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Claim No. IP-2021-000028

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

Miss Recorder Amanda Michaels, sitting as a Deputy Judge of the Intellectual Property Enterprise Court

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

Date: 2 December 2021

**B E T W E E N :**

**SERGIO COSTA**

Claimant

- and -

**(1) DISSOCIADID LTD**  
**(2) CHLOE WILKINSON**

Defendants

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**Jacqueline Reid** (instructed by **Brandsmiths**) for the Claimant

**Mitchell Beebe** (instructed by **PAIL Solicitors**) for the Defendants

**Hearing date: 19 November 2021** (held remotely by Microsoft Teams)

**HTML VERSION OF JUDGMENT APPROVED**

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Bailii at 10.30 am on 3 December 2021**

## **JUDGMENT**

### **Miss Recorder Amanda Michaels:**

1. This judgment deals with applications to strike out and/or for summary judgment made on behalf of both sides of this dispute.
2. The action is a claim for infringement of literary copyright in a number of works of joint authorship (“the Works”). Subsistence, copying and reproduction of a substantial part of the Works are not in issue. However, the Defendants counterclaim for breach of an alleged contract under which, they say, they were and remain entitled to use the Works, with additional counterclaims for breach of a non-disclosure agreement and unlawful interference.

### **Background**

3. The background to the dispute is broadly agreed, and nothing in the summary in this judgment is intended to resolve any points which remain in dispute between the parties. I am told that the Second Defendant is affected by “dissociative identity disorder.” I was told that this was previously known as “multiple personality disorder,” and is a mental disorder characterised by the maintenance of at least two distinct and relatively enduring personality states. I hope it will not cause any offence if for convenience I refer to the Second Defendant as “Ms Wilkinson” without distinguishing between the different states of identity which she calls her “alters,” as it does not seem to me that any point relevant for present purposes turns on her different states of identity.
4. In about March 2018, Ms Wilkinson started a YouTube channel under the name ‘DissociaDID’ (“the Channel”) and continued to operate the Channel until August 2020 when the First Defendant was incorporated. Ms Wilkinson is the sole shareholder and director of the First Defendant. Since its incorporation the First Defendant has operated the Channel. The Channel was used to carry out activities relating to dissociative identity disorder, including giving information, support and advice, by reference to Ms Wilkinson's experiences. I was told that the Channel was very successful, had many subscribers and provided a significant monthly income to the Defendants.
5. At some point in early 2020, Ms Wilkinson was approached by the Claimant, Mr Costa. The date when the initial communication occurred, and the details of the discussions which ensued between Ms Wilkinson and Mr Costa, are not agreed between the parties. Ms Reid, for Mr Costa, told me that the application bundle (despite being over 500 pages long) contained only a modest selection of the correspondence, as around 500 emails and a similar number of WhatsApp messages passed between the parties during 2020. Certainly, the application bundle did not contain a number of significant documents, such as the correspondence in November 2020 to which I refer below.
6. Broadly speaking, however, I think it was accepted by both sides that in about March or April 2020 Mr Costa offered Ms Wilkinson some help and assistance in relation to the Channel. I was shown an email sent on 20 April 2020 in which he said:

“So, about my proposal. I know that you have a ton of things to think about right now and I'd hate to add to that. Please don't feel pressured to reply to this email any time soon, although I kindly ask you to reply to it, regardless of your decision. This is something for you to think about when (and if) you're ready to come back.

I'm offering you my help to work behind the scenes improving your content and communication so you can feel safer and focus on what you do best: creating content. You don't have to pay me or credit me. I'm doing this for the sole reason that I believe in your project and would like to help.”

Mr Costa went on to describe his background and work in "quality control and communication efforts" and said that he might be able to offer help in terms of improving communication. Mr Costa added “So nothing too fancy, mostly just a little advice here and there.”

