



Neutral Citation Number: [2016] EWCA Civ 1214

Case No: A3/2014/1401

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM CHANCERY DIVISION**

**Mr Justice Birss**  
**HC12A02971**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/12/2016

**Before :**

**LORD JUSTICE BRIGGS**  
**LORD JUSTICE FLOYD**  
and  
**LORD JUSTICE CHRISTOPHER CLARKE**

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**Between :**

<b>WADE &amp; ANR</b>	<b><u>Appellants</u></b>
<b>- and -</b>	
<b>BRITISH SKY BROADCASTING LIMITED</b>	<b><u>Respondents</u></b>

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**Ms Christina Michalos (instructed by Payne Hicks Beach) for the Appellants**  
**Mr John Baldwin QC and Ms Lindsay Lane (instructed by Charles Russell Speechlys)**  
**for the Respondents**

Hearing date : 22 November 2016  
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**Approved Judgment**

**Lord Justice Briggs:**

1. This appeal arises out of an unsuccessful claim for mis-use of confidential information. The claim was brought by the co-creators and promoters of a proposed television talent show who believe that the gist of their innovative format was copied by the defendant British Sky Broadcasting Limited (“Sky”) in order to produce a television programme which, although differently named, was suspiciously similar to their own. They allege that the appearance of a combination of original features in both formats, coupled with the short time between their pitch of their format to Sky, and the later televising of its talent show, raises the irresistible inference that, consciously or unconsciously, the key features of their format were misused by being copied, without their consent, by Sky.
2. By contrast with the law relating to private confidences, which has been transformed by the influence of the Human Rights Convention, the law relating to mis-use of confidential information in a business context has been well settled for very many years. The following well-known dictum of Megarry J in *Coco v A N Clark (Engineers) Limited* [1969] RPC 41, at 47 has stood the test of time:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself ... must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”
3. The law as to the burden of proof in a claim of this kind is also well settled. It derives from the law relating to breach of copyright. Although the legal burden rests on the claimants throughout, the evidential burden may shift to the defendant where the claimants demonstrate sufficient similarities between their work and the defendant’s work, coupled with a sufficient opportunity for the defendant to copy their work, to raise an inference that copying actually took place. The defendant may then seek to rebut that inference by evidence which proves independent derivation. The same principles are equally applicable to misuse of confidential information where, as here, the allegation is that confidential information consisting of original aspects of the claimants’ format have been misused by being incorporated in the defendant’s format without their consent.
4. It is also well settled that misuse in the form of copying of this kind need not always be conscious or deliberate. The defendant or its staff may be shown to have learned of the relevant features of the claimants’ format, and then to have been prompted in the creation of its own format by the presence of those derived features in their sub-conscious memory: see for example *Talbot v General Television Corporation PTY Limited* [1981] RPC 1, per Harris J at 11, a decision of the Supreme Court of Victoria on rather similar facts.
5. The law is less clear about the analysis which is called for when (a) no single feature of the claimants’ format alleged to have been misused by copying has, on its own, the necessary quality of confidence about it; (b) the claimants’ format is as a whole of confidential quality but is not copied, lock stock and barrel, by the defendant; but (c) a

combination of features of the claimants' format is copied by the defendant which are alleged to have the necessary quality of confidence about them, in the aggregate, but where the two formats, viewed as a whole, have important differences between them. As will shortly appear, this difficulty was not one which the trial judge found it necessary to resolve, and nor do I.

