Case No: HC 03C00312, HC 03C03608, HC 03C04202

Neutral Citation No: [2004] EWHC 2362 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Thursday, 21st October 2004

Before :

THE VICE-CHANCELLOR

- -

Between :

CELADOR PRODUCTIONS LIMITED	**Claimant/ Applicant**
- and -	
MELVILLE	**Defendant/ Respondent**
BOONE	**Claimant/ Respondent**
- and -	
ITV NETWORK AND ANOTHER	**Defendants/ Applicants**
BACCINI	**Claimant/ Respondent**
- and -	
CELADOR PRODUCTIONS LIMITED AND OTHERS	**Defandants/ Applicants**

- -

Mr. Richard Arnold QC and Mr. Brian Nicholson (instructed by **Messrs Goodwin Derrick**) for Celador Productions Ltd and its co-Defendants
Mr. Richard Spearman QC and Mr. Andrew Norris (instructed by **Messrs Orchard**) for Mr Melville
Mr. John Baccini In Person
Mr. Timothy Boone In Person

Hearing dates : 6th, 7th, 12th and 13th October 2004

- -

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.

....
The Vice-Chancellor

The Vice-Chancellor :

Introduction

1. The well-known TV quiz programme "Who wants to be a Millionaire?" ("WWM") was first shown by ITV on 4th September 1998. Many episodes have been shown since. The programmes have been produced by Celador Productions Ltd ("Celador"), an independent TV production company, in accordance with a format, devised in the period 1995 to 1998 to which Celador claims to be entitled. Three individuals, namely Alan Melville, Timothy Leavey Boone and John William Baccini claim that the creation of the format and the showing of WWM is an infringement of the copyright to which each of them claims to be entitled in respect of a game devised by him as well as involving a misuse of confidential information in relation to that game.

2. Mr Melville relies on the format for a game called "Millionaires' Row" the relevant version of which he claims to have devised in April 1995. His claim was first notified to Celador in April 1999. In August 2002 he commenced copyright infringement proceedings in the District Court of California in respect of the showing of WWM in the US. This prompted Celador to institute proceedings in England in January 2003 for declarations of non-infringement. In those proceedings Mr Melville has counterclaimed for injunctions and damages in respect of both infringement of copyright and misuse of confidential information. On 30th June 2003 Celador applied for summary judgment in respect of its claim pursuant to CPR Rule 24.2.

3. Mr Boone relies on the format for a TV programme called "HELP!". He claims that this was devised by him and a Mr Bull in the period 7th to 28th October 1997. His claim was first communicated to Celador in October 2001. He commenced proceedings for infringement of copyright and misuse of confidential information against Celador on 14th October 2003. On 15th March 2004 Celador applied for summary judgment dismissing that claim under CPR Rule 24.2.

4. Mr Baccini claims in respect of the format for two games and the format for a TV show derived from them. The first is a board game entitled "Millionaire" devised by him in about 1982 and subsequently adapted for play on the telephone or a computer. The second is "BT Lottery" which he claims to have invented in 1990 and subsequently to have incorporated into "Millionaire". His claim was not conveyed to Celador until April 2003. Mr Baccini commenced proceedings against Celador and others for infringement of copyright and breach of confidence in December 2003. Celador applied for the summary dismissal of those claims under CPR Rule 24.2 on 18th February 2004.

5. The three applications for summary judgment issued by Celador were directed to be heard together by Lewison J on 5th April 2004 and are now before me. Though heard together the applications remain separate and in respect of claims which are factually distinct. What is common to all three applications is (a) the test to be applied under CPR Rule 24.2 and (b) the evidence as to the creation and evolution of WWM. Accordingly it is convenient to deal with those two points at the outset.

The test to be applied

6. The relevant test is laid down in CPR Rule 24.2. The court may give summary judgment against a claimant or a defendant if it considers that the claimant or defendant has "no real prospect of succeeding" on its claim or defence as the case may be and that "there is no other compelling reason why the case or issue should be disposed of at a trial". I have been referred to a number of relevant authorities by counsel for Celador and Mr Melville, namely **Swain v Hillman** [2001] 1 All ER 91, 94-95, **Three Rivers District Council v Bank of England** (No.3) [2003] 2 AC 1, 259-261 paras 90-97 and **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472 paras 8-11. In addition I was referred to the notes in Civil Procedure 2004 Vol.1 paras 24.2.1, 24.2.3-24.2.5.

7. From these sources I derive the following elementary propositions:

   a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be;

   b) a "real" prospect of success is one which is more than fanciful or merely arguable;

   c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but

   d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination.

8. For the purpose of each of the applications before me Celador accepts that the respondent has a real prospect of establishing the existence of the copyright and confidential information in respect of the work on which he relies. The question, in each case, is whether he also has a real prospect of establishing that his work was copied or his confidential information misused. Celador contends, in each case, that it is clear beyond question that he cannot. The respondents claim that the evaluation of their cases and the prolonged and detailed examination by Celador of the evidence on which they rely amounts to the conduct of a mini-trial and a usurpation of the function of the trial judge. Plainly a consideration of that submission necessarily involves engaging to some extent in the evaluation and examination to which the respondents object.

The creation and evolution of WWM

9. The evidence of Celador as to the creation and evolution of WWM is common to all three applications. It is the essential background to the claim of each respondent that his work was copied or his confidential information misused in such creation or evolution. I take the summary of that evidence substantially from the written argument for Celador.

10. The origin of WWM was a programme proposal devised by David Briggs in 1995. From 1972 to 1994 Mr Briggs had worked at Capital Radio in a number of senior positions including Head of Competitions and Executive Producer of the Chris Tarrant Show. In some of these positions he was responsible for deciding upon the use of, and in some cases devising, competitions, the majority of which were phone-in competitions in which contestants won prizes by answering a series of questions. From 1984 to 1988 his colleagues included Michael Whitehill and Steven Knight. From 1994 to 1996 Mr Briggs was Head of Marketing at GMTV, where he had responsibility for promoting competitions many of which included the use of premium rate telephone lines to answer multiple choice quizzes. Mr Briggs' proposal was for a quiz programme entitled *The Cash Mountain* in which contestants would answer multiple choice questions the value of which doubled with each question. After each round the contestants would have the choice of leaving the game and keeping the money they had won or staying in, with the risk that they would lose their winnings if they gave a wrong answer. The prize money was to be substantially funded by revenue from calls on premium lines from prospective contestants seeking to enter the quiz. Mr Briggs saw the programme as a vehicle for Chris Tarrant.

11. In early Autumn 1995 Mr Briggs had lunch with Mr Whitehill. Mr Briggs described his proposal to Mr Whitehill. Mr Whitehill suggested that he put the proposal in writing and send it to Paul Smith, the Chief Executive of Celador. Celador was and is a well-known independent television production company. Since 1988 Mr Whitehill and Mr Knight had been contracted to provide writing and other creative services to Celador, and they had worked on numerous projects including devising and developing three game shows. Mr Whitehill and Mr Knight shared an office at Celador's premises and saw Mr Smith regularly.

12. In October 1995 Mr Briggs produced a written proposal for *The Cash Mountain* dated 23 October 1995 ("Cash Mountain Version 1") which he sent to Mr Whitehill. Mr Whitehill showed this to Mr Smith, who was enthusiastic but considered that the proposal needed development. The document comprises five typed pages. The proposal involved five essential features, namely:

    (1) Contestants were to be selected by correctly answering six questions over the telephone in a call by the contestant on a premium line.

    (2) The prizes would be funded by the revenue to be derived from the use of the premium line.

(3) In the course of the programme a number of contestants would be asked a series of multiple choice questions. A correct answer would entitle the contestant to a money prize. Each successive prize would be double that of the earlier one but if the contestant gave a wrong answer then all previous prizes were lost.

(4) About two-thirds of the way through the programme the contestant who was then in the lead would go into 'the sweat-box' and play on alone for the highest value prizes.