7. Mr Costa’s offer was not accepted at that stage, but after some further correspondence, during which Mr Costa offered at least to give some advice, on 16 June 2020 he wrote saying:  
“If you need help with research, planning, writing, keeping tabs on things, etc, my offer still stands.”  
The offer was accepted by Ms Wilkinson later the same day.
8. The Defendants say that these exchanges led to the formation of a contract between them (“the Contract”).
9. In August 2020, the parties executed two written non-disclosure agreements. The first NDA dated 5 August 2020 was between Mr Costa and Ms Wilkinson and the second dated 21 August 2020 was between Mr Costa and the First Defendant. It expressly superseded the earlier NDA.
10. Subsequently, Mr Costa helped Ms Wilkinson (and/or the First Defendant) write content for use on the Channel, leading to the production of the Works, which consist of a number of scripts, pre-scripted comments and statements, and a disclaimer. The dates when the Works were produced may, I think, be in contention, but the Particulars of Claim describes the Works as having been written in August and September 2020. I do not need for present purposes to go into the details of the collaboration between the parties or the details of the Works. Mr Costa claims joint authorship of the Works with Ms Wilkinson and joint ownership of the copyright subsisting in them as literary works (despite some ambivalence in the Particulars of Claim as to whether he claims sole or joint ownership of the copyright in the works). The Defendants accept the claim to joint authorship and joint ownership of copyright save in respect of one Work, the disclaimer, which is said by the Defendants to have been written by Ms Wilkinson.
11. The Works were used in content on the Channel. However, in about November 2020, the parties fell out. The Particulars of Claim pleads that Mr Costa sent a “communication” to Ms Wilkinson on 6 November 2020 about protecting his intellectual property and a letter of claim was sent on 23 November 2020. Neither of these documents were exhibited to the Particulars of Claim or otherwise included in the application bundle, but it is alleged that “any consent to the unilateral exploitation of the Works was revoked by the Claimant at that time.” It is also said that from 12 November 2020, the Defendants claimed a right unilaterally to exploit the Works and copied them and issued the copies to the public, etc, on the Channel, leading to infringement of the copyright.
12. The Defendants accept that they continued to use the Works on the Channel after Mr Costa is alleged to have withdrawn his consent to that use, but they allege that the Contract was not determined by him in November 2020. However, Mr Costa filed

takedown notices with YouTube, initially in February 2021, resulting (according to the Defendants) in many of the First Defendant's videos being taken down by YouTube. Some were reinstated following counter-notices by the Defendants, but at least some have been taken down again following later objections from Mr Costa.

13. The claim form was issued on 17 March 2021, claiming an injunction, damages or account of profits and other relief usually sought in a copyright claim for unauthorised use of the Works. The Defence was mainly based upon the contention that the Contract gave the Defendants the right to continue to use the Works despite Mr Costa's objections, whether pursuant to a licence or an equitable assignment. In addition, the Defendants counterclaimed for:
  - a. damages for breach of the Contract: the loss of revenue from the Channel as a result of the takedown notices was said to be likely to exceed £100,000 by the date of the trial,
  - b. damages for unlawful interference (causing loss by unlawful means): alleging that Mr Costa did not honestly believe that he had withdrawn his consent for their exploitation of the Works, and
  - c. damages for the wrongful disclosure of private information by Mr Costa to a third party in breach of the NDA with the First Defendant.All of those counterclaims are denied.
14. Various further statements of case were exchanged, and the CMC was listed to be heard on 19 November.

### **The applications**

15. On 3 November, the Defendants issued an application to be heard at the CMC asking for the claim to be struck out in its entirety under CPR 3.4(2)(a) and/or CPR 3.4(2)(b) alternatively, summary judgment under CPR 24.2 in favour of the Defendants on the Defendants' Defence. The application was supported by a witness statement of the Defendants' solicitor, Mr Adediran. Mr Costa filed a witness statement in answer dated 15 November.
16. On 5 November, the Claimant issued his own application for strike out under CPR 3.4(2) or for summary judgment under CPR 24.2. That application had been foreshadowed by a letter dated 6 July 2021 (which I have not seen). The application was supported by the witness statement of his new solicitor, Mr Lee, who exhibited a marked-up, colour-coded version of the Defence showing which parts of it the Claimant sought to strike out on a variety of bases. The Claimant claimed that there was no defence to his claim. He did not seek to strike out the whole of the Counterclaim and in particular the unlawful interference claim was not sought to be struck out. The aspects of the Defence and Counterclaim which were attacked fell into these categories:
  - a. References to the Contract,
  - b. References to the Defendants' alternative argument that if there was no binding Contract, Mr Costa made a gift of the future copyright,
  - c. A reference in paragraph 55 of the Defence to the possibility that if the Defendants lose the Contract claim they may raise the claim in proceedings for protection from harassment ongoing between the parties in the Ipswich County Court in which Ms Wilkinson obtained an injunction against Mr Costa in August 2021,
  - d. Various narrative paragraphs which are said to be largely pejorative, and

e. The Defendants' claim based on alleged breach of the NDA.

