Minister is missed by Mr King, but one of the bullets strikes Sara, at around the same time she is hit by the motorcycle. The Prime Minister enters the building unscathed, and Mr King disassembles the gun. There is panic on the street. Mr Rad returns to the conference room. Mr King concludes his business and leaves.
- (v) The police investigate the death of Sara, interviewing Shadi, and taking custody of Sara’s possessions. When Sara’s phone rings, the police are obliged to tell the caller – Sara’s sister – of Sara’s death.
- (vi) Richard Green is a trainee pathologist, “sporty, energetic, quite eccentric for his profession”. He has a girlfriend, Celeste, a UN worker in Afghanistan. In a London hospital, where Richard works, Richard – distracted by various calls from Celeste, and worried about her safety – does a PM on Sara, when he should have done a PM on an old man. Reading the file on Sara, he sees that the paramedics have concluded that Sara died as a result of heart failure in a road accident. Conducting the PM, he finds that Sara was killed by a bullet shot to the head.
- (vii) After the PM, Richard’s mistake is explained to him (i.e., he carried out a PM on the wrong person), but he nevertheless records the results that he found. Interested in the case, Richard looks at Sara’s possessions – which are with the body – and takes a photograph of Sara with another young woman.
- (viii) Richard is called in for a meeting with the police. Before his interview, he meets Shadi at the police station, and they exchange email addresses to keep in touch. They have separate meetings with the detective in charge of the case, Detective Shire. In his interview with Detective Shire, Richard is informed of the police’s thinking. There are two theories: (i) that one of the demonstrators had been armed and shot Sara by mistake,

Approved Judgment:
Mr Justice Marcus Smith

wanting to hurt the police at the demonstration; (ii) that this was, in fact, an attempt on the Prime Minister's life, that failed. The police are concerned, in this latter case, that the attempt on the Prime Minister's life will be renewed, but have no evidence to back the theory up.

- (ix) Sara's family arrive to take her body and belongings. Richard meets Celeste in Turkey. Back at work, Richard discovers that the PM on Sara has been tampered with, and that what was recorded as her death (bullet shot) has been changed to road accident. He reports this to the hospital authorities; they decide to re-do the PM, but Sara's body has been cremated. It is proving difficult to trace her family.
 - (x) The hospital authorities then change tack, and tell Richard that it is impossible that anyone tampered with the PM result. The police also question the death by bullet finding, and say there is no evidence of this. Richard maintains his version of events, and comes into conflict with the hospital authorities and the police.
 - (xi) Although Celeste suggests that Richard ought just to accept that he made an error, reviewing matters in his mind, he is satisfied that he made no error and that his original report (death by bullet shot) was right. Richard is investigated by the General Medical Council.
 - (xii) Later, Richard remembers the photograph he took from Sara's possessions. There is a Persian telephone number on the back of the photograph. When he calls, he speaks to someone who claims to be Sara's sister...yet she does not know of Sara's death.
- (4) "C's Work #4" and "C's Work #5". These Works are both screenplays, the second (C's Work #5) a more extensive version of the first. C's Work #5 is 61 pages long, and in essence (although there is expansion, and some details are different) follows the plot of Work #3. C's Work #4 is a partial version of C's Work #5.

(2) Ds' Works

18. Ds' Works comprise the development from a story proposal, through various treatments, to various draft scripts, to two episodes called *Betrayal* (Parts I and II), which were screened as the final two episodes in the 22nd series of the long-running television drama *Silent Witness*. Ds' Works comprise: a story proposal, a first and second treatment, and first, second and third draft scripts.¹³ Additionally, there is a final draft script (produced during filming) and the two episodes themselves. The table below sets out Ds' Works as I refer to them in this Judgment:

¹³ Paragraph 39 of the draft Amended Particulars of Claim.