(5) There were to be three optional prize structures for 20 questions. In the first option the prizes ran from £10 for question 1 to £5,242,880 for question 20. The range for the second and third options were respectively £25 and £13,107,200 and £100 and £52,428,800.

13. During the period from November 1995 to January/February 1996 the proposal was developed by Messrs Whitehill, Knight and Smith with occasional input from Mr Briggs. During this period Messrs Whitehill, Knight and Smith came up with the ideas of having 21 questions leading to a top prize of £1 million, allowing contestants to view questions before deciding whether to answer them, providing contestants with a guaranteed level of prize money if they answered a certain number of questions correctly (safe havens) and allowing contestants three forms of assistance ("helping hands" later known as "lifelines"). Mr Whitehill came up with the idea for the "Ask the Audience" lifeline, Mr Knight came up the idea for the "Phone a Friend" lifeline and one of the three came up with the idea for the "50/50" lifeline. Various other ideas for lifelines were canvassed and rejected. At the end of this process Mr Whitehill produced a revised written proposal entitled *Cash Mountain* ("Cash Mountain Version 2"). This is an 8 page typed document. The first page is a cover sheet which specifies Cash Mountain as a series of 13 x 45 minute programmes and bears the legend "© Celador Productions Ltd 1996".

14. On or around 20 February 1996 Mr Smith 'pitched' the *Cash Mountain* proposal to Claudia Rosencrantz, Controller of Network Entertainment at ITV Network Ltd. Ms Rosencrantz was very enthusiastic, although she had reservations about certain aspects of the proposal including the title. Mr Smith and Ms Rosencrantz agreed that Chris Tarrant would be the perfect host for the proposed programme. Ms Rosencrantz suggested that Mr Smith should 'pitch' the proposal to Marcus Plantin, the then Director of Programmes, whose authorisation was required before a programme could be commissioned. On 27 February 1996 Mr Smith 'pitched' the proposal to Mr Plantin. *Cash Mountain* was logged in ITV's proposal log on the same day. Mr Plantin was not willing to commission the programme, but did agree to commission some qualitative market research to gauge likely audience reaction.

15. This research was carried out by The Qualitative Consultancy in July 1996. In August 1996 The Qualitative Consultancy delivered a report to ITV which was positive about the programme's potential and made suggestions regarding a number of its features, for example stating that reaction to the title *Cash Mountain* was very negative, that

the word “million” was considered the key word to communicate the concept and create appeal and that alternative titles suggested included “To be a Millionaire”. Nevertheless on 6 September 1996 Ms Rosencrantz wrote to Mr Smith to say that ITV would not commission the programme.

16. Subsequently Mr Smith offered the proposal to Channel 5, Channel 4, Sky, LWT and Carlton. All expressed interest, but none commissioned the programme. In November 1996 Mr Smith tried again to persuade Mr Plantin to commission the proposal, but without success. In July 1997 Mr Smith asked Ms Rosencrantz to reconsider the idea.

17. In September 1997 David Liddiment replaced Mr Plantin as ITV’s Director of Programmes. Ms Rosencrantz recommended to Mr Liddiment that ITV should commission *Cash Mountain* with Chris Tarrant as a possible host. On 22 October 1997 Mr Smith wrote to Mr Liddiment enclosing a revised proposal (“Cash Mountain Version 3”) and asking for 15 minutes to discuss it with him. Cash Mountain Version 3 comprises a cover sheet and five typed pages. The cover sheet bears the legend “© Celador Productions Ltd 1997”. The body of the document contains a description of the original proposal as modified in the subsequent discussions. It incorporated into Cash Mountain Version 2 various aspects suggested by the Qualitative Consultancy Report, including the number of questions, the maximum prize of £1m., the omission of musical acts and the method of selecting contestants.

18. On 5 December 1997 Mr Liddiment met Mr Smith and effectively agreed to commission the programme, although formal commissioning did not take place until around 24 April 1988. Mr Liddiment suggested that the programme should be “stripped” (that is, broadcast sequentially) over consecutive nights. Chris Tarrant was still the favoured presenter.

19. In January 1998 Celador produced a revised proposal (“Cash Mountain Version 4”) incorporating Mr Liddiment’s suggestion that the programme be ‘stripped’ over consecutive nights. In addition the contestant recruitment process was changed from one involving radio stations to a process in which potential contestants had to phone a premium line and answer three questions correctly to be entered into a pool from which ten would be randomly selected for each programme. At the beginning of the programme these ten would be asked a question and the one who keyed in the correct answer first would qualify as the first contestant (“fastest finger first”). Cash Mountain Version 4 is a copy of Cash Mountain Version 3, the alterations to which I have referred being incorporated by amendments to the fourth page.

20. ITV asked Celador to devise an alternative title. In March 1988 Celador produced lists of possible alternative titles devised by Messrs Briggs, Whitehill and Knight. One of the alternative titles, which was suggested by Mr Whitehill, was *Who Wants to be a Millionaire?*, after the Cole Porter song of the same name which was featured in the film *High Society*. From these lists Ms Rosencrantz selected the title *Who Wants to be a Millionaire?* in late March/early April 1998.

21. Lists of possible presenters were also produced in March 1988. In May 1988 Chris Tarrant was selected as the presenter. Mr Smith suggested that Chris Tarrant should wear dark clothing. In about May 1998 the prize structure was changed so as to reduce the number of questions to 15 ranging from £1 to £1 million. The set was devised by Andy Walmsley during the period May to September 1998 in accordance with a brief from Mr Smith. Mr Smith suggested that the host and contestant should sit on high stools.

22. A pilot programme was recorded on 17 August 1998. Mr Briggs acted as associate producer on the pilot, assisting and coaching Chris Tarrant. Messrs Whitehill and Knight were also involved in developing links for the presenter. Following the pilot programme Ms Rosencrantz suggested that the prize structure for the first five questions be changed so as to start at £100 and that there should be a box of money on stage. Mr Smith came up with the idea of Chris Tarrant handing over cheques to the contestants on stage and tearing up earlier cheques. Mr Smith also commissioned new music from Keith Strachan to replace music by Peter Waterman (commissioned for the pilot) which Ms Rosencrantz considered unsatisfactory. Celador also decided to change the expression "helping hands" to "lifelines". The first episode of WWM was transmitted on 4 September 1998.

23. The foregoing summary is based on the witness statements of Ms Rosencrantz, Mr Smith, Mr Briggs, Mr Whitehill and Mr Knight and the documents exhibited to them. Each of the respondents points out that apart from those documents there has been no disclosure by Celador. Each of them emphasises that he has had no opportunity to test the account of any of those witnesses in cross-examination. It will be necessary to consider in due course those aspects of Celador's case which the respondent is unwilling to accept.

The claim of Mr Melville

24. Mr Melville contends that the evolution of the format for WWM involved copying certain features of his work entitled "Millionaire's Row" and, in that respect, the misuse of his confidential information. His claim is formulated in an amended defence and counterclaim and is supported by a 35 page witness statement to which a number of exhibits are annexed.

25. I take as accurate the summary of his claim set out in paragraph 22 of the written argument of counsel for Celador, namely:

> (a) Between late 1994 and January/February 1995, Mr Melville created an Initial Proposal (a.k.a. *Millionaire's Row – Bingo*, the six page Document 1 annexed to the Defence and Counterclaim).
>
> (b) In around January - February 1995, Mr Melville sent his Initial Proposal to the BBC, Scottish TV and other unidentified television companies, all of which rejected it.

(c) In around April 1995, Mr Melville revised his Initial Proposal to create a Revised Proposal (a.k.a. *Millionaire's Row – Slot Machine*, the ten page Document 2 annexed to the Defence and Counterclaim). He dated the Revised Proposal 23 May 1995 and posted a copy of it to himself on 20 May 1995. Subsequently he sent it to various television companies.

(d) On about 14 August 1995 he sent a copy of the Initial Proposal to Carlton together with a seven-page manuscript letter.