17. Both sides sought to strike out on two bases: first, the alleged lack of merits of the claim/defence, and secondly on the grounds that the challenged elements amounted to an abuse of process as the value of the claim is out of proportion to the damages likely to be recovered.
18. The principles applicable to an application under CPR 24.2 were not in dispute: the court may give summary judgment on a claim or issue if it considers that the defendant has no real prospect of successfully defending the claim or issue. It was common ground that the principles were those set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:
  - i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91,
  - ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8],
  - iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*,
  - iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,
  - v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550,
  - vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63,
  - vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up

which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

19. That passage has been followed in later cases. For instance, in *TFL Management Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, Floyd LJ said (at [27]):
 

“Neither side sought to challenge these [*Easyair*] principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, ... Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications: see *Partco Group Ltd v Wragg*, para 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy...”
  
20. The principles were summarised in similar terms by Hamblen LJ in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27]. My attention was also drawn to the following passage, as to the need to have regard to the whole course of dealing between the parties in determining whether a contract had been concluded:
  - “28. It is well established that when deciding whether a contract has been made during the course of negotiations the court will look at the whole course of those negotiations—see *Hussey v Horne-Payne* (1879) 4 App Cas 311.
  29. As Earl Cairns LC observed in that case at p 316:
 

“You must not at one particular time draw a line and say, ‘We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond’. In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.”
  30. The rationale of this approach is that focusing on one part of the parties' communications in isolation, without regard to the whole course of dealing, can give a misleading impression that the parties had reached agreement when in fact they had not—see Lord Selborne in *Hussey* at p 323.
  31. In principle, the approach in *Hussey* and its rationale apply regardless of whether the negotiations are conducted in writing, orally or by conduct or by a combination of those means of communication.
  32. This is borne out by authority. For example, in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14; [2010] 1 WLR 753, para 49 Lord Clarke of Stone-cum-Ebony JSC, giving the judgment of the Supreme Court, cited with approval a passage from Lloyd LJ's judgment in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 in which he stated at p 619: “(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole ...” Lord Clarke JSC then commented: “The same principles apply where, as here, one is considering whether a contract was concluded in correspondence as well as by oral communications.”
  33. This is illustrated by the fact that *Pagnan* concerned a contract allegedly concluded during the course of oral and written communications and *Hussey* concerned dealings involving both correspondence and meetings.”

21. CPR 3.4(2) provides:

“3.4(2) The court may strike out a statement of case if it appears to the court-

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.”

22. The rule was considered recently by Julian Knowles J in *Desporte v Bull* [2021] EWHC 2370 (QB) in a lengthy judgment deciding a variety of applications in related libel and privacy claims with a complicated procedural history. These included a strike out claim made by the Defendant. He said:

“89 ... I begin by considering the proper approach to a strike out application under CPR r 3.4(2)(a).

90. Paragraph 1.7 of CPR PD3A (Striking out a statement of case) states that a party may believe he can show without a trial that an opponent’s case has no real prospect of success on the facts, in which case an application under CPR r 3.4(2) can be made. Paragraph 1.4(2) gives as an example where the court may conclude that particulars of claim fall within that provision, namely, those which ‘are incoherent and make no sense.’

91. The commentary in the *White Book 2021* explains that statements of case which are suitable for striking out under that provision include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides: *Harris v Bolt Burdon* [2000] CP Rep 70. However, an application to strike out should not be granted unless the court is *certain* that the claim is bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, [22]. Unless the court is certain, the case is inappropriate for striking out: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557.

92. A cautious approach is therefore necessary.”

Part of the claim was struck out because it was held that the claimant would fail to prove that the communications complained of bore the defamatory meaning she alleged.

