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Case No: IP-2016-000050

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

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

Date: 22/11/2017

**Before :**

**HIS HONOUR JUDGE HACON**

**Between :**

(1) NICHOLAS MARTIN	
(2) BIG HAT STORIES LIMITED	<u>Claimants</u>
- and -	
JULIA KOGAN	<u>Defendant/Part</u>
- and -	<u>20 Claimant</u>
(1) FLORENCE FILM LIMITED	
(2) PATHÉ PRODUCTIONS LIMITED	
(3) QWERTY FILMS LIMITED	<u>Part 20</u>
	<u>Defendants</u>

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**Tom Weisselberg QC** (instructed by **Lee & Thompson LLP**) for the **Claimants**  
**Simon Malynicz QC and Ashton Chantrielle** (instructed by **Keystone Law**) for the  
**Defendant/Part 20 Claimant**  
**Jonathan Hill** (instructed by **Wiggin LLP**) for the **Part 20 Defendants**

Hearing dates: 10-11 October 2017

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HACON

## **Judge Hacon :**

### **Introduction**

1. On 12 April 2016 the premiere of the film *Florence Foster Jenkins* (“the Film”) was held in London. It is a comedy drama starring Meryl Streep and Hugh Grant, directed by Stephen Frears. The Film is based on the latter part of the life of Florence Foster Jenkins (“Florence”), a New York heiress and socialite who died in 1944. Florence became famous for her striking soprano voice.
2. The Film’s credits identify the First Claimant (“Mr Martin”) as the sole author of the screenplay. Since April 2014 the Defendant (“Ms Kogan”) has sought a proportion of Mr Martin’s income from the Film. Mr Martin and Ms Kogan lived together as partners during the period in which the idea of a film based on Florence arose and when treatments and early drafts of the screenplay were written. Mr Martin is a professional writer of film and television scripts. Ms Kogan is principally a professional opera singer. It was not in doubt that the couple frequently discussed the Florence project.
3. Mr Martin seeks a declaration that he is the sole author. The work of which Mr Martin claims sole authorship is referred to in the Particulars of Claim as “the Screenplay”. Ms Kogan filed a Counterclaim for a declaration that she is joint author of the Screenplay and that the Claimants have infringed the copyright in it. She also joined the production and financing companies for the Film as Part 20 Defendants, against which she seeks relief for infringement of the copyright.
4. The pleadings leave open some doubt as to what is meant by “the Screenplay”, but in my order dated 15 December 2016, made following the case management conference, it was pinned down to mean the final draft as used to shoot the Film.
5. The Second Claimant is Mr Martin’s company, which played no significant part in the dispute.
6. The Part 20 Defendants largely relied on the arguments advanced on behalf of the Claimants and in addition raised a defence of acquiescence or estoppel. The Defence of the Part 20 Defendants also alleged that there had been an agreement that Mr Martin would be sole author of the Screenplay but the evidence suggested no meeting of minds that could qualify as an agreement and the point was not pressed in argument.
7. Tom Weisselberg QC appeared for the Claimants, Simon Malynicz QC and Ashton Chantrille for Ms Kogan and Jonathan Hill for the Part 20 Defendants.

### **The issues**

8. Stated broadly, the issues are straightforward:
  - (1) What was the nature and extent of Ms Kogan’s contribution to the writing of the Screenplay?

- (2) Did that contribution make the Screenplay a ‘work of joint authorship’ within the meaning of s.10(1) of the Copyright, Designs and Patents Act 1988 (“the Act”) and qualify Ms Kogan to be joint author with Mr Martin?
- (3) Did any act or statement by Ms Kogan, or lack of the same, provide the Part 20 Defendants with a defence of acquiescence or estoppel?

### **Ms Kogan’s case**

9. At the case management conference the Claimants sought an order for further information regarding the nature of Ms Kogan’s case, with good reason. At the trial I was shown a transcript of the hearing of the CMC. It appears that I not only wished to clarify the identity of the copyright work in issue, I also shared the Claimants’ view that Ms Kogan should state with sufficient precision the nature and extent of the contribution to the Screenplay she was asserting. At the CMC junior counsel for Ms Kogan stated that Ms Kogan’s case was simple: she and Mr Martin had co-written the whole thing. Counsel said that their respective contributions were so interlinked that it would not be possible to spell out who did what. The joint devising of everything would be explained in Ms Kogan’s evidence. Given that this was how Ms Kogan was going to put her case, I did not order the further information sought by the Claimants.
10. When Ms Kogan’s evidence was served it must have been apparent that she had changed her case. She now said that she and Mr Martin had each made separate and distinct contributions of various kinds, the remainder of the Screenplay having been created jointly. Annexed to Ms Kogan’s witness statement was a breakdown of what had happened, running to 42 pages. I did not see it until shortly before the trial when I found it vague and rambling. At the trial Mr Malynicz conceded that it did not explain Ms Kogan’s case on her contribution in the most helpful way.
11. The upshot was that the trial started with no focussed idea of what Ms Kogan’s case was. On the first day she stated in cross-examination that she alone had been responsible for writing significant parts of the Screenplay with the remainder mostly having been written jointly, although some of it written by Mr Martin alone. I asked Mr Malynicz to provide a marked-up copy of the Screenplay showing Mr Kogan’s case as to who had done what. A copy was provided the next day, highlighted in three colours.
12. This was an advance in clarifying Ms Kogan’s case but it did not shine light on her argument regarding non-textual contributions. Mr Malynicz said in his closing submissions that he would put Ms Kogan’s case by reference to her six best contributions, consisting of both textual and non-textual input, which he would explain. He acknowledged that if Ms Kogan did not get home on these, her counterclaim was liable to fail. Mr Malynicz’s selection of the six best contributions was very helpful, bringing some order to the arguments.