6. After a four day trial in the Chancery Division, Birss J dismissed the claim. He found that there was a sufficient basis in the existence of a combination of similar features between the two talent shows and the time-line between the claimants' communication of theirs to the defendant and its production of its own show to justify an inference, although not a very powerful inference, sufficient to transfer the evidential burden of proof to Sky. But he found that the detailed evidential proof, by documents and witnesses deployed by Sky, demonstrated that its show, including the combination of similar elements, had been created independently, without either deliberate or sub-conscious copying. The claimants therefore failed to satisfy Megarry J's third condition in *Coco v Clark*. As to the question whether the claimants' format had the necessary quality of confidence about it, the judge concluded that the show in its totality did so, but that none of the individual elements relied upon did so, viewed separately. It was not alleged that the claimants' format had been copied lock, stock and barrel by Sky. Since he had concluded that Sky's show was independently created, without copying of any ideas from the claimants' format, he found it unnecessary to decide whether the alleged combination of similar features satisfied Megarry J's first condition.
7. In concise and well-focussed submissions for the claimants Ms Christina Michalos (who did not appear below) pursued three main themes drawn from rather extensive grounds of appeal. First, she submitted that the judge's analysis was vitiated by errors of law. He had failed to approach the issues in the right order. He should have concentrated on the alleged combination of common factors between the two shows and decided whether it had the necessary quality of confidence, rather than looking at individual factors separately. He should have carried out a detailed chronological analysis of the development of the defendant's show and, in particular, the changes in its format by which it converged with features of the claimants' show. Had he done so he would have concluded that the inference of copying was overwhelming.
8. Secondly, she submitted that the judge had failed to apply the civil burden of proof, by assuming that the claimants needed to deploy "strong evidence" to displace the defendant's case of independent creation.
9. Finally, she advanced a number of specific submissions about the detail of the judge's analysis under the common heading that inferential findings which he made were wrong.
10. In conclusion she submitted that if any of her three themes were made good, there could in reality be no alternative outcome than a re-trial.
11. Mr John Baldwin QC and Ms Lindsay Lane for Sky resisted all those submissions. Pursuant to a Respondent's Notice, they submitted in addition first that the judge should have grappled with the question whether the alleged combination of copied features had the necessary quality of confidence about it, and concluded that it did not. Secondly they submitted that the claimants' case of deliberate or sub-conscious

copying had not been properly put to Sky's witnesses in cross examination. It was no excuse that, having rejected an open offer of settlement, the claimants had lost their legal representation shortly before trial, and continued as litigants in person.

12. These submissions and counter-submissions do not mask the reality of this appeal, which is that it is essentially about a finding of fact, namely that the defendant did not actually use the claimants' information in the production of its show, whether or not, in combination, the similar features had the necessary quality of confidence about them. This court is therefore constrained by well known principles about the approach to factual appeals. They are sufficiently summarised by Lewison LJ in the following passage from *Fine & Country Limited v Okotoks Limited* [2013] EWCA Civ 672, at paragraphs 50-53, under the heading "the role of the appeal court":

"50. The Court of Appeal is not here to retry the case. Our function is to review the judgment and order of the trial judge to see if it is wrong. If the judge has applied the wrong legal test, then it is our duty to say so. But in many cases the appellant's complaint is not that the judge has misdirected himself in law, but that he has incorrectly applied the right test. In the case of many of the grounds of appeal this is the position here. Many of the points which the judge was called upon to decide were essentially value judgments, or what in the current jargon are called multi-factorial assessments. An appeal court must be especially cautious about interfering with a trial judge's decisions of this kind. There are many examples of statements to this effect. I take as representative Lord Hoffmann's statement in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, 2423:

"Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle."

51. Where the appeal is (or involves) an appeal against a finding of fact, the role of an appeal court is as stated by Lord Mance in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325 at [46] approving a passage from the judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, 580 – 581 as follows:

"14. The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293 and *Bessant v South Cone Inc* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral

evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a ‘rehearing’ under the RSC and should be its approach on a ‘review’ under the CPR 1998.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.”

52. I would add to that citation the statement of Lord Steyn in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 274:

“The principle is well settled that where there has been no misdirection on an issue of fact by the trial judge the presumption is that his conclusion on issues of fact is correct. The Court of Appeal will only reverse the trial judge on an issue of fact when it is convinced that his view is wrong. In such a case, if the Court of Appeal is left in doubt as to the correctness of the conclusion, it will not disturb it.”