23. The parties here both relied upon an additional argument that the other side’s case (or part of it) was an abuse of process because the costs of resolving it risked being out of all proportion to any damage, based on *Jameel v Dow Jones & Co Inc* [2005] QB 946. That was a defamation case, in which various applications for summary judgment/strike out were made, including on the basis that there had been only minimal publication of the allegedly libellous statements within the jurisdiction, so that (*inter alia*) the expensive action was disproportionate and so an abuse of process. On the latter point, Lord Justice Phillips MR noted at [60] that:

“If vindication is the first object advanced by the claimant for pursuing this litigation, the second is to obtain an injunction restraining Dow Jones from repetition of the alleged libel.”

At [69] he said:

“If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be

minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.”

The Master of the Rolls went on to consider at [71]-[77] whether the claim for an injunction to prevent repetition of the alleged libel justified the claim, which otherwise would be dismissed as an abuse of process. He concluded that it did not, as there was no real likelihood that the libel would be repeated.

24. The *Jameel* abuse jurisdiction was also said to be engaged in *Desporte v Bull (supra)*:  
 “[141] I turn to the final head of abuse of process relied on ..., namely that this litigation is pointless and wasteful given – even if it were viable, which obviously [counsel] did not accept - any damages would be minimal.  
 142. ...The test is whether ‘there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources’: *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409, [29].”
  
25. In *Sullivan v Bristol Film Studios Ltd* [2012] EMLR 656, a claim for infringement of copyright was dismissed despite it being accepted (for the purposes of the application) that it had a real prospect of success. The judge thought it not worth the candle, as he assessed the level of likely damages at £50. Lewison LJ said:  
 “29. ...The mere fact that a claim is small should not automatically result in a court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.  
 ...  
 32. In my judgment in principle a claim like Mr Soloman’s could have been tried in the PCC if its true value had been recognised at the outset. When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure.”
  
26. As Warby J commented at [34] of *Ames v Spamhaus (supra)*:  
 “[*Sullivan*] also serves as a reminder, however, of why the jurisdiction is exceptional: it is a strong thing for a court to strike out a claim on proportionality grounds if it has at least arguable merit, and the court must be alive to the risk that it might unjustifiably deprive a claimant of access to justice.”
  
27. This line of authority was also considered with specific reference to the IPEC and its small claims track by HHJ Hacon in *Lilley v DMG Events Ltd* [2014] EWHC 610 (IPEC). He concluded:  
 “30. Thus the potential gain to a claimant in litigation can be so trivial that the commitment of the resources of the English court to the resolution of the claim is an abuse of process. There can be no precise tariff for damages below which an abuse is triggered. It will always depend on the circumstances. For instance if the



proceedings are heard in the IPEC the commitment of time and resources will be less than would be the case in the High Court and so there can be a lower potential benefit to the claimant without giving rise to an abuse. If the case can be transferred to the small claims track, the potential benefit can be smaller still.

31. I have to weigh the potential benefit to Mr Lilley of his claim for infringement of copyright against the resources of this court that would have to be devoted to his pursuit of that claim. I do not believe that a transfer to the small claims track of the IPEC is an option. Neither party has asked for such a transfer and in fact Mr Lilley is unhappy that the action is not still in the High Court. But even if there had been an application to transfer, I would have refused. Mr Lilley's pleadings are lengthy and complex and just for this application the documents ran to 7 lever arch files and 2 further files. I do not think that this is a case that would ever be suitable for transfer to the small claims track, see CPR 63.27(3) and 26.8(1)(c) and (f).

32. The authorisations which are the basis of Mr Lilley's claim for infringement of copyright complained of stopped a long time ago, in December 2006, so there is no value to Mr Lilley in an injunction. The potential benefit to him rests in damages only, which he says are very great indeed.

33. I have to make an assessment of the upper limit of damages to which Mr Lilley would arguably be entitled if he were to prove infringement at trial. I must then decide whether that upper arguable limit warrants the commitment of this court's resources to Mr Lilley's claim.

...

60. ... the maximum quantum of damages which Mr Lilley could claim is about £83.

61. My best guess is that the trial of this action would take about two days. I also think that to make sure the trial is conducted with clearly defined issues and also to ensure that it does not overrun, a significant amount of case management would be necessary. That might take a day.