Approved Judgment:
Mr Justice Marcus Smith

| Name/Reference | Description |
|----------------|--|
| Ds' Works #1 | A story proposal, dated around 15 May 2018, sent to the producer of the series <i>Silent Witness</i> . The story centred on a recurring character in <i>Silent Witness</i> , a Jack Hodgson. The story proposal was provisionally entitled <i>Shine</i> or the <i>Ties That Bind</i> . |
| Ds' Works #2 | A full treatment of the story proposal, the first such treatment. |
| Ds' Works #3 | A second treatment of the story proposal. One significant change is the central character, which shifts from Dr Hodgson to Dr Nikki Alexander, another recurring character in <i>Silent Witness</i> . |
| Ds' Works #4 | The first draft script, dated around 23 July 2018. |
| Ds' Works #5 | The second draft script, dated around 22 August 2018. |
| Ds' Works #6 | The third draft script, dated around 14 September 2018. |
| Ds' Works #7 | The fourth draft script, done during filming, completed on 15 October 2018, and with a new title for the episodes, <i>Betrayal</i> . |
| Ds' Works #8 | <i>Betrayal</i> Parts I and II, aired on BBC1 on 4 and 5 February 2019. |

19. Unsurprisingly, the treatments and the draft scripts are long. There are, also unsurprisingly, differences between them. The episodes aired on BBC – which I have watched – run for nearly one hour each. I set out below a fairly detailed summary of the plot, which is intended to be a description of the plot as articulated in all of Ds' Works.
20. The plot of Ds' Works is as follows:
- (1) Dr Nikki Alexander is a pathologist at the Lyell Centre (for forensic pathology). Dr Alexander's competence is called into question in a court case where a second post-mortem has a finding contrary to and inconsistent with hers. The error, which it is alleged Dr Alexander made, is significant. She found that the heart of a police officer who died in an assault was diseased (mitral valve prolapse) and the true cause of his death. Dr Amanda Long, the pathologist providing the second finding, had a previous relationship with Dr Thomas Chamberlain (another recurring character in the series working at the Lyell Centre). This provides an additional *frisson* in what is already a charged situation. Dr Long's report found no diseased heart – and clearly the inference is that it was the assault that killed the officer. The inconsistency between the two reports is, thus, highly significant for the purposes of the criminal trial.
 - (2) Two rowers find a floating body in a wetsuit. The body proves to be that of a research chemist (Kalan Dhana) employed by a pharmaceutical company, Pujari Pharmaceuticals. Dr Alexander does the PM. There are

Approved Judgment:
Mr Justice Marcus Smith

mysterious puncture marks on the body. Because of the previous court case, the police are reluctant to accept Dr Alexander's findings – or, at least, question them. In parallel with the consideration of what killed Kalan, Dr Alexander is excluded from internal discussions, becomes defensive and feels increasingly isolated.

- (3) The investigation into Kalan's death raises questions about drug use in Pujari Pharmaceuticals. It is clear from interactions between other researchers at Pujari Pharmaceuticals (Richard Austin, Jenna Hong and Jacob Nduka) that things are going on – which they do not tell those investigating Kalan's death – regarding the development of a product that may have caused Kalan's death. The company CEO, Arthur Pujari, whilst apparently behaving in a frank and open manner, is withholding information.
- (4) Dr Alexander revisits her original PM on the police officer, with an independent observer (Alice, an employee) reporting on camera. (Alice is a non-recurring character in the series.) In relation to the deceased police officer, Dr Alexander DNA tests hair taken from his body, and the heart said to be his. The results, when they come, show that the hair and the heart come from different people. Dr Alexander shares this result with others at the Lyell Centre and Dr Long. The court dealing with the criminal case, to whom this matter is reported, recognises that something has gone seriously wrong in the case, and orders that a new investigation be carried out, independent of the two previous labs.
- (5) Another researcher at Pujari Pharmaceuticals is found dead (it is Jacob Nduka, hanged), with a suicide note. Investigation by various members of the Lyell Centre suggests that neither death (neither Kalan nor Jacob) is what it seems. Both in fact died from a hidden drug testing programme run out of Pujari Pharmaceuticals, and approved by Arthur Pujari.
- (6) Arthur Pujari's role in seeking to develop a drug to be used to inject death-row prisoners in the US is discovered. The reason for the police officer's swapped heart (which is how both Dr Alexander and Dr Long's correctly done examinations produced different results) is Alice, who did this (and ensured other irregularities at the Lyell Centre) in order to discredit pathological evidence so as to assist in procuring her father's acquittal at his (re-)trial for murder.
- (7) Arthur Pujari escapes the country, in part because Alice confused the forensics. Alice herself is arrested for perverting the course of justice.