53. This corresponds with the test set out in CPR Part 52.11 (3)(a).”

### **The Factual Framework**

13. The appellants and first and second claimants Mr Brian Wade and Ms Geraldine Perry enjoyed a successful career in the music industry. Sky is a well known telecommunications company which provides television, internet and fixed line

telephone services in the UK. Part of its business consists of commissioning and deploying TV programmes from independent production companies. In about 2006 the claimants came up with an idea for a prime-time TV programme which they called “The Real Deal” (“TRD”). It was to be a music talent show featuring singer-songwriters who wrote and performed their own material. At the initial auditions, contestants would be invited to perform in front of a panel of off-screen judges. Those who were successful would be invited to a second audition, at which eight contestants would be selected to participate in televised finals. The finals would take the form of live Saturday night broadcasts in which each contestant would perform an original song of their own composition. Their performances would be critiqued by a judging panel consisting of celebrity singer-songwriters.

14. At the end of each live show, one contestant would be eliminated in what is generally called a “whittle” format. On the day after each show, the contestants’ original songs would become available for internet download, and would be eligible for inclusion in the national pop charts, their position depending upon the number of downloads which occurred. At the end of the series, the winning contestant would be awarded a recording contract with a major record label. By employing a music talent show format which was a proven ratings success, and featuring singer-songwriters who wrote and performed their own material, TRD was aimed to position itself as a more authentic yet equally successful rival to existing programmes such as the X Factor and Britain’s Got Talent.
15. In order to maximize their prospects of success, the claimants formed a group called The Real Deal Partnership (“the Partnership”). In January 2007 they recruited a Mr Lester Mordue, the former head of programming at MTV. In 2008 they recruited Mr Tim Van Someren, an experienced television director. The Partnership (which may have been a joint venture rather than a partnership in the strict legal sense) then sought to interest TV companies in TRD but, in the event, without success.
16. A pitch to the BBC in November 2008 led to the Partnership concluding that TRD would be likely to secure better ratings if contestants began by singing “covers” (i.e. known songs by other artists) rather than their own compositions. They therefore revised the format of TRD so that contestants would sing covers during the first four televised shows, while behind the scenes footage generated public interest in them as potential singer-songwriters. In the remaining shows they would sing a cover and an original song of their own, and only the original songs would be downloadable.
17. This was the format which the Partnership presented to Sky, based upon a series of PowerPoint slides (called in the litigation “the deck”). They used the deck to pitch TRD to Ms Clare Hollywood, a commissioning editor at Sky, on 17 June 2009. On her initially enthusiastic response, they sent her copies of the deck. In subsequent email exchanges they were told that Ms Hollywood needed to get their proposal considered and if possible approved by Mr Stuart Murphy, a director of programmes at Sky.
18. In January 2010, possibly in response to an informal tender for a music talent programme, a company called Princess Productions (“Princess”), owned or controlled by a member of the Murdoch family, pitched to Sky a programme then called “Got to Sing” (“GtS”). At that stage the main feature of GtS was that it enabled contestants (who could be singers or players) to enter the competition by a mobile phone

application by which they could record themselves performing on their own mobile phones. After Ms Hollywood, Mr Murphy and Mr Duncan Gray, Sky's Head of Entertainment had discussed this and other responses to the informal tender, Ms Hollywood emailed Mr Van Someren (on behalf of the Partnership) to inform him that Sky would not be commissioning TRD.