(e) About two or three weeks later, he sent Carlton the Revised Proposal with a further letter.

(f) Subsequently he received a receipt from Carlton dated 29 August 1995.

(g) Around the end of September 1995 he received a Carlton rejection letter dated 25 September 1995. Mr Melville then telephoned Carlton to ask for the return of his Proposals. About a month later he received a photocopy letter with the manuscript annotation dated 20 October 1995 enclosing the Initial Proposal but not the Revised Proposal. Mr Melville then telephoned Carlton to ask for the return of the Revised Proposal, but was told that the only version of his format they had any record of receiving was the Initial Proposal.

(h) Subsequently Mr Melville sent his Proposals to other television companies. He sent the Initial Proposal to Granada, and received a rejection letter dated 6 October 1996. He also sent one or both Proposals to Action Time, and received a rejection letter dated 4 October 1996. He sent the Revised Proposal to Granada, and received a rejection letter dated 15 November 1996.

(i) In 1997 Mr Melville went to live and work in Tenerife.

(j) In 1998, Mr Melville saw a report about WWM in *The Sun* newspaper issue dated 28 April 1998, and concluded that "this game show had a more than striking resemblance to my formats the Initial Proposal and the Revised Proposal". He made enquiries and was told that the show was to be produced by Celador. Prior to that time, Mr. Melville had not heard of Celador. He is certain that he had never sent Celador either of his Proposals.

(k) Mr Melville watched the first screening of WWM on British television after his return from Tenerife and concluded that the show was substantially the same as his Revised Proposal.

(l) Mr Melville noted a credit for Carlton in the final screen shot. He originally thought that it said “A Carlton Production for the ITV Network”, although he now accepts that it may have read “Carlton Presentation for ITV”. He concluded that Carlton had passed his work to Celador.

(m) Mr Melville made a number of telephone calls to Carlton to express his concerns. He spoke to someone who acknowledged that Carlton had received the Initial Proposal but denied receipt of the Revised Proposal, and advised Mr Melville to put his complaint in writing. Accordingly he sent the letter dated 21 April 1999, to which Carlton replied in the letter dated 10 May 1999 referring him to Celador. He therefore sent the letter dated 11 May 1999.

(n) Mr Melville remains suspicious of Carlton, but accepts that “the information could have leaked, whether intentionally or not, from any of the other television companies that I sent the format to”. Despite this, his pleaded case is that it is to be inferred from the similarity between WWM and the Revised Proposal that “Carlton had a relationship with [Celador] in relation to WWM” and there is no pleaded allegation that Celador obtained a copy of the Revised Proposal from any other television company.

(o) Mr Melville contends that the Revised Proposal is a copyright work which has been reproduced by Celador, and he states that he makes no claim that Celador derived WWM from the Initial Proposal.

26. Thus Mr Melville’s claim is based on his Revised Proposal referred to in paragraph 25(c), not the Initial Proposal mentioned in paragraph 25(a). Mr Melville claims that his Revised Proposal contains 23 relevant features of which 4 were present in Cash Mountain Version 1 (October 1995), 9 in Cash Mountain Version 2 (February 1996) and 22 in WWM as transmitted in September 1998. Mr Melville relies on the fact that after his Revised Proposals were sent to Carlton, as he claims, in September 1995 and to other TV companies in 1996 5 features to be found in his Revised Proposals were added in the compilation of Cash Mountain Version 2 and a further 13 before the first transmission of WWM in September 1998. The additional 5 features include (1) the top prize of £1m, (2) the progressively harder multi-choice questions and (3) the Help-lines. The 13 features include (1) the adoption of the title “Who wants to be a Millionaire?” in WWM which was the catchphrase used in his Revised Proposals, (2) the process for selection of the initial 10 contestants (3) the subsequent whittling down of contestants to one in the first stage of the show, (4) set design and lighting.

27. Mr Melville has adduced no direct evidence to show that his Revised Proposal was received by Celador or seen by Mr Smith, Mr Whitehill, Mr Knight, Mr Briggs or Ms Rosencrantz. He submits that the court can and should infer such receipt or sight from a number of factors. He relies on the similarities and the coincidence in point of time of the disclosure of his Revised Proposal to Carlton and the other TV companies

and the evolution of WWM through Cash Mountain Version 2 to the format of the programme as ultimately transmitted in September 1998. He points out that Carlton and the other TV companies have had dealings with Celador and suggests that the world of TV programme producers is relatively small. He contends that the description of the evolution of WWM is neither clear nor comprehensive, in particular that how and why the features of 10 panellists reducing to 1, the adoption of the title and the adoption of premium rate lines came to be included is obscure.

28. Celador submits that Mr Melville has no real prospect of establishing that (1) his Revised Proposal existed at any time before 11th May 1999, but, if it did, that (2) copies were sent by him to Carlton or any other TV company in 1995 or at any other time before the first transmission of WWM in September 1998, or (3) were received or seen by Celador or any of the individuals concerned in the evolution of WWM. Celador contends further that (4) Mr Melville will not be able to undermine the evidence of the experienced professional individuals who have given evidence on behalf of Celador and (5) his own evidence is so incredible and contradictory as to be clearly unacceptable. These submissions are largely based on the time when and the terms in which Mr Melville first complained that WWM infringed his copyright and the subsequent development of his claim.

29. The first time he claimed such infringement was on 21st April 1999 in a letter to Carlton TV (see para 25(m) above). Throughout that letter he referred to his game show, Millionaires' Row, in the singular. He enclosed with it a letter to Carlton TV dated 14th August 1995 (see para 25(d) above) and the enclosure to that letter he described as his game show proposal 'Millionaire's Row'. That enclosure is the Initial Proposal not the Revised Proposal on which Mr Melville relies.

30. In the light of the response of Carlton TV Mr Melville then wrote to Celador on 11th May 1999 (see para 25(m) above). In that letter he again referred to his game show in the singular and enclosed a copy of what he described as "a copy of my original game show". The copy was of the Initial Proposal not the Revised Proposal. In addition he enclosed copies of letters from Carlton dated 25th September 1995 and another copy of the same letter with a manuscript addition dated 20th October 1995 (see para 25(g) above). The former notified him of Carlton TV's rejection of his proposal, the latter recorded the "return of your format". The other documents record the rejection of his proposal dated October and November 1996 by Action Time and Granada.

31. Celador answered on 13th August 1999 denying any copyright infringement. Mr Melville claims that he did not receive that letter. Whether or not that is so, Celador heard nothing further from Mr Melville until he started the proceedings in the District Court of California to which I have referred. Counsel for Celador contends that there is nothing in any of this correspondence to support the contention of Mr Melville that he sent his Revised Proposal to Carlton TV or any other TV company in 1995 or 1996.

32. The next contact between Celador and Mr Melville occurred in 2002 in consequence of the institution by Mr Melville of proceedings in the District Court of California to

which I have referred. One of the defendants was the assignee of Celador in respect of the North American format rights in WWM. In paragraphs 8 and 9 of his Complaint Mr Melville alleged that in 1995 he had developed an original "treatment" for Millionaires' Row and had mailed copies of it to numerous UK based broadcasting and production companies including Carlton UK TV. In his initial disclosure Mr Melville produced three documents to which he had not referred in the correspondence with Carlton and Celador in 1999. They are (1) a ten page document described as a game show format entitled Millionaires' Row designed and written by Mr Melville with a claim to copyright at 23rd May 1995 (see para 25(c) above), (2) a self-addressed document bearing the postmark Kirkaldy 20th May 1995 (see para 25(c) above) and (3) a letter purportedly written by Mr Melville on 14th September 1995 enclosing a copy of a game show format he claimed to have designed and referring in a post script to another game show format called Millionaires' Bingo (see para 25(e) above).