Approved Judgment:
Mr Justice Marcus Smith

D. COPYING AND PLOT SIMILARITY

21. I remind myself that this is an application for summary judgment, and that if a pleaded proposition can arguably be sustained,¹⁴ then Dr Molavi has a right to have her claim heard at trial. I also consider that I should disregard the very considerable body of evidence assembled by the BBC which articulates what Mr Norris contended for, namely that the copying could not have taken place, because there was no way any part of C's Works could have found their way into Ds' Works. Were I to pay heed to the fact that this evidence demonstrates (as, on the face of it, it does) the impossibility of copying, I would be conducting a mini-trial by attaching undue weight in an interlocutory application to what is, at the end of the day, factual evidence to be assessed at a trial.

22. The point can be tested in the following way: suppose Dr Molavi had pleaded a positive case of copying – other than the inference of copying arising out of similarity – which (although extremely unlikely as a case) passed the arguability test. Even if I was confident that the BBC would ultimately prevail a trial, it would not be right to end Dr Molavi's claim at this stage. The position ought to be the same in the case of an inference: if that inference is sufficient to render the proposition of copying arguable, then I should not be persuaded that it is not arguable simply because of the witness evidence that has been adduced by the BBC on this point.

23. The question I must consider, therefore, is whether the plea in paragraph 45 of the draft Amended Particulars of Claim is arguable. That plea, I remind myself, is this:

...there are substantial similarities between the plots set out in [C's Works] and [Ds' Works] that cannot be explained by coincidence...

24. With that introduction, I turn to the plot similarities alleged:

(1) C's Works cannot properly be regarded as part of a series. The works concern a "standalone" plot, where the characters are introduced to the reader for the first time. By contrast, Ds' Works represent a new story concerning a number of existing characters, in roles and with positions that cannot possibly have been copied from C's Works because they were inherent to a series that had been broadcast on television well-before C's Works were ever written. That disposes of the first two similarities pleaded by Dr Molavi:

43.1 The setting of the plots in both the Claimant's and the Defendants' Works in a forensic pathology unit.

¹⁴ I am, of course, applying a standard of reasonable arguability, but I propose to allow the "reasonable" to be implied rather than be expressly stated from hereon.

Approved Judgment:
Mr Justice Marcus Smith

- 43.2 The protagonist of both the Claimant's and the Defendants' Works is a forensic pathologist and in the Defendants' First Treatment¹⁵ is a male pathologist like the Claimant's protagonist.

Neither of these similarities (and, to be clear, I accept they are similarities) supports a contention of copying. The series *Silent Witness* has always been set in some kind of forensic pathology unit; and has always contained both male and female forensic pathologists as protagonists. The fact that Ds' Works changed the victim of Alice's tampering from Dr Hodgson to Dr Alexander is neither here nor there. A proposition of copying based on these pleaded similarities is unarguable.

- (2) The remaining alleged similarities need to be set out in full:

- 43.3 The plots of both the Claimant's and Defendants' Works centre on a dispute over the accuracy of findings made by the protagonist in a post-mortem examination report.
- 43.4 In each case, this dispute over the accuracy of the report centres on whether the deceased's death arose from heart failure or homicide.
- 43.5 The protagonist faces the risk of significant harm to his or her professional reputation as a result of this controversy over the accuracy of his or her reports and/or the need to repeat their post-mortem examinations.
- 43.6 The protagonist also faces criticism and opposition from a variety of sources as a result of this controversy, including:
- 43.6.1 The protagonist's colleagues at the forensic pathology unit who put pressure on him or her to accept that the report is inaccurate; and
- 43.6.2 The media.
- 43.7 The protagonist's colleagues blame his or her apparent mistakes on distracting personal issues arising from a long-distance relationship.
- 43.8 A senior police officer does not believe that there can have been a mistake but is not in the end able to assist the protagonist.
- 43.9 The protagonist is convinced that there has been no mistake and conducts an independent and covert investigation of the inaccuracies in the post-mortem reports.
- 43.10 The protagonist discovers that there has been unauthorised interference and tampering with the human remains he or she had examined.