19. There followed an intensifying level of communication between Sky and Princess, in particular at meetings on 16 March and 8 April 2010, during the course of which Princess's proposal underwent a series of revisions, including more than one change of name, before it emerged into the public gaze in August and September 2010 as a talent show called "Must Be The Music" ("MBTM"), filming of auditions having started in July. I shall for convenience refer to Princess's proposed show throughout as MBTM, but this should not mask the real changes to the format which were made between the time when it was first pitched to Sky in January 2010, and when it was finalised, filmed and shown in the summer of that year.
20. In its final form, MBTM did not pursue the dedicated mobile phone application. Nonetheless it remained open to all comers (whereas TRD had planned to recruit contestants by invitation). It was never limited to songs, still less to singer-songwriters as the only contestants, although in the event the finalists turned out to be singer-songwriters. The format enabled same-day downloading of contestants' televised performances with eligibility for the pop charts, but did not at any time include the whittle method of selection of finalists or winners. The performers themselves were to be the main beneficiaries from income generated by downloads. By contrast with TRD, the winner's prize was not a recording contract, but a substantial money prize, coupled with facilities for making a recording in a leading studio. From start to finish, the individuals identified as proposed judges in the Princess pitch of MBTM were in fact (bar one or two exceptions in the earlier pitches) singer-songwriters. In TRD, the three proposed off-screen judges included only one singer-songwriter, but the judges in the proposed televised part of the competition were all to be singer-songwriters. I shall refer to other features of TRD and MBTM in due course, when considering the third part of Ms Michalos's submissions.
21. The first series of MBTM did not achieve the desired ratings, and Sky cancelled the show early in 2011, although it was sold and later televised, with some success, in several series in Poland.
22. In the meantime, MBTM had come to the claimants' attention. Mr Van Someren had been engaged by Princess to direct MBTM. The detail of the announcement of auditions for MBTM by Sky in June 2010 led the claimants to conclude, notwithstanding Mr Van Someren's assurances to the contrary, that their ideas, as set out in the deck for TRD, had been copied. They were encouraged in that view by receiving congratulations on the broadcast of MBTM from a Mr London (to whom they had pitched TRD in March 2008 when he was executive producer of entertainment at RDF television), on his mistaken assumption that MBTM was a re-named version of TRD.

### **The Trial**

23. As the judge said (at paragraph 23) the claimants' case at trial was that the coincidences of similarity and timing between TRD and MBTM were too great to be

accounted for by independent creation, so that Sky must have acted in breach of confidence. Disclosure of the successive iterations of the slides depicting MBTM (under its various earlier names) enabled the claimants to invite the court to compare it in great detail with the deck (depicting TRD) copies of which, it was common ground, had been in Sky's possession at the material time. In addition to themselves, the claimants called as witnesses the other members of the Partnership, including Mr Van Someren, although he had by then directed MBTM. They also called Mr London to confirm his opinion about MBTM being derived from TRD, to which I have referred.

24. For its part, Sky's main case was that, regardless of the level and detail of similarities and dis-similarities between TRD and MBTM, every element of MBTM had been independently created without regard to TRD or the deck. Sky said that the deck had never been seen by anyone other than Ms Hollywood. Separately, Sky contended that no individual part or combination of parts of TRD enjoyed the requisite quality of confidence, although it was not disputed that the occasion upon which TRD had been explained to Sky was sufficiently confidential to satisfy the second of Megarry J's conditions in *Coco v Clark*.
25. Sky called no less than ten witnesses in an endeavour (which succeeded before the judge) to provide comprehensive evidence of the process whereby MBTM had been conceived and developed, from start to finish, by Princess in collaboration with Sky. The witnesses included Ms Hollywood, her boss Mr Murphy and Mr Lucas Green, a series producer at Princess who, it was said, had provided the main inspiration for the key selling features of MBTM in the form in which it finally reached the public.
26. Eight out of ten of Sky's witnesses gave oral evidence and were (to the extent of their abilities), cross-examined by the claimants as litigants in person. It does not appear that the written evidence of the two witnesses who were not cross-examined played a significant part in the judge's deliberations.
27. It is evident both from the judgment and from the transcript of the trial that the judge was alert to the difficulties facing the claimants as advocates and (in particular) cross-examiners in a challenging trial. To the extent reasonably possible, he made due allowance for their difficulties, both by excusing them for failures to put part of their case to witnesses, and by asking questions of witnesses himself, in a manner which did not require or imply his descent into the arena. It is also evident from the judgment (at paragraphs 26-47) that the process of oral evidence in chief and, albeit limited, cross-examination was sufficient to enable the judge to form clear and nuanced views about the credibility and weight of the oral evidence.
28. Since the documentary material was by no means conclusive as to the origin of the various elements of MBTM, this was a case in which the credibility and weight of the oral evidence went to the heart of Sky's case of independent creation, as to which the judge was therefore much better placed than this court, both in relation to findings of primary fact and in relation to the drawing of factual inferences, as I shall seek to demonstrate in due course.