33. The explanation of those documents had to wait until the original defence and counterclaim served by Mr Melville in these proceedings. In that document he explained that there had been two proposals for his game show, the Initial Proposal otherwise known as Millionaires' Row – Bingo and the Revised Proposal otherwise known as Millionaires' Row – Slot Machine. He claimed that the Revised Proposal was sent to Carlton TV under cover of the letter of 14th September 1995. He accepted that the Initial Proposal had been returned, as indicated on the manuscript note dated 10th October 1995 on the copy letter dated 25th September 1995 but claimed that the Revised Proposal had been retained by Carlton TV. This was the first time Mr Melville had suggested that there were two versions of his proposal.

34. In paragraph 18 of his original defence and counterclaim Mr Melville explained the relevance of the envelope. He asserted that he had posted to himself on 20th May 1995 the Revised Proposal dated 23rd May 1995. He understood that this was necessary to perfect his right to copyright in the Revised Proposal. He wished to do so with effect from his birthday on 23rd May and so dated the Revised Proposal 23rd May even though he claimed to have posted it to himself on 20th May.

35. The letter to Carlton TV bearing the date 14th September 1995 under cover of which Mr Melville suggests that he sent his Revised Proposal to Carlton TV was not referred to in any of the correspondence passing between Mr Melville and Carlton TV or Celador in April/May 1999 or, initially, in these proceedings.

36. After the commencement of these proceedings the envelope postmarked 20th May 1995 referred to in paragraph 32(2) above was submitted to Dr Audrey Giles, a well known Document Examiner, by the solicitors for Celador and Mr Melville. In her report dated 4th October 2004 she concluded that her

> "findings are inconclusive as to whether the envelope and its contents had passed through the postal system on 20th May 1995 as indicated by the postmarks."

37. It is in these circumstances that Counsel for Celador submitted that the envelope and its contents were a concoction and the evidence of Mr Melville as a whole so riddled with contradictions, implausibilities and unsupportable assertions as to be plainly incredible. Counsel for Mr Melville replied to the effect that the allegations of counsel for Celador were allegations of fraud which must be particularly alleged and proved. He suggested that in the light of the report of Dr Giles reputable counsel, such as counsel for Celador, could not properly allege fraud in the first place.

38. I do not accept this submission of counsel for Mr Melville. It is Mr Melville who relies on the envelope and its contents as confirmation of his oral evidence that he did, as he asserts, formulate his Revised Proposal in May 1995. It is for him to prove it. Counsel for Celador is fully entitled on the evidence before me to submit that Mr Melville is unable to do so. Nevertheless I do not think that counsel for Mr Melville need put his case that high.

39. The crucial issue in the claim of Mr Melville is whether or not his Revised Proposal was in existence in the middle of 1995. If, as he claims, it was then there is no reason, at this stage, to doubt that he sent it to Carlton under cover of the letter dated 14th September 1995 and the other TV companies as he contends. There is clear evidence that he did send the Initial Proposal. If he sent it, why not send the Revised Proposal? And, if it be the case that the Revised Proposal was in circulation amongst TV companies and their employees in 1995 and 1996, it would not be impossible to infer that is contents came to the notice of Celador or those who claim to have been involved in devising WWM, given the extent of the similarities between the Revised Proposal and WWM, as transmitted, and the period and manner of the evolution of WWM. By contrast, if the Revised Proposal was not in existence until some time after 11th May 1999, as counsel for Celador suggests, then it could not have been sent to Carlton or any other TV Company until after the first transmission of WWM and could not have been copied by WWM or any of the individuals concerned in the evolution of WWM. In this event the similarities would have been created by the fraudulent activities of Mr Melville.

40. The proper resolution of that issue must, in my judgment, be made at a trial and not on an application for summary judgment. The answer is not so clear as to justify the wholesale rejection of the oral and documentary evidence of Mr Melville at this stage, before disclosure and without cross-examination. The credibility and honesty of Mr Melville depends on all the evidence, including his oral evidence, and on all the linked issues. So, to take a hypothetical example, the discovery of a letter dated November 1995 in the files of a TV company acknowledging receipt of the Revised Proposal would cast a new light on some of the more curious features of Mr Melville's case.

41. For these reasons I am unable to conclude that Mr Melville has no real prospect of success in his defence to the claim of Celador or on his own counterclaim. If that is not enough, I conclude that the state of the evidence and the nature of the issues are compelling reasons why the case should be disposed of at a trial. I dismiss the application of Celador for summary judgment in respect of the claim against Mr Melville.

The claim of Mr Boone.

42. What became the claim of Mr Boone was first intimated to Mr Liddimont of ITV in a letter dated 25th October 2001 by a company, Watch TV Ltd ("Watch TV"), which had been incorporated a week before. On 30th November 2001 solicitors for Mr Boone made similar allegations, namely that WWM infringed the rights of Mr Boone and a Mr Bull in the TV format for a quiz game called "HELP!". On 12th February 2002 Watch TV gave notice to Mr Johnson of ITV to the effect that Mr Bull had assigned to Watch TV his interest in HELP! On 1st March 2001 Watch TV commenced proceedings against ITV and Mr Boone claiming that the production of WWM involved a breach of copyright in HELP! and the misuse of confidential information in respect of it. The Watch TV proceedings were disposed of by an agreed order in Tomlin form compromising the claim by Watch TV against Mr Boone and an order for summary judgment made in favour of ITV dismissing the claim of Watch TV as lacking a real prospect of success. Both orders were made on 5th August 2002 by Master Moncaster. Though Watch TV obtained from Pumfrey J on 3rd July 2003 permission to appeal from the order of the Master dismissing its claim against ITV all further proceedings in the action were stayed by order of the Court on 9th October 2003 because Watch TV had been struck off the register of companies and thereby dissolved.

43. Five days later, on 14th October 2003 Mr Boone instituted proceedings for infringement of copyright and misuse of confidential information against ITV and Celador. He had solicitors acting for him at that stage but since 10th February 2004 Mr Boone has been acting in person. On 15th March 2004 Celador and ITV issued the application for summary judgment against Mr Boone by the dismissal of his claim against them.

44. The claim of Mr Boone as formulated in the particulars of claim served on 13th February 2004 is, subject to one point, accurately summarised in paragraph 37 of the written argument of counsel for Celador as follows:

> (a) The *HELP!* format was devised by Mr Boone and Mr Bull between 7 and 28 October 1997.
>
> (b) The *HELP!* format is recorded in the document a copy of which forms attachment A to the Particulars of Claim and a two-page summary which forms attachment B to the Particulars of Claim. (In fact attachments A and B are identical four-page documents and correspond in content, although not typography, to the two-page summary which formed Attachment B to the Particulars of Claim in the *Watch TV* case. The typography of attachments A and B matches the typography of the 11-page document enclosed with the letter dated 30 November 2001. The latter is similar in content, although not typography, to the 14-page document which is Attachment A to the Particulars of Claim in the *Watch TV* case).

(c) On 16 October 1997 the *HELP!* format was submitted by Mr Boone to Talent TV via his agent pursuant to an agreement between Mr Boone and Talent TV made on or about 3 December 1996.

(d) On or about 30 October 1997 Mr Kaye Cooper of Talent TV submitted the *HELP!* format and/or the two-page summary to Ms Rosencrantz of ITV.

(e) Mr Boone retains full copyright in the *HELP!* format, although it is also alleged that Mr Bull enjoyed a 50% beneficial interest.

(f) The *HELP!* format was submitted to ITV in circumstances such that ITV came under a duty of confidence.

(g) In August 1998 Mr Boone became aware of a newspaper interview with Chris Tarrant in which he described WWM. When WWM was first aired in September 1998 he immediately realised that his rights had been significantly breached.

(h) The production and broadcasting of WWM has infringed Mr Boone's copyright in the *HELP!* format and constitutes a breach of confidence.