¹⁵ I.e., Ds' Works #2.

Approved Judgment:
Mr Justice Marcus Smith

43.11 The protagonist successfully identifies the person responsible for this interference and establishes the initial accuracy of the protagonist's post-mortem reports.

- (3) I do not consider that these alleged similarities are capable of giving rise to an arguable inference of copying. Before descending to specifics, it is necessary to make two general points. First, that stories – including screenplays – derive their drama from certain basic themes, which are surprisingly few in number. Booker has written a book suggesting that the number of basic plots number no more than seven.¹⁶ Without wishing to descend too far into literary criticism, which I am unqualified to offer, the tropes that underlie our drama are limited by what drives the human condition – and a story based around revenge or jealousy or power will share certain basic features with another story similarly based. Secondly, and relatedly, for an inference of copying to be arguable, the similarities must go beyond these tropes which are common not because of copying, but because we all share the same human condition.
- (4) Stepping back, therefore, the plot contained in C's Works is very different to the plot contained in Ds' Works. Although both involve efforts by protagonists to overcome a force for bad, there the similarities end:
- (i) Cs' Works – which even in their most developed form, are still quite undeveloped¹⁷ – are in the form of a political drama, where there is (or may be) a plot to assassinate a leader, which is (in a way not very well articulated) covered up. The plot is unitary in nature (at least, so far as I can discern) because the undeveloped Iranian story appears to be the reason for the assassination attempt in the first place.¹⁸
- (ii) Ds' Works concern Alice's attempt to undermine an established and good process for a bad reason, which affects Dr Alexander's position and the outcome of a criminal trial and – in a loosely related second plot – also affect the investigation into the nefarious dealings at Pujari Pharmaceuticals that have caused the death of two of its workers. The story is – unsurprisingly, because it was broadcast – fully developed and nailed down.

¹⁶ Booker, *The Seven Basic Plots*, 1st ed (2004). If one were to apply his schema to these plots – which I am not – these would be classed as “overcoming the monster”, where the protagonist sets out to defeat an antagonistic force that threatens the protagonist or the protagonist's way of life/home/values, etc.

¹⁷ Thus, for instance, the story ends *in media re* with the discovery that Sara's body has been taken by persons who may not be her family. The question of whether there is a plot to kill the Prime Minister is never resolved. The assassin – Mr King – appears and then vanishes, and we have no idea what or who is motivating him. We have no understanding of how or why the cause of Sara's death is changed. These undeveloped features mean that it is difficult to work out what the plot in C's Works actually is.

¹⁸ I may be wrong about this, but that is a reasonable view of the plot as described in C's Works. It may be that the “plot to kill the Prime Minister” and the “plot regarding Sara” are, in fact, different: but if so, the story is even less articulated than I thought.