62. I do not believe this would be an appropriate use of the court's resources when the maximum which could ever be at stake is around £83. It would be an abuse of the process. I must consider other litigants with more serious and possibly more pressing claims, the resolution of which would necessarily be delayed by the hearing of the trial of this action and any preliminary hearings in advance of the trial."

### **Merits of the applications**

28. The parties' applications to some extent mirror each other: the Defendants claim that the Contract provides a complete defence to the claim, so that the infringement claim can be struck out, whilst the Claimant argues that the pleaded Contract was not a binding agreement at all, and so that all references to the Contract in the Defence should be struck out.
29. The first 30 paragraphs of the Confidential Defence and Counterclaim ("the Defence") set out the Defendants' version of the background to the claim and counterclaims. The Contract was pleaded at paragraph 13 as having a single express term:  
"that any advice and feedback rendered by the Claimant concerning the content and communication for the DissociaDID project would be for free."  
At paragraph 14 the Contract was said also to have two implied terms: that Ms Wilkinson and her successors/assigns would have a licence to use any content created

by Mr Costa, and that he would not derogate from grant. In addition, at paragraph 18 the Defendants said:

“the consequence of the Contract was that the Second Defendant (and any successors or assignees) would have a licence to the copyright in any works (whether joint or otherwise) created by the Claimant and would be free to use those works for the purposes of the DissociaDID project both during and after the term of the Contract. In the alternative, even if it was held that no Contract arose in June 2020, then the Claimant’s services were in the nature of the [*sic*] gift and involved an equitable assignment of the Claimant’s copyright in the Works to the Defendants.”

30. Paragraph 34 of the Defence expanded a little on paragraph 13:

“the parties agreed to the Contract, whereby the Claimant agreed to provide advice and feedback for free to the Second Defendant, which included the development of content and improvement of communication concerning the Channel.”
31. In paragraph 39 (b), the Defendants denied that the Contract was terminated by the Claimant's letter of 23 November 2020, and said that even if the Contract had been terminated, the implied licence would have survived termination, and repeated that the Claimant's services were:

“in the nature of the gift and involved an equitable assignment of the Claimant's copyright to the Defendants.”
32. In paragraph 4 of his Reply, Mr Costa disputed that there had ever been a binding contract and denied, in particular, that there was any consideration moving from the Defendants. His was a gratuitous offer of assistance. Furthermore, at that stage the offer did not include the creation of content by Mr Costa. In paragraph 9, Mr Costa denied that the alleged implied terms could be implied into the alleged Contract, so there was no extended copyright licence or equitable assignment, just a bare licence.
33. In the Reply to Defence to Counterclaim the Defendants denied that there was no consideration, saying "The absence of a fee is irrelevant. In the context of the contractual consideration, the Defendants acted to their detriment." This point was pursued in a Part 18 request by the Claimant, and the Defendants replied saying that consideration was provided by Ms Wilkinson's change of position in agreeing to work in association with Mr Costa, which meant that she incurred ‘additional obligations’ and that this amounted to the prospect of detriment. Alternatively, the consideration was the provision of an indirect benefit to Mr Costa from working on the Channel, allowing him to develop his CV and experience.
34. Mr Beebe, for the Defendants, submitted that consideration can be nominal and need not represent ‘adequate’ value in comparison to the consideration moving from the promisee (see e.g. *Chitty on Contracts* 34<sup>th</sup> ed at 6-015, 6-022). He relied on *Shadwell v Shadwell* (1860) 9 CB NS 159, discussed at *Chitty* 6-006 and 6-010. Paragraph 6-006 suggests that what was important to the finding of consideration in *Shadwell* was that there was some exchange – amounting to a bargain - between the parties. Paragraph 6-010, which is discouragingly headed “Invented consideration,” concludes that such cases are a source of considerable uncertainty, as the Defendants accepted.
35. Ms Reid, for Mr Costa, emphasised that an informal, gratuitous promise does not amount to consideration, and that was all that was given here. In response, Mr Beebe pointed to paragraph 6-214 of *Chitty*, which states that occasionally there may be

consideration in an indirect benefit obtained from the arrangement, such as favourable publicity.