## The Judgment

29. The reserved judgment of this experienced intellectual property judge (delivered within a month of the trial) speaks for itself. It needs no summary or interpretation. It is published on BAILII under the neutral case citation [2014] EWHC Civ 634 (Ch). Without wasting words, it gives an amply sufficient explanation of the judge's reasoning for his dismissal of the claim. Nonetheless, since the first main theme of Ms Michalos's submissions is that the judge approached the issues in the wrong way, it is necessary to summarise the structure of the judgment.
30. Having introduced the parties and the background (paragraphs 1-19) and summarised the parties' cases (paragraphs 20-25) the judge then described in general but sufficient terms his perceptions as to the credibility of the witnesses and the weight of their evidence (at paragraphs 26-47). He then gave a brief summary of the applicable law at paragraphs 48-58 in a manner which is not criticised on appeal.
31. For present purposes the meat of the judgment begins under the heading "Assessment" at paragraphs 59-60, in which he outlines a three-staged structure, first of considering the inferences which might be drawn from the similarities and time-frame (an approach which he derived by analogy with copyright cases, again without criticism on this appeal) then considering the evidence of independent derivation, and then looking at the matter overall.
32. At paragraphs 61-62 the judge concludes that the second condition in *Coco v Clark* is satisfied and that, viewed as a whole, the deck also satisfied the first condition. But he said that this was of no particular assistance in a case where the complaint is not that the whole of TRD as set out in the deck was copied or published, but that ideas within it were used in MBTM. Again, that is not challenged on appeal.
33. At paragraphs 64-66 the judge identifies eight elements in the deck relied upon by the claimants as copied ideas, six relating to the way in which the show would work, and two relating to branding. He then identifies six other aspects of the deck which may be said to illustrate differences between TRD and MBTM. After an analysis of the key features, under the headings downloading and singer-songwriters, and concluding that, viewed separately, none of them had the necessary quality of confidentiality, he concludes, at paragraph 76:
- "There are no other individual ideas in the deck which on their own have the necessary quality of confidence but that does not mean the claimants have no rights. A line exists somewhere between the full detail of the deck as a whole, which I have accepted as being protectable, and the individual ideas taken alone, none of which I have accepted. The question is where that line is to be drawn."
34. The judge then looks for a potentially qualifying combination of features within the deck which might, together, have the necessary quality of confidence. At paragraph 81 he identifies this combination:

“(i) Chart eligible downloads during the run of the show.

- (ii) Judges being exclusively singer-songwriters.
- (iii) Contestants being singer-songwriters.
- (iv) Prime time.”

He continues:

“At this stage I entertain a doubt whether this combination fairly reflects the content of the deck. It is in danger of being a combination created with hindsight cherry picking elements from the deck, rather than a reflection of what the claimants really conceived. However I will suspend judgment on the combination point until I have considered the other issues and return to it at the end.”

35. Under the heading “Comparison with Must Be The Music” the judge then undertakes a detailed analysis of what he describes as “the key similarities between the programmes which are relied on”, dealing with each of them in turn, then with key differences relied upon by Sky. The similarities were:

- i) Chart eligible downloads during the run of the series.
- ii) Singer-songwriters.
- iii) Prime time rather than edgy.
- iv) The word “real”.
- v) Badges.

At paragraph 99, he concludes:

“Some of the points made by the claimants are very weak but at the heart of the claimants’ case is an argument based on the timing, including the fact that the deck was in Sky’s possession for many months, coupled with major points of similarity relating to downloads and the emphasis on singer-songwriters as judges and contestants. Even though it is true there are a number of differences between the deck and the show as broadcast, without an explanation from Sky, I would not be prepared simply to dismiss the inference that Sky derived ideas from the deck for The Real Deal. It is perfectly obvious why the claimants are concerned in this case. However the inference cannot be taken too far. The inference has some substance but it is not at all overwhelming.”

36. At paragraphs 100-106, under the heading “Sky’s positive case of independent derivation” the judge then looks in detail at Sky’s evidential case and concludes, at para 101:

“I have mentioned all of the witnesses called by Sky. Taken together their evidence would make good Sky’s case which I have summarised above. An important point is that Sky has called all the relevant individuals to establish its version of events. There are no gaps.”