45. The parenthetical comment in paragraph 44(b) above indicates confusion as to whether Mr Boone's claim to copyright and confidence was limited to the two page summary and did not extend to the longer document, whether of 14 or 11 pages. Mr Boone contended that his claim had always extended to the longer document. He also complained that he had not had any notice of the point on which counsel relied. The latter comment is wrong because the point was clearly made in paragraph 37(b) of Counsel's written argument, which had been with Mr Boone since 4th October 2004. But examination of the court file showed that Mr Boone's contention was correct. As filed with the court and served on ITV, though seemingly not Celador, attachment A is an 11 page document in the same form as the HELP! format exhibited by Mr Kaye Cooper to his witness statement and referred to in paragraph 44(d) above.

46. Celador and ITV contend that the claim of Mr Boone has no real prospect of success and should be summarily dismissed. They do so on two grounds: (1) in the context of the Watch TV proceedings this action is an abuse of the process of the court and (2) on the evidence before the court the claim of Mr Boone must fail. Mr Boone disputes both grounds.

Abuse of the process

47. Counsel for Celador and ITV point out that the claim made by Watch TV, as assignee of Mr Bull, against ITV was based on a 14 page document setting out the format for a TV game called HELP! in substantially the same form as the 11 page document

comprising attachment A to the particulars of claim in this case. In that case, as in this, the claimant alleged infringement of copyright and misuse of confidential information derived from that format in the production and transmission of WWM. The terms of the Tomlin order setting out the agreement between Watch TV and Mr Boone show that Watch TV was the alter ego of Mr Bull, that through Watch TV Mr Bull would do all he could to obtain judgment against ITV for infringement of copyright and misuse of confidential information in HELP! and that Mr Boone would not oppose Watch TV's claim to half the beneficial interest in the copyright in HELP! as assignee of Mr Bull.

48. At the time the Watch TV proceedings were commenced and at all material times thereafter Mr Boone was in receipt of advice from solicitors. Counsel for Celador and ITV submit that he could and should have issued a Part 20 claim against Celador and ITV alleging infringement of copyright and misuse of confidential information on a similar basis to that advanced by Mr Bull through Watch TV. Mr Boone did not do so. Counsel submit that to institute these proceedings on 14th October 2003 after the claim of Watch TV against ITV had been summarily dismissed and five days after any proceedings by way of appeal had been stayed is an abuse of the process of the court.

49. Counsel rely on the well-known passage in the judgment of Sir James Wigram V-C in **Henderson v Henderson** (1843) 3 Hare 100, 115:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

50. The extent of that principle and its juridical basis were comprehensively reviewed by the House of Lords in **Johnson v Gore-Wood & Co**. [2002] 2 AC 1. After an examination of all the relevant authorities, on pages 30/31 Lord Bingham of Cornhill said:

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising

from the same factual matter," 19 *Civil Justice Quarterly*, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

51. Thus it is for Celador and ITV to establish that the claim of Mr Boone could and should have been raised, if at all, in the proceedings brought by Watch TV. They have plainly established that it could have been. Both ITV and Mr Boone were parties, the subject matter was the same and Mr Boone could have issued a Part 20 claim against ITV, Celador and Watch TV without any difficulty.

52. Mr Boone explained in his submissions to me, though not in evidence, that at the time of the commencement of the Watch TV proceedings he had fallen out with Mr Bull. They had previously thoroughly investigated the alleged infringement with the assistance of a number of lawyers on a conditional fee basis. It is evident from documents produced by Mr Boone for the purposes of the hearing of the application before me, including e-mails he sent to his own solicitors in June or July 2002 and 2003, that he was then contending that documents produced by ITV relating to Cash Mountain were falsely dated. But Mr Boone did not agree with Mr Bull as to the way in which their claim should be pursued. It appears that Mr Bull wished to obtain publicity with which to shame Celador and ITV whereas Mr Boone only wanted to force them into negotiations for some recognition and compensation. Thus Mr Bull assigned his interest to Watch TV and commenced proceedings through that company and, instead of being a co-claimant, Mr Boone found himself as a defendant.

53. When sued Mr Boone considered that the claim of Watch TV was weak. He, Mr Boone, wished to obtain disclosure of the original Cash Mountain documents and pilot videos so as to identify the stage at which, as he claims, elements of HELP! were incorporated. Mr Boone considered that he should bring the claim, that Mr Bull was merely his employee and that at that time he, Mr Boone, was unable to do so, but for a reason he never explained. He understood that he had six years in which to sue. He contended that the acts and omissions of Mr Bull and Watch TV should not be held against him.

54. The fact that the limitation period of six years applicable to a claim for infringement of copyright had not expired when these proceedings were commenced on 15th October 2003 is immaterial if the circumstances do amount to an abuse of the process of the court. **Securum Finance Ltd v Ashton** [2001] Ch.291. Further the submission of counsel for Celador and ITV does not involve holding against Mr Boone the acts and omissions of Mr Bull and Watch TV. The alleged abuse of process arises from the acts and omissions of Mr Boone in pursuing his claim in these proceedings instead of in the earlier proceedings brought by Watch TV.

55. In my view Celador and ITV have established that Mr Boone should have pursued his claim by Part 20 proceedings in the Watch TV action and the institution and prosecution of these proceedings is an abuse of the process as claimed. At the time of the Watch TV action Mr Boone was represented by Solicitors. The claim then made by Watch TV was the same as that now made by Mr Boone. It was artificial to treat the Watch TV claim as made only in relation to the half the beneficial interest in the copyright vested in Watch TV leaving Mr Boone free to bring such proceedings in relation to the other half as he thought fit. The grounds on which Mr Boone now relies, namely alleged falsification of documents, is the same as the ground on which he relied in June 2002.

56. So long as the Watch TV proceedings continued Mr Boone did nothing to pursue his claim in relation to the half of the beneficial interest vested in him. Only when those proceedings came to an end did he seek to protect his interest in the copyright by instituting his own claim on identical grounds. No doubt he felt more comfortable sheltered behind Watch TV and Mr Bull for as long as he could. But that is not a proper use of the machinery of civil justice or the procedure by which civil claims are enforced by the court. In my judgment the claim of Mr Boone has no real prospect of success because it is an abuse of the process and liable to be struck out on that ground.

57. That conclusion is sufficient to dispose of the application before me. But it is plain that Mr Boone is convinced that he, and probably others, are victims of dishonest production companies. He believes that they receive from free-lance writers, such as himself, a very large number of original ideas for TV programmes from which they feel free to select one or more elements for incorporation into their own. He complains that the person who had the idea receives neither acknowledgement nor compensation. In these circumstances I consider that I should reach a conclusion on the second point to which I have referred in paragraph 46 above on the hypothesis that these proceedings are not an abuse of the process. If there is merit in the complaints made by Mr Boone then it should not be obscured by my decision on the first point; if there is not then Celador and ITV are entitled to a finding to that effect.

Does Mr Boone have a real prospect of success?

58. Celador and ITV rely on a number of inter-linked points to support their submission that there is no merit in the claim made by Mr Boone. They point out that the copyright work and confidential information on which Mr Boone relies is the format for HELP! enshrined in the 11 page document which is attachment A to the particulars of claim. They submit, and Mr Boone did not disagree, that there can be no separate copyright or confidential information in the shorter document whether comprising two or four pages because it was just a summary of the longer one. They emphasise that though copying a substantial part of the work constitutes infringement it does not follow that every element of the work is protected. This point is illustrated by the decision of the Court of Appeal in **Norowzian v Arks Ltd** (No.2) [2000] EMLR 67.

59. Celador and ITV contend that their evidence establishes that Cash Mountain had been developed to the stage embodied in Cash Mountain Version 3 before any part of HELP! had been communicated by Mr Kaye Cooper to Ms Rosencrantz at ITV. Accordingly the elements contained in Cash Mountain Version 3 cannot have been copied from HELP! They submit that the elements subsequently added to Cash Mountain either cannot be found in HELP! or, if found in some form, cannot amount to the copying of a substantial part of HELP!