### **The law on joint authorship**

#### *The statute*

13. Section 10(1) of the Act states:

“(1) *In this part a ‘work of joint authorship’ means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.*”

14. The words of the subsection provide two express requirements for joint authorship. First, the work must have been produced by the collaboration of two or more authors. Second, the contribution of each author must not be distinct from that of the other author or authors. That would be the case, for example, where the contributions in question are distinct literary works published in a single compilation. It was not in dispute in the present case that the second criterion was satisfied.
15. It was also common ground that s.10(1) contains an implied third requirement. Where a person has contributed to the creation of a work in collaboration with another, he or she must have made a sufficient contribution to qualify as a joint author. This has been explained and rationalised on the basis that a joint author is *ipso facto* an author within the meaning of s.9(1) of the Act and therefore must have contributed a significant part of the skill and labour protected by the copyright (see *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449, at 455).

#### *Collaboration*

16. Mr Weisselberg suggested two short cuts to a result in this action. The first was based on Mr Martin having been solely responsible for creating the Screenplay itself, the final draft. Ms Kogan admitted in cross-examination that her input had not been of any significance after the third draft, which was completed in October 2013. Between the third and fourth drafts Ms Kogan moved out of Mr Martin’s flat and the couple began therapy to help them with their relationship. In late October 2014 the relationship broke down irrevocably. It was not clear when the Screenplay itself was written but it was after October 2014 and the Screenplay was probably not finalised much before shooting of the Film began in May 2015.
17. Mr Weisselberg emphasised that copyright in the Screenplay was all that mattered. It was not in doubt that the Screenplay was created by Mr Martin alone and there was an end of it.
18. Mr Malynicz did not dispute that each draft of the screenplay, including the Screenplay itself, was a separate copyright work (see *Robin Ray v Classic FM plc* [1998] FSR 622 at 638). He argued that Ms Kogan’s creative work, originally contained within drafts one to three, had found its way into the Screenplay, of which it formed a substantial part. Therefore she was entitled to claim joint authorship of the Screenplay. He said that any other result would be absurd.
19. I do not accept that Mr Weisselberg’s proposition would lead to absurdity. To test the point, I will here assume that Ms Kogan’s contributions to the third draft qualify her as joint author of that work and that all such contributions survived to become a substantial part of the Screenplay. On those assumptions, Ms Kogan could have brought a counterclaim for a declaration that she is joint author of the third draft and a finding that the copyright in the third draft has been infringed by exploitation of the Screenplay. She would have succeeded. On those assumptions, the law does not lead to an absurd result; the source of the difficulty for Ms Kogan would be that she relied on the wrong copyright.

20. Mr Weisselberg's argument turns on the express requirement under s.10(1) that for a work to be a work of joint authorship, it must have been produced by the collaboration of the authors.
21. *Levy v Rutley* (1871) L.R. 6 C.P. concerned a claim of joint authorship in a play entitled *The King's Wager, or The Camp, the Cottage and the Court*. The statute under which the case was decided, the Literary Copyright Act 1842, contained no concept of joint authorship. Such a concept emerged for the first time in the Copyright Act 1911. However the 1911 Act on joint authorship reflected the law as it had previously existed under the 1842 Act (see *Copinger and Skone James on Copyright*, 17<sup>th</sup> ed., para. 4-44) and the relevant section of the 1911 Act, s.16(3), was effectively the same as the current s.10(1):

“(3) For the purposes of this Act, ‘a work of joint authorship’ means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.”

22. Thus *Levy v Rutley* remains good law (see *Beckingham v Hodgens* [2003] EWCA Civ 143; [2003] EMLR 18, at [51]).
23. The play in *Levy* had been written by a Mr Wilks, to whose work the plaintiff, and others at the plaintiff's suggestion, had added a scene and a few other alterations and additions. The plaintiff claimed that he was joint author of the play. This was rejected in the Court of Common Pleas by Keating J, with whom Byles and Montague Smith JJ agreed:

“Could the additions so made constitute him a joint author with Wilks of the whole piece? There may, no doubt, be a plurality of authors: the statute, in s.1, dealing with the duration of copyright, speaks of “the author or authors, or the survivor of the authors.” But I fail to discover any evidence that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue, so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to rearrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a common design.”