Approved Judgment:
Mr Justice Marcus Smith

- (5) Looking simply at the two plots, I do not consider that anyone would mark them out as similar or related; and would certainly not draw an inference that Ds' Works had copied parts of C's Works. My judgment is that a reader/viewer of both works would regard them as very different; and would consider an allegation of copying to be far-fetched, if not outlandish.
- (6) Turning then to the specific, the similarities alleged turn far more on the pleader's skill than on any actual similarities between the works. Thus, paragraph 43.3 of the draft Amended Particulars of Claim is very general. I would not accept that the plots of either C's Works or Ds' Works centre on a dispute about post mortem findings, although this is a feature that both works contain. The plots are as I have described them in paragraph 24(4) above, and the post mortem accuracy is a part of these (very different) plots. Whilst I would not go so far as to say that paragraph 43.3 is wrong (it is not), it zones in on a point of similarity that is a plot device and not a plot.
- (7) Paragraph 43.4 is too generally put and when unpacked wrong. The dispute regarding the post mortem is not, in reality, about cause of death being heart failure or homicide. In Ds' Works, the question is why two pathologists, who thought they were examining the same heart, reached different conclusions as to the state of that organ. (The tension, of course, is resolved in favour of both, because they were examining different hearts). In C's Works, Richard Green conducts an examination where he concludes that a shot to the head has killed Sara and not, as later stated, heart failure through a road accident. But for the cremation of Sara's body, a re-examination would quickly prove Richard right or wrong; and the tension arises less from a difference of judgment and more from a cover up by destruction of evidence (the body) and falsification of material (Richard's report being changed). Paragraph 43.4 thus papers over very significant plot differences.
- (8) Paragraph 43.5 is correct so far as it goes, but the reason for the conflict and the criticism is very different in each of the two cases, for reasons that I have given. The mere fact of conflict or harm to reputation or criticism cannot, in and of itself, be regarded as a similarity suggestive of one work being derived or copied from another. The same is true for paragraph 43.6. Paragraph 43.7 is referring to what is a subsidiary element in C's Works (the distracting role of Celeste, the UN worker) and a bare hint (when there is a reference to a long-term boyfriend) when Dr Alexander questions her judgment in Ds' Works. But, again, the differences are more important than the superficial similarity. Richard was distracted, and hence did the wrong post mortem (Sara, and not an old man). Dr Alexander is not distracted (she carried out the post mortem correctly), questions herself after her "mistake" is discovered, but self-confidently double-checks, by doing further concrete examination of the policeman's body.

Approved Judgment:
Mr Justice Marcus Smith

(9) Paragraphs 43.8 to 43.11 are too general to amount to similarities capable of leading to an inference of copying. They are, essentially, common consequences of very different plot drivers. Paragraph 43.10 is also materially inaccurate. Whilst it is true, in Ds’ Works, that the unauthorised interference is discovered by Dr Alexander (she conducts an illicit second examination), Richard Green can merely review his recollection, there being no body to re-examine. Paragraph 43.11 is also overstated. It is substantially accurate in the case of Ds’ Works, but not an accurate description of C’s Works: we do not discover who is responsible at the end of the story; and whilst Richard is convinced he is right, he has not – by the end of the story – actually got to the bottom of what is wrong. To this extent, C’s Works are (even in their most advanced form) incomplete.

25. For all these reasons, I find that the plea of inferred copying based upon plot similarities to be unarguable. There are no similarities capable of giving rise to the inference pleaded in paragraph 45 of the draft Amended Particulars of Claim.

E. COPYING AND DETAILED SIMILARITIES

26. I turn to the further case pleaded by Dr Molavi. This is set out in paragraph 44 of the draft Amended Particulars of Claim, which provides:

Further, the Claimant relies on the detailed similarities set out in Annex A to these Particulars of Claim, consisting both of linguistic similarities and similarities of the selection and arrangement of narrative details. In addition to the similarities in Annex A, the Claimant will rely on further similarities of plot between the Claimant’s Works and the Defendants’ Shooting Script identified at Amended Annex B.

27. Paragraph 44 is expressly pleaded as a “further” not an “alternative” case, and – strictly speaking – is not sustainable in light of my conclusion regarding the allegations concerning plot similarities pleaded in paragraph 43 of the draft Amended Particulars of Claim. The averments in paragraph 44 are “further” to averments in paragraph 43, and those averments (as I have found) are not arguable.

28. However, particularly when this point was not taken by Mr Norris, I should not determine the application in this way. Rather, I shall treat the paragraph 44 allegations as self-standing (i.e., a genuine alternative case) and then I shall also consider (in Section F) whether read in combination the averments in paragraphs 43 and 44 disclose an arguable inference of copying by the BBC.