60. They also submit that there is no evidence that Celador ever received or saw any version of HELP! so that they could only have copied whatever part of HELP! could be shown to have been communicated to them by Ms Rosencrantz. They submit that the evidence of Mr Kaye Cooper shows that he only 'pitched' or communicated to Ms Rosencrantz the short summary, with the consequence that elements to be found only

in the longer document could not have been copied by Celador as they had never been communicated to ITV. They contend generally that Mr Boone has no real prospect of satisfying a court that it should accept his evidence and theories in preference to the evidence of the experienced professionals who have provided witness statements for them.

61. All this is disputed by Mr Boone. He claims that TV companies generally take elements of programme formats submitted to them and add them to formats of their own without either acknowledgement or reward to the person who had the original creative idea. He points to The Television Programme Proposals Code of Practice to which all the major TV companies are parties in which it is stated that:

> "similar, if not identical, creative material may be submitted to a receiver by different originators at different times. This code does not restrict the freedom of receivers to select the best creative material from the best talent in accordance with commissioning and scheduling priorities."

Mr Boone described this attitude as 'the atmosphere' at the time.

62. Mr Boone emphasised that he did not claim that there was a substantial similarity between HELP! and WWM. His complaint is that key elements of his format have been lifted out and incorporated into WWM. He suggested that, given the number of proposals submitted to Ms Rosencrantz and the limited clerical assistance she had, mistakes were bound to occur. He accepted the evidence of Mr Briggs and of Mr Kaye Cooper but not that of Ms Rosencrantz or Messrs Smith, Whitehill or Knight.

63. The key element of Mr Boone's case lies in his challenge to the authenticity of documents produced by Celador and ITV on which they rely for their principal submission that Cash Mountain had been developed to the stage demonstrated in Cash Mountain Version 3 before there was any communication of HELP! to ITV. The documents he alleges to have been falsified are (1) the report of the Qualitative Consultancy dated August 1996 (see para 15 above), (2) Cash Mountain Version 2 and in consequence Versions 3 and 4 also (see paras 13 and 17 above) and (3) The entry of Cash Mountain in the Log maintained by ITV on 27th February 1996 (see para 14 above). I will consider Mr Boone's contentions in respect of each of those documents in turn.

64. Mr Boone's concern to challenge the authenticity of the Qualitative Consultancy Report lies in the fact that, if properly dated August 1996, it is independent corroboration of the authenticity of Cash Mountain Versions 2, 3 and 4. The suspicions of Mr Boone were aroused by the various versions of the Report to be seen as exhibit CR3 to the witness statement of Ms Rosencrantz and the bundle of documents submitted to Master Moncaster for use on the summary judgment application in August 2002. The copy of the report in the bundle was paginated in manuscript but page 194 was missing. In another version the place of missing page 194 was taken by two unnumbered pages which related to the element of "Helping Hands".

65. Mr Boone submitted copies of the various versions to a forensic document examiner, Mr Allen, to advise whether there were any indications that parts of the documents had been produced at different times. Mr Allen noted that as he had only been supplied with copies of the challenged documents the scope of potential comparison was limited. In respect of the Report he advised that all parts had been produced on the same word-processor but that copies or parts of them were of different generations. Thus, though most of the Report appeared to be a fourth generation copy, of the two pages which appeared in place of missing page 194 the second appeared to be a first generation copy. He added that "it is not possible to interpret the significance of this...however it is clear that [such second page] has a different history to the other pages in the Report".

66. This led to the production of a third witness statement from the partner of the solicitors instructed by Celador and ITV in charge of their case, Mr Swaffer, to which he exhibited (i) as exhibit PSJS11 what he described as a true and complete copy of the original report, (ii) as PSJS12 the first generation copy of that Report exhibited as CR3 to the witness statement of Ms Rosencrantz and (iii) as exhibit PSJS13 a copy of exhibit CR3 as copied and included in the bundle put before Master Moncaster. He added that he had spoken to the partner responsible for the preparation of that bundle who had explained that due to a photocopying error the second page of the Helping Hand section had been omitted from exhibit CR3 and that error had been perpetuated in the production of the bundle for use by the Master. After the bundle had been lodged with the court she realised that this page had been omitted and arranged for a copy of the relevant page to be handed to the Master which was inserted in the bundle in unpaginated form.

67. After the hearing on 7th October 2004, at which that witness statement was introduced, Mr Swaffer produced to Mr Boone in the corridor what he claimed to be the original version of the Report. He declined to answer questions in respect of it, referring Mr Boone to his witness statement. Mr Boone examined the Report for himself and noticed that the two pages headed "Conclusions" were on coloured paper. This was, he thought, another discrepancy compared with the exhibited versions in most of which the "Conclusions" appeared to be on white paper. Mr Boone also discerned in exhibits PSJS11 and PSJS13 discrepancies in relation to extraneous marks.

68. These discoveries led Mr Boone to refer the exhibits to Mr Swaffer's witness statement to Mr Allen and to make another witness statement in which he described the third witness statement of Mr Swaffer as "a useless smokescreen". Mr Allen in a report dated 11th October 2004 explains how a word-processor may be used to produce copies over several generations each with its distinctive mark but all derived from the same source document. With regard to the pages containing the "Conclusions" he considered that the most likely explanation is that some were copied from documents printed on white paper but from an ancestor printed on coloured paper. With regard to the two pages of the Helping Hand section he repeated his earlier opinion that the second page had a different ancestry to the other pages in the Report but that the page in both the original report and as inserted in the bundle share a common ancestor.

69. Finally Celador and ITV produced a witness statement from Ms Allison Parke. She had been employed by the Qualitative Consultancy since 1984 becoming a director in

1995. She and her colleague, Catherine Gammon, had carried out the necessary research in July 1996 and had produced the Report in August 1996. As she points out, the Report was to accompany an oral presentation to ITV. She confirmed that the report produced to her was a true and correct copy of what she and Catherine Gammon had produced in July/August 1996.

70. I examined the original report for myself. There are 38 pages enclosed between two stiffish cardboard covers and spiral bound. It contains two pages headed "A Helping Hand" and the two pages of conclusions are printed on paper of a bluish/grey hue. The other 36 pages are printed on white paper. The pages are not numbered.

71. I am satisfied that Mr Boone has no prospect of satisfying any court that the Report of the Qualitative Consultancy was produced at any time later than Ms Parke states or in any form other than that which she has verified. The discrepancies noted by Mr Boone are all explained by the mistake in compiling the exhibit CR3 to Ms Rosencrantz's witness statement, in preparing the bundle for the use of Master Moncaster and some commonplace consequences of the successive generation of copies from a common ancestor on a computer. Further, the omission of the second page of the section headed "A Helping Hand" cannot possibly be indicative of the later insertion of both pages, particularly as the first page foreshadows the existence of the second.

72. I have dealt with Mr Boone's criticisms of the Report at a length not usually appropriate for an application for summary judgment because of its importance to the claim of Mr Boone. I can deal with the other documents more quickly. Cash Mountain Version 2 contains two sections of importance. One is headed "A Helping Hand", the other "Building the Tension". The former appears in Versions 3 and 4 but the latter has been omitted.

73. Mr Boone submitted Cash Mountain Version 2 to Mr Allen and asked him to consider whether there were any indications that parts had been produced at different times. Mr Allen considered in his report dated 2nd January 2004 that there were none, specifically that "there is no apparent indication that the sections "A Helping Hand" or "Building the Tension" have been added".

74. I can see no prospect of Mr Boone's challenge to the authenticity of Cash Mountain Version 2 succeeding. There is no indication of any later addition. The Report of the Qualitative Consultancy made in August 1996 confirms that both elements were present in the format for Cash Mountain as it then existed in Cash Mountain Version 2. It is clear that the reason why the section "Building the Tension" was omitted from later versions is because the Report, in effect, advised that the musical acts to which it referred should be left out of the format of the programme. If Version 2 is authentic there is no ground on which the authenticity of Versions 3 or 4 can be questioned.