24. Montague Smith J distinguished the circumstance in which alterations are made to a work which will not lead to joint authorship of the original work from a true collaboration which might result in joint authorship (at p.530-1):

“It is, no doubt, difficult to draw the line: but it never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work. If, when the piece was brought to the plaintiff, he had said to

Wilks, ‘This thing requires to be remodeled, and you and I will do it together,’ and Wilks had assented, possibly a case of joint authorship might have been set up. But the evidence here falls very short of that.”

25. Mr Malynicz submitted that Ms Kogan had consented to the use of her material generated for the first to third drafts in the final Screenplay and that consent was enough to make her a collaborator. I disagree. Consent by an author to the use of his or her work product in combination with that of another is no doubt necessary for collaboration, but not sufficient. There must have been a ‘common design’ to use the words of Keating J, i.e. co-operative acts by the authors at the time the copyright work was created, which led to its creation. Thus the collaboration must have been in relation to the specific copyright work in issue.
26. The Screenplay was written after the final breakdown of the personal relationship between Mr Martin and Ms Kogan and after the end of their working together on the Florence project. There was no collaboration between Mr Martin and Ms Kogan in creating the Screenplay itself. It follows that Ms Kogan is not a joint author of that work.
27. However, I will go on to consider the merits of Ms Kogan’s case on the assumption that her contributions to earlier drafts must be taken into account. The question is then whether Ms Kogan’s contributions were sufficient to make her a joint author.

*The ultimate arbiter test*

28. Mr Weisselberg offered me a second short cut. Ms Kogan accepted in cross-examination that in relation to all the draft screenplays and indeed the treatments which preceded the drafts, Mr Martin had had the final word as to what would go in and what would not. He was the ultimate arbiter. Mr Weisselberg argued that it necessarily followed that Mr Martin was the sole author of all the drafts and treatments.
29. I discuss below the law on what sort of contribution to a work qualifies someone as a joint author, but I will say here that I do not accept Mr Weisselberg’s ultimate arbiter test, at least not in the absolutist way it was put. I can conceive of a collaboration within the meaning of s.10(1) – on the writing of a screenplay for instance – where each writes a substantial part and where the junior member of the team has agreed with the senior that in the event of disagreement the latter’s view on what goes in will always prevail. I would not dismiss the possibility of joint authorship in such circumstances. In my view, the presence of an ultimate arbiter is a relevant factor when assessing whether there is joint authorship, sometimes highly relevant, but it is not decisive.

*The case law on sufficient contribution*

30. As I have indicated, there is an implied requirement of sufficiency to be fulfilled in order for there to be joint authorship within the meaning of s.10(1).
31. In *Tate v Thomas* [1921] 1 Ch 503, a Mr Peterman commissioned the plaintiff to write the music of a play and it was agreed that two others should write the libretto. This was done. Peterman devised the name of the play and the leading characters; he

arranged the scenic effects and supplied certain catch lines in the dialogue. He claimed all this entitled him to be a joint author. Eve J held that the scenic effects were not in themselves subject to copyright protection under the Copyright Act 1911, and therefore to be disregarded, and his other contributions were too insignificant to make him a joint author.

32. *Wiseman v George Weidenfeld & Nicholson Ltd* [1985] FSR 525 concerned a play called *The English Way of Doing Things* written by the second defendant, William Donaldson, who based it on his novel of the same name. Donaldson was an established novelist but had never written a play. The idea for transforming the novel into a play came from the plaintiff, Wiseman, an aspiring stage producer, who provided Donaldson with advice and criticism during the writing of the play and who claimed to be a joint author. Whitford J found as a fact that Wiseman had written no part of the play. The judge went on to consider whether the contribution Wiseman had made qualified him as a joint author. It did not:

“I have said that Mr. Donaldson quite frankly accepted that he had not had great experience in the field of the theatre. He made it quite plain that, in writing this play, he was indebted to Mr. Wiseman not only for many hints of stagecraft, but also for a great deal of constructive criticism. Mr. Wiseman, Mr. Donaldson told me, was a useful critic, able to say pertinent things about how plays should be written; but, says Mr. Donaldson, he certainly did not write the play.”

33. In *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449 the plaintiff's employee wrote computer software for use with telecommunications equipment. The defendant's employee had set the specification of the software, reported errors and bugs, made suggestions as to the cause of some faults and had provided technical information about the hardware with which the software had to work. The defendant claimed joint authorship of the source code. Laddie J held that although the contributions made by the defendant's employee had been extensive and technically sophisticated, had taken a lot of time and were very valuable, they did not constitute contributions to the authoring of the source code. The defendant was not a joint author.
34. In *Robin Ray v Classic FM plc* [1998] FSR 622 the defendant was a radio station playing classical music. Before the station went on air the plaintiff, Robin Ray, presented to it five documents setting out a proposed categorisation of musical tracks. These enabled the station to select tracks appropriate to the programme being broadcast and which satisfied other requirements. Ray also selected the station's music library or 'catalogue' and provided at least the bulk of the information for each track necessary for its categorisation. The station's employees added information to the catalogue and incorporated it and the five documents into a database. The station later sold the database for use by radio stations abroad. Ray raised no claim to the database itself, but alleged infringement of his copyright in the catalogue and five documents by reason of their having been indirectly copied to overseas radio stations. Among the defences raised, the station argued that it was joint author of the catalogue and five documents. The argument was rejected by Lightman J:

“A joint author must participate in the writing and share responsibility for the form of expression in the literary work. He must accordingly do more than

contribute ideas to an author: he must be an author (or creator) of the work in question.