36. On 4 August 2021, the Claimant's then solicitors wrote to the Defendants complaining that their Part 18 reply identifying the alleged 'additional obligations' on the part of the Defendants was too vague for the Claimant to know the case he had to meet, but the Defendants refused to give any further particulars. As a result, in his own summary judgment application, Mr Costa submitted that the Defendants had failed to plead their case on consideration with sufficient particularity, in breach of CPR 63.20(1).
37. I do not accept the Claimant's submission that it is clear that there was no agreement for the Claimant to create or edit literary works for the Channel. His emails of 20 April and 16 June 2020 refer respectively to offering to his services 'improving content' and 'help with ... writing', so in my judgment it is possible that at trial the Defendants may be able to establish that the parties intended Mr Costa to write or edit content for the Channel (and that this was, as pleaded, an implied term of the Contract). If there was a binding agreement at all, it is in my view arguable that this was part of it.
38. However, the consideration relied upon by the Defendants as moving from the Second Defendant raises issues which are far from straightforward. Indeed, the unusual nature of the consideration was accepted by Mr Beebe. He submitted that it was telling that the Claimant had not produced any additional documents clarifying the extent of the agreement between the parties, so that the court is able to determine the contractual issues on a summary basis, in the light of the limited number of documents exhibited at this stage. I do not accept that submission. The Defendants' position on consideration depends upon unusual and uncertain legal points, which it seems to me can only be determined in light of all of the evidence. I have considered carefully whether this falls into the error of 'Micawberism,' but as Lewison J said in *Easyair* at paragraph 15(vi), the court must hesitate before making a final decision where reasonable grounds exist for believing that a fuller investigation at trial would add to or alter the evidence available or would show the existing evidence in a new light. Ms Reid, for the Claimant, submitted that it would be inappropriate to decide this point without hearing from the witnesses and seeing the full run of correspondence. I agree. Overall, I have concluded that the court is likely to be in a better position to decide the issue of consideration at trial than it is at this summary stage. It is likely to be assisted by more extensive evidence about the communications between the parties both before and after the date when the Contract is said to have been made, which, as I have mentioned, were far more extensive than the limited number of emails which I have been shown.
39. The Defendants also rely upon terms which they say should be implied into the Contract, another point hotly contested by the Claimant. Again, this seems to me to be an issue better considered in the light of all the surrounding circumstances, rather than on the basis of the limited evidence before me. As a result, in my judgment the Defendants have not shown that the defence based upon the Contract is so strong that the claim has no reasonable prospect of success.
40. Paragraphs 25-27 of Mr Lee's witness statement indicated that the Claimant's application to strike out the references to the Contract in the Defence was based upon the contention that the alleged consideration was insufficiently particularised. In response, Mr Beebe relied upon the IPEC guide which says:

“Part 63 rule 20(1) requires that a statement of case in the IPEC must set out concisely all the facts and arguments upon which the party serving the statement relies. This is sometimes misunderstood. All relevant facts and arguments must be stated. But they should not be set out in a manner which includes every detail. There will be an opportunity by the time of the trial to explain to the court everything that matters. A good approach is to make the statement of case as concise as is possible, while considering whether any argument proposed to be run at trial and the basis for it will come as a surprise to an opponent who has read the statement of case. If not, the statement of case has probably been drafted in sufficient detail.”