He then deals with, and rejects, Sky’s submission that a challenge to its evidential case was fatally flawed by the absence of requisite cross-examination. At paragraphs 105-106 he concludes:

“105 First, honest evidence may not be cogent enough to rebut an inference of derivation derived from the circumstances. Giving honest evidence is not the same thing as a finding that the witnesses are correct in their assessment of what happened.

106 Second, and of more importance on the facts of this case, the evidence from Sky’s witnesses does not entirely rule out the possibility of a transfer of ideas which took place unwittingly, unconsciously or which has been genuinely and truly forgotten. Ms Hollywood clearly had the deck and liked the idea of The Real Deal. Perhaps she unwittingly influenced Mr Murphy or Mr Gray or both of them, and passed ideas from The Real Deal on to those individuals. After all they all worked very closely together in an open plan office environment. Or alternatively, although Mr Gray and Mr Murphy genuinely believe they never read the deck, perhaps they are mistaken. Perhaps one of them did skim it, the key ideas lodged in their mind and went on to influence the development of Must Be The Music.”

37. Since the question whether Sky had succeeded in its case of independent derivation remained open at that stage of the analysis, the judge then proceeded to consider a series of “tell tale indications” in the evidence, relied upon by the claimants, as destructive of Sky’s case. I shall have to return to some of them but, for present purposes, it is sufficient to recite the judge’s overall conclusions, at paragraphs 120-121:

“120 I have addressed the various tell tale indications relied on to show a link between Must Be The Music and The Real Deal individually. Even when I consider them as a whole, they do not amount to strong evidence to support the inference that aspects of Must Be The Music were derived from The Real Deal.

121 I will now consider the evidence as a whole. Sky’s evidence was cogent and taken as a whole presented a clear and persuasive picture. There are similarities between the show and some ideas in the deck but the evidence explained their origin. The inference that the ideas which Must Be The Music embodies in common with The Real Deal must have been derived from the deck is not strong enough to leave me in any real doubt about the right conclusion in this case. I accept

Sky's evidence. I find that Must Be The Music was created entirely independently of The Real Deal.”

38. Having thus concluded that the third condition in *Coco v Clark* was not satisfied, because there had been no use of the claimants' confidential material, the judge briefly noted at paragraph 122 that it was unnecessary for him to have to decide whether the particular combination of elements shared between TRD and MBTM had the necessary quality of confidence to satisfy the first condition.

#### **Errors in approach – Grounds 1-5**

39. It is difficult to deal with the first five of the claimants' grounds of appeal entirely separately. I have found it easier to address them by reference to the manner and order in which they were dealt with in Ms Michalos's helpful oral submissions.
40. Her overarching point was that the judge had simply failed to see the wood for the trees. This manifested itself, she submitted, in the following ways. First he had failed to stand back and look at the compelling inference to be derived from the time-line, consisting in essence of the presentation of TRD to Sky in June 2009, its rejection in February 2010 and the first broadcast of MBTM in August 2010. He had not even conducted a detailed chronological analysis of the development of MBTM.
41. Secondly, Ms Michalos pointed to what she said was a persistent tendency of the judge to look at the individual elements of TRD, rather than at their effect in combination, both for the purpose of deciding whether they enjoyed the requisite quality of confidence and for the forensic purpose of deciding whether there had been copying. She submitted that the judge ought not to have parked the first of those issues, at paragraphs 81 and 122. He should have resolved that issue first.
42. Thirdly, Ms Michalos submitted that the judge gave no sufficient thought to the question whether there had been subconscious copying, and blinded himself to that probability by his erroneous conclusion that there were “no gaps” in Sky's evidence about independent creation.
43. To make good the first and third of these submissions Ms Michalos took us very carefully through a chronological analysis of the way in which the Princess pitch which started life as GtS and ended as MBTM developed over time. As a forensic analysis of a documentary trail, based upon successive versions of MBTM in slide presentations on different dates, it was an impressive exercise, tending to show that, at certain times the MBTM concept appeared to diverge away from ideas to be found in TRD, and at other times to converge with them. She also used her analysis to support her challenge to the judge's conclusion that there were “no gaps” in Sky's evidence about independent creation. This submission really focussed on a meeting between representatives of Sky and Princess on 8 April 2010, of which there were no minutes or attendance notes, and about which Sky's representatives at the meeting had no detailed recollection.
44. Taking Ms Michalos's points in turn, I am not persuaded by the first point about a failure to focus on the time-line or detailed chronology. In his thumbnail sketch of the claimants' case at paragraph 23, the judge identified timing as lying at the heart of it. At paragraph 99 he stated in terms that timing lay at the heart of the claimants' case