...

There is no reason why penmanship should be insisted on any more in case of joint authors than in the case of a sole author, who may dictate his work to a scribe. But in my judgment what is required is something which approximates to penmanship. What is essential is a direct responsibility for what actually appears on the paper.” (at 636)

35. The claimant in *Brighton v Jones* [2004] EWHC 1157 (Ch); [2005] FSR 16 was the director of a play. The defendant had written the entirety of the play first presented at rehearsals, although during rehearsals the claimant suggested changes. Park J ruled that the claimant was not a joint author because (i) even where changes were made at the instigation of the claimant, the defendant was responsible for deciding what the new words would be, (ii) the changes were not significant to the plot, (iii) the contributions were only to interpretation and presentation of the play, not to creating the play itself, (iv) the defendant was in ultimate charge of words to be used in the play and (v) the director did no more than the actors in making the script better in the course of rehearsal.

36. In *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 the plaintiffs designed and built houses. They employed a firm of technical draftsmen to produce drawings of elevations and floor plans for a new range of houses. The technical draftsmen made all the drawings but the design director of the plaintiffs told the draftsmen precisely what features were to be incorporated into each house design and marked up alterations to be made. The plaintiffs claimed that their design director was a joint author of the drawings. Laddie J agreed:

“In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant. As Mr Howe has said, where two or more people collaborate in the creation of a work and each contributes a significant part of the skill and labour protected by the copyright, then they are joint authors” (at 835-6).

37. Lightman J referred to this passage in *Robin Ray* and expressed the view that it will be rare for a person who has not significantly contributed to the penmanship in creating an artistic or literary work to qualify as a joint author:

“As it appears to me, the architects in that case were in large part acting as ‘scribes’ for the director. In practice such a situation is likely to be exceptional.” (at 636)



*A multi-purpose test*

38. Mr Malynicz emphasised (and it was not in dispute) that the test for whether a work is protected by copyright is now governed by EU law: a work is protected only if it is original in the sense that it is the author's own intellectual creation, see Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, at [33]-[37]. So where part of a copyright work is copied by an unlicensed third party, it will qualify as a substantial part within the meaning of s.16(3)(a) – and thus there will be an infringement of the copyright (see s.16(1)) – if the part in question contains elements which are the expression of the intellectual creation of the author of the work, see *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; [2014] RPC 8, at [38].
39. Mr Malynicz went on to argue that if the part of a copyright work created by a person in collaboration with others is a substantial part and therefore itself protected by copyright, that person has sufficiently contributed to the creation of the work to be a joint author.
40. In effect, the argument was that the same test applies when making two, in fact presumably three, assessments of sufficiency in relation to copyright:
- (1) whether what has been copied from a copyright work is a 'substantial part', thus giving rise to infringement of the copyright if the copying was done by an unlicensed party;
  - (2) whether a modification made by a person to an earlier work is sufficient for new copyright to arise in the modified work, and
  - (3) whether a contribution by a person to the creation of a copyright work in the course of collaboration with one or more others is sufficient to qualify the person as a joint author of the work.
41. This would be a logical result and there is support for it, see *Wiseman* at 527-8 and *Fylde Microsystems* at 455-6.

*Types of contribution to a copyright work*

42. First of all, there is no question that if the contribution did not go to the *creation* of the work it is to be disregarded. For instance, making scenic effects for the production of a play is irrelevant to the issue of joint authorship of copyright in the play, see *Tate v Thomas*. Likewise, contributions such as setting out the specification for software and reporting errors and bugs in it have no bearing on whether there is joint authorship of copyright in the source code, see *Fylde Microsystems*.
43. Turning to contributions which did form part of the creation of the work, it could be inferred from earlier cases that the significance of the contribution depends on the type of skill employed in making that contribution. Here I use 'skill' as a shorthand term for the intellectual creativity of an author required for copyright protection within the meaning discussed in *Infopaq*.