41. I was concerned about the Defendants’ failure to give any further explanation of the pleading that the Contract imposed additional obligations upon Ms Wilkinson. However, Mr Beebe explained that these were the obligations which would flow from the need to collaborate with the Claimant, a point which is set out in the Part 18 Reply. On balance, I have concluded that the Claimant is not likely to be taken by surprise by this point at trial, and so the Defendants’ pleading satisfies the requirements of the Rules. I therefore decline to strike it out on that basis.
42. Ms Reid also sought to strike out the (blue) parts of the Defence based upon the alleged Contract because of the inadequacy of the pleaded consideration and the difficulty of incorporating the alleged implied terms into the Contract, not just as a matter of law, but in light of the facts and the other pleaded terms of the Contract. As I have already said, the legal basis of the consideration which was pleaded by the Defendants is unusual, if not exceptional, and the legal points made by Ms Reid highlighted the challenges which the Defendants will face in this regard, as well as in relation to the existence or ambit of the implied terms, at trial. However, the Claimant’s objection to the Defendants’ application (that it should be decided in light of all the evidence) applies with equal force, in my judgment, to his own application to strike out the Contract defence. Again, in my judgment these are points which should be considered in the light of all the evidence.
43. There is an additional consideration, which is that there is no challenge to the unlawful interference counterclaim, which would therefore survive the Claimant’s strikeout application. Nor was there any suggestion that the counterclaims would be abandoned if the Defendants’ summary judgment application were to succeed. That being so, the counterclaims will go to trial and it is clear that the evidence relevant to them would overlap very considerably with the evidence relating to the Contract. There will therefore be no or very little saving to be made in terms of time or costs by striking out the claim on the one hand and the defence based upon the Contract on the other.
44. For these reasons, the first limb of the Defendants’ application fails, and I decline to strike out of the Defence any reference to the Contract as sought by the Claimant.
45. The second limb of the Defendants’ application was based upon the *Jameel* line of authority. They submitted that the Claimant’s willingness to work with Ms Wilkinson without payment should estop him from claiming valuable damages now. In addition, they said that the value of the Claimant’s claim is so low as to amount to an abuse of process. Mr Adediran produced evidence of the very modest charges which might have been incurred had Ms Wilkinson used various copywriters to carry out the writing tasks done by the Claimant. Mr Costa challenged those figures, and produced alternative

figures based upon his own charge out rates which (assuming a 50% interest in the Works) amounted to \$4,179, so perhaps around £3000, well under the small claims cap. It is hard to see how that would justify a full-blown IPEC trial.

46. However, Mr Costa's claim is not simply for damages. He also seeks a declaration of authorship, an injunction, additional damages, and (as an alternative to damages) an account of profits. Ms Reid submitted that the possibility of seeking an account has to be seen in the light of the Counterclaim for damages, in which the Defendants plead that their losses arising from the Claimant's alleged breach of contract and/or unlawful interference, through content having been taken down from the Channel, may amount to £100,000 by the time of trial.
47. In my judgment, this is not a case in which would be appropriate to strike out the claim on the basis that it is an abuse of process simply because of the small amount of damages which the Claimant may recover. It is not clear to me that there is no need for an injunction, nor can the possibility be excluded at this stage that the Claimant, if successful, might be able to claim either additional damages or an account of profits which would justify the costs of the claim. Moreover, again, the merits of the Defendants' application on this basis are undermined by the fact that striking out the claim would not resolve all of the issues between the parties or prevent the counterclaim going to trial. Striking out the claim whilst the counterclaim goes ahead is unlikely to produce valuable savings of time or costs. I therefore decline to strike out the claim upon the second limb of the Defendants' application.
48. I must turn now to the further aspects of the Claimant's application. First, he sought to strike out (green) references to the Defendants' alternative argument that if there was no binding Contract, there was an equitable assignment, by way of gift, of the future copyright in the Works. In the Part 18 Replies, the Defendants said that even if there was no such equitable assignment, the gift of services included an irrevocable licence. In his witness statement, Mr Lee submitted that this claim was inconsistent with paragraph 37(b) of the Defence (which admitted joint ownership of the copyright in the Works), whilst Ms Reid's skeleton argument submitted that there was simply no evidence of a gift other than to take some of the wording of the April 2020 email out of context.
49. It seems to me that the question of whether a gift was made by the Claimant is inextricably linked to the issues relating to the existence of the Contract and will turn upon exactly the same facts. Again, I think that it would be necessary to see the full run of communications between the parties to assess the merits of this claim, whilst there would be no real benefit in terms of the saving of costs or time in striking out this element of the Defence at this stage. I shall not strike this out.
50. Next, the Claimant sought to strike out (pink) paragraph 55 of the Defence which reserved the Defendants' position to raise the claim in the County Court proceedings ongoing between the parties, if the Defendants lose the Contract claim. For what it is worth, I agree that this adds nothing to the current claim or counterclaim, Mr Beebe said it was simply there to flag the future position. I do not think that it is worth taking further time on this point and I think that this paragraph should be struck out.
51. The Claimant's application also sought to strike out more (red) parts of the Defence containing various points which the Claimant alleges are vague, vexatious or irrelevant.