75. Finally I turn to the entry in the log relating to Cash Mountain. This is a computer-generated document (probably Excel) entitled Entertainment Proposal Log 1995-2000. It has seven columns headed Title, Offer Date, Company, Contact, Format, Response and Notes. The third page contains entries under the first five headings "Cash Mountain", "27/02/96", "Celador", "Paul Smith" and "SYN" [synopsis]. There is no entry under the sixth or seventh headings. In her witness statement Ms Rosencrantz verifies both the Log and this entry.

76. The suspicion of Mr Boone was excited by the fact that this entry, unlike any of the others, has a number of extraneous marks. He referred it to Mr Allen and asked him to advise on whether this entry might have been added or tampered with in some way. In his report dated 10th May 2004 Mr Allen pointed out that if it was intended to tamper with the entry this could be done electronically without leaving any mark at all. He concluded that the questioned entry

> "has more extraneous marks associated with it than other entries on these pages, but the reason for this is not clear, particularly in the absence of any demonstrable evidence of insertion of the entry."

Once again I do not consider that Mr Boone has any prospect of establishing that the entry in the log is in any way false or deceptive.

77. The consequence of my conclusions regarding Mr Boone's attack on the documentary evidence is that the issue of copying must be approached on the footing of the chronology of the development of Cash Mountain and WWM for which Celador and ITV contend. There is simply no reason to question it. It follows that the development of Cash Mountain had reached the stage indicated in Cash Mountain Version 3 before any version of HELP! was communicated by Mr Kaye Cooper to Ms Rosencrantz on or about 30th October 1997. Accordingly if any elements of the latter are to be found in the former it cannot be the result of copying. The issues then become whether the elements of Cash Mountain and WWM added after Cash Mountain Version 3 are to be found in HELP! and if so whether those similarities could justify the inference that a substantial part of HELP! had been copied.

78. Before I turn to those questions I should return to the argument for Celador and ITV recorded in paragraph 60 above to the effect that, as the evidence of Mr Kaye Cooper shows that he only pitched or communicated to Ms Rosencrantz the short summary, elements of HELP! to be found in the 11 page document but not the summary could not have been copied by Celador as they had never been communicated to ITV by Mr Kaye Cooper. The submission is based on the witness statement of Mr Kaye Cooper. It is true, as counsel submits, that only Mr Kaye Cooper and Ms Rosencrantz can have first hand knowledge of what was communicated so that Mr Boone is in no position to know. Nevertheless Mr Boone seeks to rely on what he contends is a general practice of submitting the full format even if only the summary is 'pitched'. Further the evidence of Mr Kaye Cooper on this point is couched in tentative terms. Accordingly I do not accept that at this stage it is clear that only elements in the summary should be considered.

79. The elements of Cash Mountain which were added after Cash Mountain Version 3 and are therefore chronologically capable of being derived from HELP! may be summarised as:

(1) stripping the programme (see para 18 above),

(2) the method of recruiting contestants (see para 19 above),

(3) the Title "Who wants to be a Millionaire?" (see para 20 above),

(4) dressing the presenter in dark clothing (see para 21 above),

(5) the use of high stools (see para 21 above),

(6) other elements of the set (see para 21 above),

(7) the inclusion of a box of money on stage and the use of cheques (see para 22 above).

80. It is not suggested that elements (1) or (2) could have been derived from HELP!. Plainly the titles of the two formats are wholly different. Nevertheless Mr Boone claims that the titles constitute 'an essential similarity' because each is the title of a popular song. In my view this contention is manifestly absurd. Copyright exists in the format for HELP! as expressed in the 11 page document on which Mr Boone relies, not in any idea or thought process which may underlie it.

81. It is true that dressing the presenter in dark clothing, element (4), is an element appearing in HELP! and WWM. In the case of element (5) there is no similarity between the chair used in HELP! and the high stools in WWM. Mr Boone suggested that the similarity lay in the fact that in each case the contestant was left with his or her feet dangling in the air. It is not even a consequence of the seating arrangements that the contestants in WWM should be left with feet so dangling because their stools are equipped with footrests. There are similarities in the sets (element 6) in the use of spotlights, the dimming of lights, background noise, cutting to a relation of the contestant in the audience. Equally there are similarities in the use of a glass sided box of money and the giving and later destruction of cheques (element 7).

82. But the question is whether it would be possible for a court to infer from these similarities both that they had been taken from the format for HELP! and that they constituted a substantial part of HELP!. I do not think that Mr Boone has a real prospect of success in satisfying a court that such similarities justify the rejection of the evidence of the witnesses who have given witness statements for Celador and ITV on this application as to the evolution of Cash Mountain from Version 3 to the time of first transmission. Few if any of them amount to more than the application of well known presentational techniques. But even if Mr Boone was able to clear that hurdle he could not, in my judgment establish that the elements which were similar constituted a substantial part of HELP!

83. At the outset of the hearing Mr Boone contended that the format of HELP! was still confidential. I rejected his application for the hearing to be heard in private but I did make orders under CPR Rule 31.22(2) in relation to certain documents in which the format of HELP! is recorded. Accordingly I have not described the nature of HELP!. Suffice it to say that it is clear on reading attachment A to the Particulars of Claim that the key elements and the whole thrust and emphasis is quite different to that of WWM. What I have identified as similar elements are no more than elements of style or technique which, as the Court of Appeal held in **Norowzian v Arks Ltd** (No.2) [2000] EMLR 67, when divorced from their context cannot give a cause of action for

breach of copyright. Nor, in my judgment, can such elements so divorced constitute confidential information capable of being misused.

84. For all these reasons I conclude that even if the institution and prosecution of this claim by Mr Boone is not an abuse of the process of the court he has no prospect of succeeding in establishing his claims. Nor do I discern any reason why the claim should be disposed of at a trial. Accordingly I will make the order sought by the application issued by Celador and ITV on 15th March 2004.

The claim of Mr Baccini

85. The claim of Mr Baccini was first notified to Ms Rosencrantz by e-mail on 8th April 2003. On 22nd December 2003 Mr Baccini commenced proceedings against Celador, ITV and Messrs Smith, Briggs, Knight and Whitehill and Ms Rosencrantz. His claim is for infringement of copyright and misuse of confidential information in respect of his board game called “Millionaire” and his game concept called “BT Lottery” and the TV format derived from them. By an application issued on 18th February 2004 the defendants applied for an order by way of summary judgment under CPR Rule 24.2 dismissing the claim against each of them.

86. Mr Baccini has acted in person throughout these proceedings. It is not easy to determine exactly what his claim is. I accept as accurate the summary contained in paragraph 53 of the written argument for Celador, namely:

(a) In 1982 Mr Baccini created a board game known as *Millionaire*.

(b) In 1990 Mr Baccini created an outline for a game called *BT Lottery*, based upon a lottery of telephone numbers. He sent this to British Telecom in 1991.

(c) At some unspecified point Mr Baccini incorporated the money-raising feature of *BT Lottery* into the *Millionaire* TV format.

(d) In March 1995 Mr Baccini sent *Millionaire* to Complete Communications Corporation Ltd (“CCC”), supposedly a sister company to Celador but in fact its holding company. It is unclear exactly what is alleged to have been sent to CCC at this time.

(e) In January 1996 Mr Baccini sent *Millionaire* to ITV and CCC. Copies of the documents alleged to have been sent are appended to his Particulars of Claim behind the page headed “What was sent to Celador and ITV”. They included three pages describing the TV format.

(f) At all times a duty of confidence existed between Mr Baccini and all of the Applicants.

(g) In January 1999 Mr Baccini saw an article about WWM in the *Daily Mail* and recognised that the article was possibly referring to his game. Subsequent further research established that many features of WWM were the same as those featured in *Millionaire*, and that all the key features and mechanics of *Millionaire* had been copied into WWM. In addition the method of raising prize money which formed part of *BT Lottery* had been copied into WWM.