44. A distinction can be drawn between what might be described as the ‘primary’ skill required to create a copyright work and other, ‘secondary’, skills.
45. In the case of an artistic work for instance, the primary skill lies in the use of a pencil, brush, computer program or other means to create an image. In the case of a literary work such as a novel or screenplay, the primary skill is in the selection and arrangement of words in the course of setting them down.
46. Examples of secondary skills for, say, a painter are composition and selection of colour. For an author of a novel or screenplay, secondary skills include inventing plot and character.
47. I should emphasise that I do not here imply that secondary skills are necessarily less important in the creation of a work, particularly when viewed in other contexts such as commercial success. I draw the distinction only to explain my view on the law of joint authorship.
48. It seems clear that if the putative joint author has contributed by way of using the primary skill, the test of joint authorship is whether the contribution constitutes a substantial part of the whole. This will be akin to the test of substantiality in the context of infringement, a qualitative as well as quantitative assessment.
49. Where the putative joint author has only used secondary skills to make his or her contribution, the case law suggests that it is more difficult to establish joint authorship. *Cala Homes* provides an exceptional example of joint authorship being established in that way. If Lightman J’s observation about *Cala Homes* quoted above were to be taken too literally, then to succeed in a claim of joint authorship based on a contribution of just secondary skills it is necessary to show that the contribution is sufficiently overwhelming to render the person who provided the primary skills – the draftsman or writer, etc – nothing more than a scribe. I do not believe that this is what Lightman J meant.
50. If, for instance, an individual were to create the entirety of the plot of a novel or play and all the characters featured in it, and a collaborator were left to do the writing with discretion as to wording, such that the collaborator could not be dismissed as a scribe, I doubt that the possibility of joint authorship could be ruled out.
51. Although the case law sets the bar high when it comes to secondary skills, I take the view that there was no intention on the part of the courts in question to create a distinction in law between primary and secondary skills in relation to their intrinsic capacity to give rise to joint authorship. It may often be harder to establish joint authorship solely by reference to secondary skills. But that will be for evidential reasons and/or because it can be difficult to establish that the contribution relied on is the product of relevant secondary skills and thus protected by the law of copyright, as opposed to being what are sometimes called ‘mere ideas’ which are not protected. The latter distinction turns on a related but separate principle of law.
52. To my mind, irrespective of the nature of a contribution to the creation of a copyright work, if it is of itself protected by the law of copyright then a collaborator who made the contribution will qualify as a joint author of the work. There is a multi-purpose test.

53. In *Brighton v Jones* Park J noted (at [34]) that a finding of joint authorship did not mean (contrary to his earlier view) that the joint author was bound to be an equal owner of the copyright. As the parties agreed in the present case, if I were to find that Ms Kogan is a joint owner of the copyright in the Screenplay, I should go on to decide the correct apportionment of ownership following further submissions. The practical effect would be an apportionment of royalty income generated by exploitation of the copyright work and/or damages consequent upon infringement of the copyright.

*Summary of the law*

54. I here summarise my understanding of the law on joint authorship of copyright to be applied to facts of this case:

- (1) A party will be joint owner of the copyright in a work only if he or she (or in the case of a company, its employees) collaborated in the creation of the work. The collaboration must be by way of a common design, i.e. co-operative acts by the authors, at the time the copyright work in issue was created, which led to its creation.
- (2) The contribution of each author must not be distinct from that of the other author or authors.
- (3) Contributions by a putative joint author (including those done by way of collaboration) which formed no part of the creation of the work are to be disregarded in the assessment of joint authorship.
- (4) No distinction is to be drawn between types of contribution that did form part of the creation of the work. In particular, there is no distinction which depends on the kind of skill involved in making the contribution.
- (5) The contribution, assuming it is relevant to the assessment of joint authorship, must be sufficient. This depends on whether the contribution constitutes a substantial part of the whole of the work in issue.
- (6) That will be the case if the contribution would be protected by copyright in the work. Thus, if the contribution alone were copied by an unlicensed third party and such copying would result in an infringement of the copyright, the contribution constitutes a substantial part of the whole.
- (7) The test of substantiality in the context of joint authorship of copyright, as in the context of infringement, involves a qualitative as well as quantitative assessment.
- (8) Suggestions from a putative joint author as to how the main author should exercise his or her skill – for instance by way of criticism or editing of a literary work – will not lead to joint authorship where the main author has the final decision as to the form and content of the work.
- (9) It is thus relevant, but not decisive, whether an author is the ultimate arbiter as to the content of the work.

- (10) If joint authorship is established, the court may apportion ownership of the copyright.

*Burden of proof*

55. Section 104(1) to (3) of the Act provide:

“104. (1) *The following presumptions apply in proceedings brought by virtue of this Chapter with respect to a literary, dramatic, musical or artistic work.*

(2) *Where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved—*

(a) *to be the author of the work;*

(b) *to have made it in circumstances not falling within section 11(2), 163, 165 or 168 (works produced in course of employment, Crown copyright, Parliamentary copyright or copyright of certain international organisations).*

(3) *In the case of a work alleged to be a work of joint authorship, subsection (2) applies in relation to each person alleged to be one of the authors.”*

56. The Film as released names Mr Martin the sole screenwriter. The burden of proof thus rests on Ms Kogan to establish that she is a joint author. Mr Weisselberg placed some emphasis on s.104 but I think that the burden is no different from the usual one in civil litigation, to be resolved on the balance of probabilities.

**The reliability of recollection**

57. Unsurprisingly, the bulk of the evidence regarding the key issue of who did what came from Mr Martin and Ms Kogan. Both were cross-examined and each was criticised in closing by opposing counsel. I found Mr Martin’s evidence to be more consistent than that of Ms Kogan, but then his case was straightforward: he did everything of substance without exception. Ms Kogan’s case was more complex and suffered from not having been fully thought through. However, my overall impression was that both were stating their honestly held views.