The passages in red mainly cast aspersions upon the Claimant's character, some (such as paragraphs 16 and 60(b)) alleging that after November 2020 he undertook a "retaliatory and vindictive campaign" against Ms Wilkinson. Ms Reid submitted that these serve no purpose in putting forward a defence to copyright infringement or in supporting any of the counterclaims, and will waste costs and time, and distract from the substantive claims. The Defendant's response was to suggest that these allegations are relevant to the counterclaim for unlawful interference in causing loss by unlawful means, for which it is necessary to show an intention to injure.

52. In my judgment, the passages marked in red are either of no substance or significance (e.g. in the first sentence of paragraph 1 and paragraph 30) or repeat much the same points about the Claimant's state of mind and motivation (e.g. paragraphs 4, 5, 16, 21 and 60(b)). I quite understand why the Claimant is unhappy about all of these passages, but both disclosure and the evidence will be restricted to dealing with the issues identified in the case management order. These points may only be taken further if they are relevant to those issues. As a result, it does not seem to me that those passages which fall into the first category will add anything to either side's trial preparation, whilst those in the latter category may be said to be relevant to the unlawful interference counterclaim, and should not deal with wider matters. On balance, I do not consider that it is either worthwhile or appropriate to strike these passages out.
53. Lastly, the Claimant seeks to strike out the (purple) part of the counterclaim which relates to an alleged breach of the NDA with the First Defendant. The Defendants say that in November 2020 the Claimant wrote to one of Ms Wilkinson's friends, mentioning confidential personal information about her (which it is unnecessary to identify in this judgment), in breach of the NDA with the First Defendant. In paragraph 70 of the counterclaim, Ms Wilkinson seeks damages for breach of the NDA "between £5,000 to £15,000, with damages to be assessed, representing the value of the personal information ..." although there is no equivalent counterclaim in the prayer for relief. No injunction is sought to restrain further breaches of the NDA.
54. The confidentiality of the information was not admitted in the Defence to Counterclaim, and it was denied that Ms Wilkinson had suffered any loss caused by its disclosure. Ms Reid submitted first of all that the information was not confidential, but equivalent to personal information which Ms Wilkinson had previously posted online. This (it seems to me) puts the Claimant's case higher than in his pleading, and it does not seem to me that this is a point which I can resolve on the facts at this stage. Next, she submitted that Ms Wilkinson cannot claim for breach of the NDA with the First Defendant, to which she was not a party. It expressly superseded the original NDA with her. That may be a persuasive point, but it is unpleaded.
55. The Claimant had denied that any damage had been caused to Ms Wilkinson, and Ms Reid submitted that the damages claim is not apparently based on any pecuniary loss, no special damage has been identified. That is significant, she said, because this counterclaim will raise issues and require substantial evidence not otherwise before the court. Mr Lee said in evidence that the costs of dealing with this claim would be inflated *inter alia* by the need to instruct specialist junior counsel, and to have disclosure of past public disclosures of equivalent personal information by Ms Wilkinson, so that the costs of this counterclaim are such that it does not pass the cost benefit analysis. I do not accept that the costs of dealing with the NDA counterclaim would necessarily be as

high as Mr Lee anticipates. In particular, I cannot see that it would be necessary or appropriate to instruct separate counsel to deal with the point. However, I accept that unlike the other counterclaims it would require separate, additional disclosure and evidence.

56. In the absence of any particulars or evidence, it is unclear how damages for breach of the NDA have been calculated to justify the pleaded figures of £5,000 to £15,000. There is no evidence to show how likely it is that damages would fall into the higher end of that bracket. If damages fall into the lower part of the range, then this counterclaim may well not be 'worth the candle' and it seems likely that the costs of dealing with the point could equal or exceed the likely recovery.
57. Moreover, Ms Wilkinson's County Court proceedings include a claim for misuse of her confidential information arising out of the same facts as the NDA claim, including a claim for damages under that head. It seems to me more appropriate that the issue should be heard in those County Court proceedings.
58. In the circumstances, I have concluded that the counterclaim for breach of the NDA does not pass the costs benefit analysis which it is appropriate to apply to an IPEC case. I will stay that part of the counterclaim, and leave Ms Wilkinson to pursue her claim for breach of confidence in the County Court proceedings.
59. I trust that the parties will be able to agree the amendments to the draft Order which was discussed at the hearing before me in the light of this judgment but will deal with any queries about it on paper.
60. The costs of both applications will be reserved.