(h) The production and broadcasting of WWM, and the production and marketing of the WWM board game and computer game, has infringed Mr Baccini's copyright(s) in *Millionaire* and/or *BT Lottery* and constitutes a breach of confidence.

87. The documents allegedly sent to CCC and ITV consist of (1) 5 pages relating to Millionaire behind a cover sheet containing that name and the legend "Copyright John Baccini 1995" and (2) a four page document entitled "BT Lottery". The second page of the first document describes a board game for two to eight players called Millionaire with the following features (a) players are given £1 to start with, (b) players have to double their stake twenty times to win the Million, (c) there are 20 rooms or squares, (d) there are four safe zones and (e) there are three sets of chance cards. After two pages depicting the board there is a further summary of a TV Game Show entitled "Millionaire" with the following features (a) a £1m prize, (b) a game for 10 players, (3) questions on general knowledge, (d) each player starts the game with £1, (e) each player must double up their £1 to become the Millionaire, (f) there is a floor, (g) there are safe zones, (h) there are chance lines and (i) there is a host. The next page and a half describe how the TV game is to be played. The 10 contestants are chosen by correctly answering questions on a premium rate telephone line. Those 10 attend the studio. In the studio they are given £1 and required to answer questions. Each correct answer entitles the contestant to a cash prize which is double that awarded for the previous question. In addition the contestant advances one square across the floor of the studio. The first player to reach £1,000, described as 'the fastest foot', goes forward to the next round in which he or she alone is asked questions. If he successfully reaches £32,000 he cannot lose that prize which constitutes another safe zone and has crossed the floor. He or she then goes on to compete for the £1m top prize. With each successive correct answer the contestant wins a prize and advances along a corridor or wall.

88. The idea of the BT Lottery is described on the second page of the second document. Each week a lottery of phone numbers takes place. The lottery entry consists of a call to a special number. Each call generates a further entry. The winning number is selected by a computer. The prize money is £25,000 per week of which the winner takes £20,000 and once a year, in Christmas week, there is an additional prize of £250,000. It is suggested that the cost of the entries will more than pay for the prizes.

89. Mr Baccini has produced a schedule of similarities between his game and WWM they are (1) the £1m prize, (2) the Title of Millionaire, (3) multi-choice questions, (4) Safe Zones at £1,000 and £32,000, (5) the fastest foot concept, (6) the premium phone line, (7) the Prize Fund, (8) the pool of contestants and (9) the Mechanics.

90. Mr Baccini justifies the lateness of his claim and the paucity of documents to support it by the facts that he was arrested on 13th June 1997 and sentenced to 2.5 years imprisonment on 13th May 1998. At the time of his arrest all his belongings were removed from the place where he then lived. He was released in April 1999 but it was not until 13th November 2002 that he found some of his documents in an old brief case in the loft of his son's house.

91. The evidence for Celador consists of witness statements from Ms Rosencrantz and Messrs Smith, Briggs, Whitehill and Knight. All deny ever receiving or seeing any of the documents Mr Baccini claims to have sent to CCC or ITV. They question why Mr Baccini should send any of them to CCC anyway as it was not involved in the production of TV programmes. All deny any copying or misuse of confidential information.

92. Counsel for Celador submits that Mr Baccini has no real prospect of success on his claim. He submits that there is no credible evidence that Mr Baccini's formats were ever sent to CCC or ITV before the commencement of these proceedings. He claims that the alleged similarities are insufficient to justify any inference of copying or misuse of confidential information. He suggests that there is no reason to suppose that Mr Baccini will be able to shake the evidence of any of the witnesses for Celador. He relies on a variety of points for the submission that the evidence of Mr Baccini is simply incredible.

93. All these propositions were disputed by Mr Baccini, but, as he admitted, he is not very good at 'explaining things'. In addition he disputed the authenticity of two documents adduced in evidence by Celador. Those documents were exhibits CR2 and PAS1. They are two copies of Cash Mountain Version 2. As Mr Baccini pointed out they are not identical. He suggests that if two documents alleged to be copies of the same original are manifestly different then what other alterations may have been made? It is true that there are differences but they are differences between the copyright insignia in upper case and lower case, the omission of a full stop, a failure to justify the heading to a sub-paragraph and the number of punch holes apparent from the photocopies. Counsel for Celador suggested that most, if not all, these differences are accounted for by separate printouts of a computer file and the multiple generation of photocopies. He may well be right but I do not need to decide. What is clear is that there are no alterations to the substance of the documents and no justification for inferring that there have been alterations to such substance.

94. The onus of proving that copies of the TV format for Millionaire were sent to CCC or ITV lies on Mr Baccini. He says he did send them. Celador and its witnesses deny receipt. This is a straight conflict of evidence. But even if the format was sent as alleged there can be no inference of copying a substantial part unless the similarities are sufficient. In this case it is that issue which is the crucial one. Counsel for Celador submits that they are trite or not, in truth, similarities at all.

95. I would accept that submission if only the board game had been sent. In the board game there is no actual prize of £1m or any other sum. WWM has no squares or rooms. The purpose of the safe zones and chance cards in the board game are not explained so they could hardly have been copied. Nor is it clear that the contestant moves from one square to another on the basis of successfully answering a question.

96. The position is quite different in the case of the format for the TV game. I have set out the salient features in paragraph 87 above. The description attached to it explains those features. Thus (a) both Millionaire and WWM have a real maximum prize of £1m, (b) both have an initial pool of 10 contestants selected on the basis of answering questions in a telephone call to a premium number, (c) both employ the concept of the fastest contestant in the first stage proceeding to the next, in Millionaire that is described as 'the fastest foot' and in WWM as 'the fastest finger', (d) both take the form of a quiz show with multiple choice general knowledge questions, (e) in both correct answers give rise to a doubling up of prizes, (f) in both there are safe havens in that the prize money won to that stage is protected from loss in the next stage. The differences are that Millionaire does not have 'Lifelines' or 'Helping Hands' and WWM does not show contestants crossing the floor or proceeding down a corridor.

97. In my view the extent of the similarities between the TV format for Millionaire and WWM as transmitted are capable of giving rise to an inference of copying a substantial part. Similarly they are capable of being corroborative of Mr Baccini's assertion that he sent the documents to CCC and ITV in March 1995 or January 1996.

98. It is true, as counsel for Celador submits, that there are surprising aspects of the case for Mr Baccini. Why should he send the proposals to CCC at all? Why did he send them the board game? Why did he make no complaint until April 2003? But none of those points can justify the rejection of the evidence of Mr Baccini at this stage. As in the case of Mr Melville the credibility and honesty of Mr Baccini must be assessed on all the evidence after both disclosure and cross-examination.

99. For these reasons I am unable to conclude that Mr Baccini has no real prospect of success in his claim for infringement of copyright and breach of confidence. If that is not enough, I conclude that the state of the evidence and the nature of the issues are compelling reasons why the case should be disposed of at a trial. Accordingly I dismiss the application of Celador for summary judgment in respect of the claim by Mr Baccini.

Summary

100. In summary my conclusions are that:
(1) Mr Melville has real prospects of success on his defence and counterclaim to the action brought by Celador on 22nd January 2003. Consequently I dismiss the application of Celador dated 30th June 2003 for their summary dismissal.
(2) The institution and prosecution by Mr Boone of the claim issued by him on 14th October 2003 against ITV and Celador is an abuse of the process of the court. In addition he has no real prospect of success in respect of it. For both these reasons I will make the order sought in the application of ITV and Celador issued on 15th March 2004.

(3) Mr Baccini has real prospects of success in respect of his claim issued on 22nd December 2003 against Celador, ITV, Smith, Briggs, Knight, Whitehill and Rosencrantz. Accordingly I dismiss the application for the summary dismissal of his claim issued by the defendants on 18th February 2004.

I will hear further argument on the form of the orders I should make, on costs and on any other matters consequential on these judgments.