58. Given that their evidence was often entirely contradictory and could not on any view be reconciled, it superficially makes no sense for me to say that both were being honest. But that would be to ignore widely held views of how memory works.

59. The observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) have been referred to subsequently by a number of judges. I set them out here:

*“Evidence based on recollection*

[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a

statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been “refreshed” by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

60. Leggatt J returned to his judgment in *Gestmin* recently in *Blue v Ashley* [2017] EWHC 1928 (Comm):

“[68] A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare*

*Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, " *The fallibility of memory in judicial processes: Lessons from the past and their modern consequences* " (2015) *Memory*, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

"... what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (*consolidated*) with other information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst."

[69] In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light."

61. Leggatt J's admonition that the best approach for a judge is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and instead to base factual findings on inferences drawn from the documentary evidence and known or probable facts seems to me appropriate to the present case.

#### **The six contributions relied on by Ms Kogan**

62. These were the six best contributions from Ms Kogan, as advanced by Mr Malynicz.

(1) *Lily Pons and the Bell Song*

63. In a scene in Florence's apartment she puts a shellac disc on to a phonograph. The recording is of the Bell Song sung by Lily Pons, an operatic soprano who enjoyed fame in the 1930s and 40s. The orchestra on the record is conducted by Arturo Toscanini. Toscanini had featured in the previous scene, touting for money and presenting the disc to Florence. As the music plays, the scene fades into one which takes place during a concert at Carnegie Hall where Miss Pons is on stage singing the Bell Song.
64. Ms Kogan claimed that she created a significant part of these scenes and that it was her idea that Lily Pons should be the performer who inspires Florence to take singing lessons once again; it was also Ms Kogan's idea that Lily Pons should sing the Bell Song. (*The Bell Song* is the name in English given to an aria from the opera *Lakmé* by Delibes.)

(2) *McMoon's audition*

65. Florence requires a pianist to accompany her as she practises her singing. Several are called for audition, of whom Cosmé McMoon is the successful candidate.
66. Ms Kogan claimed to have written a substantial part of the scene of McMoon's audition in Florence's apartment. McMoon plays *The Swan* by Saint-Saëns. Ms Kogan said that she was instrumental in the selection of that piece.

(3) *The rehearsal scene*

67. Florence's first rehearsal with McMoon also takes place in her apartment. She is coached by Carlo Edwards who is an assistant conductor at the Metropolitan Opera. Her partner, St Clair Bayfield, is present. She begins by singing the Bell Song. The aria features a short introduction, here by McMoon on the piano, followed by a long unaccompanied vocal flight from Florence. She is tutored and encouraged by Edwards who uses language such as "Raise the soft palette!" and "Think of the mask, Florence. The squillo! The voice is the mask!". (Mr Martin explained *squillo*, having been informed by Ms Kogan: "... it is about getting the cavities in the forehead to resonate so that the sound will reach the back of the room with a certain ping.")
68. Ms Kogan claimed to have written much of this scene by herself. She said that she was particularly responsible for introducing the vocally technical language, with which she was familiar as an opera singer.

(4) *Scene in the lift*

69. In a hotel lift McMoon expresses to Bayfield careful misgivings about Florence's readiness for a public performance. Bayfield is perplexed.
70. Ms Kogan said that she wrote much of this and was in particular responsible for McMoon's technical language, such as his observation "[Florence's] vocal cords...don't phonate freely...her phrasing is haphazard, and as for her sub-glottal pressure...".

(5) *Further rehearsal scenes*



71. In a series of short scenes, Florence continues to rehearse, accompanied by McMoon and coached by Edwards. Edwards again employs some jargon: “Lean into it. *Appoggio*. Expand your diaphragm, Florence! Breathe!”, “Soar! Like a bird!”. (*Appoggio* is a breathing technique, requiring the body to maintain the ‘noble’ position.) When Florence asks the maestro whether she is ready for a concert, he answers that she will never be more ready.
72. Ms Kogan did not claim sole authorship of the text of any of these scenes, although according to her much had been written jointly. She claimed sole responsibility for the musical jargon.

(6) *Melotone Records scenes*

73. Florence, Bayfield and McMoon go to the premises of Melotone Records where Florence pays to have a recording made of her singing, accompanied by McMoon, so that copies can be given to her friends for Christmas.
74. Ms Kogan said that she wrote one sentence, co-wrote much of the rest and was instrumental in having these scenes included in the Screenplay. She stated that she had provided extensive vocal notes for Meryl Streep and Stephen Frears, although at that stage she had in mind Florence singing the Queen of the Night aria from *The Magic Flute*. In the final Screenplay it was McMoon’s song *Like a Bird*.