29. I can deal with Annex B rather quickly, because it is a combination of “plot similarities” of the sort I have already considered and dismissed and “linguistic similarities” of the sort also featuring in Annex A. Thus, paragraphs 1 to 4 of Annex B are re-articulations of points already made in paragraph 43 of the draft Amended Particulars of Claim, and fail for the reasons that I have given. The

Approved Judgment:
Mr Justice Marcus Smith

remaining parts of Annex B are much more similar in character to the allegations in Annex A, and I will consider these allegations together.

30. Linguistic similarities *per se* cannot give rise to an inference of copying. To put the point differently, the whole point about language is to enable one person to communicate with another, and so we have commonly understood words and expressions enabling precisely this. Using such commonly understood words and expressions is not copying. Such similarities are inevitable between works, and can give rise to no suggestion of copying. The same is true of basic forms of human conduct. When it is dark, and a character opens a door to a room, the likelihood is that the next thing the character does is switch on the light. So, one similarity relied upon in Annex B is the following:

| <u>C's Works</u> | <u>Ds' Works</u> |
|--|---|
| A sequence as follows: 1. A door is opened. 2. A light is turned on in the mortuary. 3. A man in white uniform removes Sara Shenee's body from a freezer. | A sequence as follows: 1. A door is opened. 2. A light is turned on in the mortuary. 3. A person in white scrubs pulls the body of PC Stephen Francis from the drawer. |

This is a hopeless allegation on which to found an inference of copying. *Silent Witness* has featured scenes in a pathological unit for years, and given that C's Works have elected to incorporate a pathological theme, similarities like this are inevitable. The BBC could equally say Dr Molavi had copied from *Silent Witness* – but Mr Norris, wisely, did not make that point: for it would be similarly unarguable.

31. I am not going to repeat the other instances in Annex B. The point is the same in all. I turn to the linguistic similarities in Annex A. I set out below a series of examples. None of them – individually or collectively – assists Dr Molavi in establishing an arguable inference of copying. They are all the sorts of language that one would expect to use to articulate the very different plots that I have described, and are in themselves and collectively in no way suggestive of copying:

| <u>C's Works</u> | <u>Ds' Works</u> |
|---|---|
| Detective Shire investigates the theory...nothing is found, no evidence comes to light and no plot is exposed to prove the idea of an assassination attempt | ...even the senior officer can't prevent the devastating blow of the temporary closure of the Centre and the suspension of all operations |
| Richard is sure that he has seen the damages caused by a bullet which caused her death...He comes in conflict with the hospital authorities. | ...he's 1000% certain he missed nothing... |

Approved Judgment:
Mr Justice Marcus Smith

| | |
|--|---|
| Stage direction – RICHARD GREEN (30s), in an athletic gear, well built, energetic, jogs | Stage direction – “...where RICHARD PATTERSON (44), handsome, expensively dressed...” |
| <p><u>Dr Patel</u> (after a beat): I have received the police report, they have confirmed that there is no evidence to prove the result of your autopsy notes. On this basis...</p> <p>(Richard shakes his head, “No”, Dr Patel keeps going)</p> <p>...we do have to accept the original report from the paramedic team, which is registered in the hospital data...but we...</p> <p>(Richard keeps calm)</p> <p>...we’re questioning the credibility of all your autopsy reports...</p> | <p>I’ve compared your photographs and original findings with Jenna’s, and I think her estimations of depth might have been more accurate. The scalloped edges are up for debate and neither issue is as significant as the defence might have suggested, but...</p> |
| Crowded with beer drinkers...Celeste in pyjamas | A rowdy pub, full of late-night drinkers...Nikki in her PJs, brushes her teeth... |

32. The detailed similarities case is not arguable, whether the items listed in the Annexes are viewed individually or collectively.

F. EVERYTHING IN THE ROUND

33. Considering all of the case pleaded by Dr Molavi, I conclude that there is no arguable basis for the contention that it is to be inferred from this material that the BBC copied any part of C’s Works.

G. DISPOSITION

34. It follows that the application of the BBC succeeds, both in relation to the copyright infringement claims and in relation to the breach of confidence claims, which depend upon the same (not arguable) averments. Summary judgment should be entered for the BBC. It also follows that the application to amend the Particulars of Claim must be dismissed.