## The facts

### *Ms Kogan’s contributions to the text*

75. I consider first whether Ms Kogan by herself wrote any part of the text of the first three drafts of the screenplay, text which survived to become part of the final Screenplay. I have mentioned the marked-up copy of the Screenplay provided by Mr Malynicz on the second day of the trial. I asked for it because I needed to know what Ms Kogan’s case on textual contribution was and at that stage I had not had the benefit of Mr Malynicz’s six best points. But for reasons discussed above I have largely disregarded it in my assessment of their respective roles in writing the Screenplay along with the rest of her and Mr Martin’s evidence insofar as they consisted of unsupported assertions as to what either of them had done. I have instead relied on documentary evidence and agreed facts.
76. Ms Kogan’s view of her case has evolved over time. She first asked for part of Mr Martin’s income from the Screenplay in April 2014. In April 2015 she claimed that she had contributed to the Screenplay. At the CMC in December 2016 she said that the entire Screenplay had been jointly written by her and Mr Martin. In May 2017 Ms Kogan’s witness statement was served with the 42-page annex in which she said that her contributions had included text written only by her. In the annex Ms Kogan summarised her sole input in this way:

“2.2 **Dialogue which was written solely by me.** Some of the dialogue was written solely by me. This is mainly musical jargon or mumbo-jumbo which I had heard during my career in music. As I explained in my witness statement, Nick had no musical training [and] did not have any idea of the expressions that singers would use. I was able to bring this to the collaboration.”

77. In her cross-examination at trial Ms Kogan claimed that her textual input as sole writer went significantly further than musical jargon and mumbo-jumbo. This claim was followed and confirmed the next day by providing the tri-coloured copy of the Screenplay. Yet aside from Ms Kogan's own assertions there was no support for her claim to the input which she identified as hers alone.
78. I find that Ms Kogan's contributions as sole writer of the text of the Screenplay were limited to suggestions of technical musical language, with which she was undoubtedly more familiar than was Mr Martin. These were incorporated into drafts one to three and some of them found their way into the final Screenplay.
79. A major part of Ms Kogan's case was that most of the remainder of the text of the Screenplay was written jointly with Mr Martin. There was some limited evidence in support of this:
- (1) After Mr Martin had prepared his first thoughts on the Florence project in March 2012, he sent a 'story outline' to Ms Kogan, who was then in the United States. He asked for Ms Kogan's input in an email dated 28 March 2012 and referred to her as his 'special collaborator'.
  - (2) On 2 April 2012 Ms Kogan sent Mr Martin an email saying "It is such fun for me to work on these things with you. I hope we'll get to do much more..."
80. But these were very early days and the affectionate language of the emails gives little idea of how Mr Martin and Ms Kogan planned to work together on the subsequent writing of the draft screenplays for the Florence project.
81. By contrast there was more telling agreed and documentary evidence which suggested that the first three drafts of the screenplay were written by Mr Martin alone, with only very limited help from Ms Kogan:
- (1) By the time of the Florence project Mr Martin was a screenwriter of some standing, having written several screenplays for TV drama shows. Ms Kogan was an operatic singer by training and profession. She had written magazine articles and children's books, but claimed no experience of screenwriting before she met Mr Martin.
  - (2) In July 2012 Ms Kogan had suggested that she and Mr Martin should jointly write a script for a different project. Mr Martin reacted badly to the suggestion and told Ms Kogan that he always worked alone. Despite his being in a romantic relationship with Ms Kogan, there was no evidence that he changed his mind about this, aside from Ms Kogan's assertions that he had.
  - (3) Mr Martin was the ultimate arbiter of what went into the screenplay drafts.
  - (4) Emails at the time the story outlines were being written (i.e. before the first draft of the screenplay) indicate that Ms Kogan was making typographical corrections and other comments of a proof-reading kind, but nothing more substantial. An email dated 31 March 2012 from Ms Kogan is typical in this regard. It also includes this:

“Of course, please ignore whatever you please of what I say, this is totally your baby.”

- (5) Mr Martin started work on the first draft of the screenplay in February 2013 while Ms Kogan was in France. It was completed in early April. Ms Kogan wrote an entry in her diary on 3 April 2013:

“N finishes Flo.”

- (6) The second draft was completed on 19 June 2013. Mr Martin emailed a copy to Ms Kogan on 21 June 2013. Ms Kogan replied on 23 June 2013:

“...you have done it – you have accomplished the great task of creating something truly important. ... All the more so because you have written Florence under so much pressure, in such difficult circumstances. ... Making something from nothing but your own talent is a value in itself. To create in a near vacuum is the real thing.”

- (7) Mr Martin went to Los Angeles in July 2013 where he met people in the Hollywood film industry with whom he reviewed the Florence project, in particular Ben Lewin, a director, producer and writer of screenplays and Mr Lewin’s wife, Judi Levine. Their son carried out some research for the project. In an exchange of texts on 27 July 2013 Ms Kogan advised:

“You must protect your position as the writer.”

- (8) After Mr Martin had returned to London, work was done on the third draft. Mr Martin was concerned that Mr Lewin and Ms Levine would claim a share of the authorship, making it difficult for him to claim sole authorship when selling the project to finance companies. To neutralise the difficulty, he decided to offer them part of his writing income. 15% was later agreed. In an email to Ms Kogan dated 23 January 2014 Mr Martin discussed this – he called it “the Ben and Judi problem” – and asked her what she thought about offering part of his income. On the same day Ms Kogan replied “It makes sense...”. On 5 March 2014 Mr Martin’s company, the Second Claimant, signed an agreement with Qwerty, the third Part 20 Defendant, for the financing of the Film. It included a warranty that Mr Martin was sole writer of the script. Throughout this Ms Kogan did not suggest that she should be given a share of the income. It was not raised until 8 April 2014, following a therapy session attended by Ms Kogan and Mr Martin in an attempt to save what had by then become a difficult relationship.

- (9) Ms Kogan knew that Mr Martin had registered the first three drafts of the screenplay with the Writers’ Guild of America with Mr Martin listed as sole author. She raised no objection.

82. In my view, the documentary and undisputed evidence supports Mr Martin’s claim to have been the sole writer of the text of drafts one to three of the screenplay with only limited input from Ms Kogan. This consisted of musical expressions of a technical nature, already mentioned, together with some minor editing changes.

*Non-textual contributions*

83. I think it is likely that Ms Kogan was also responsible for non-textual contributions to the first three drafts, made in the course of her discussions with Mr Martin. Looking at the six best examples advanced on her behalf, the non-textual input probably consisted of the following ideas:
- (1) using Lilly Pons as a character in the Film and using the Bell Song;
  - (2) using *The Swan* in McMoon's audition scene;
  - (3) having Florence visit Melotone Records.
84. As with the textual input, it was Mr Martin who decided which of Ms Kogan's ideas were to be used in the Screenplay and which not.

**Whether Ms Kogan's contributions were sufficient**

85. In my judgment the textual and non-textual contributions made by Ms Kogan never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions. Taken together they were not sufficient to qualify Ms Kogan as a joint author of the Screenplay, even had those contributions all been made in the course of a collaboration to create the Screenplay. Mr Martin was the sole author.

**Acquiescence and estoppel**

86. On my finding that Ms Kogan is not joint author of the Screenplay, the Part 20 Defendants' defence of acquiescence and estoppel does not arise. I will consider it briefly.
87. Mr Hill said that there was no material distinction in the Part 20 Defendants' case as between acquiescence and estoppel. For both they relied on Ms Kogan's failure to raise objection to three matters until about April 2014: (i) Mr Martin's registration of the first three drafts of the Screenplay with the Writers Guild of America, listing himself as sole author; (ii) the optioning of the Screenplay to the Third Part 20 Defendant in March 2014 and (iii) the development of the Film without her involvement. They further relied on their investment in the Film, by way they acted to their detriment, and their belief that they had acquired from Mr Martin all relevant rights to the Screenplay.
88. Mr Hill argued that the Part 20 Defendants would not have run the risk of financing the Film had they known that they were exposed to Ms Kogan's claim that she was a joint author. There had been a representation by silence on the part of Ms Kogan on which they could now rely.
89. Mr Malynicz made an unpleaded submission that Directive 2001/84/EC prevented a party from raising an argument of estoppel by way of defence to a claim of copyright infringement. This was barely argued and I express no view on it. Mr Malynicz submitted more substantively that I must assess this claim of representation and alleged detriment as part and parcel of the overall inquiry into whether Ms Kogan had acted unconscionably. He referred me to the opinion of Lord Neuberger, with whom

Lords Hope, Walker and Mance and Baroness Hale agreed, in *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764:

“[63] Fourthly, in so far as the respondents' argument is put on the basis of estoppel, they would have to establish that it would be in some way unconscionable for Mr Fisher now to insist on his share of the musical copyright in the work being recognised. As Robert Walker LJ said in *Gillett v Holt* [2001] Ch 210, 225d, “the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine” of estoppel. Given that their case at each of the three stages is based on the fact that Mr Fisher did not raise his entitlement to such a share, one would expect the respondents to succeed in estoppel only if they could show that they reasonably relied on his having no such claim, that they acted on that reliance, and that it would be unfairly to their detriment if he was now permitted to raise or to enforce such a claim. As was also said in *Gillett v Holt* [2001] Ch 210, 232d, the “overwhelming weight of authority shows that detriment is required” although the “requirement must be approached as part of a broad inquiry” into unconscionability.”

90. As Mr Malynicz said, I must approach this by considering primarily whether Ms Kogan acted unconscionably.
91. Ms Kogan's statements and behaviour towards the Part 20 Defendants, and indeed everyone else, were always consistent with, and I think took the form of, a representation that she believed that the Film should be produced and released. In my view, had she been joint author of the copyright in the Screenplay it would have been unconscionable for her to rely on joint ownership of the copyright to restrict the public performance of the Film in any way. To that extent, in my view the defence of estoppel would have succeeded.
92. I can take it no further because to do so would require hypothetical facts arising from the assumption that Ms Kogan *had* made significant textual and other contributions to the Screenplay but had not informed the Part 20 Defendants about them or made any claim to joint authorship until late in the day. Whether Ms Kogan acted unconscionably would depend on the precise nature and circumstances of those facts.

### **Conclusion**

93. Mr Martin is entitled to a declaration that he is the sole author of the Screenplay and that the Claimants have not infringed the copyright in the Screenplay. The Counterclaim and Part 20 Claim are dismissed.