and that it was a major factor in his decision that the evidential burden shifted to Sky to prove independent creation. Furthermore, his detailed analysis of the claimants “tell tale indications in the evidence” following paragraph 107 demonstrates a perceptive and detailed command of the order of relevant events.

45. More generally, it by no means follows from the fact that a judge chooses to express the reasons for his decision by using a particular, non-chronological, structure, that he has not in fact carried out the chronological analysis about the apparent absence of which the claimants complain. Very few judges consider it incumbent upon them to set out the whole of their thought processes in a judgment, and judgments would tend to be far too long if they did.
46. Next, I reject Ms Michalos’s point about a failure to look at relevant aspects of the ideas in TRD in combination, rather than individually. It was, to my mind, perfectly appropriate for the judge to start with an analysis of each of the allegedly confidential aspects of TRD, before looking at any particular combination of them. But the judge plainly did then look at what he regarded as the best available combination, from the claimants’ perspective, both for the purposes of beginning an analysis of whether that combination had the requisite quality of confidence, and for the quite separate purpose of his forensic examination of the allegation of copying. He embarked upon the first of those at paragraphs 76 to 81. At paragraph 81 he plainly sought to choose the best possible combination from the claimants’ perspective, because he introduced the four elements of it by the phrase:

“One might say that the claimants should then rely on the combination of ...”

47. Similarly, the judge introduces his detailed analysis of the comparison to be made between TRD and MBTM by identifying the combination of “key similarities between the programmes” as consisting of five elements which overlapped with, but were not identical to, the four elements which he had identified for qualification for the requisite quality of confidence. Of course it was incumbent upon him then to look very carefully at each, but his conclusions at paragraph 99 (favourable to the claimants in leading to a reversal of the evidential burden of proof) were based upon an overall review of the combined effect of those items, viewed in the aggregate and coupled with the inference to be drawn from the time-line. Finally, his review of the alleged “tell tale indications in the evidence” by which the claimants sought to challenge Sky’s case of independent creation, at paragraphs 107-121, involved considering all those points “as a whole” at paragraph 120 and the entirety of the evidence “as a whole” in paragraph 121.
48. I was initially attracted to Ms Michalos’s submission that the judge went too far in his conclusion, at paragraph 101, that there were “no gaps” in Sky’s evidential case about independent creation, in particular by reference to the important meeting on 8 April between representatives of Sky and Princess, following which there was some element of convergence between Princess’s developing ideas and those to be found in the deck.
49. I have nonetheless not been persuaded by the submission, for the following reasons. First, set in its context, the judge’s reference to “no gaps” is part of a paragraph which places emphasis on the fact that Sky had called as witnesses everyone who appeared

to have been involved in the collaboration with Princess on what became MBTM, both from Sky's own staff and those involved on behalf of Princess. He was not, I think, suggesting that every meeting or exchange between those involved in a rapidly developing planned TV programme which underwent numerous amendments was minutely recorded in documents, attendance notes, minutes or the conscious recollection of witnesses. There was in fact documentation from which most of the story could be gleaned, but it had not been prepared for the purpose of demonstrating from whose minds or previous experience particular ideas had emerged. Nor could it be expected that the witnesses would remember every stage in a detailed process occurring three and a half years previously (that is before they made their witness statements) during the course of busy lives which were by no means, in the case of most of them, devoted wholly or even predominantly to MBTM.

50. In particular, Mr Baldwin demonstrated that, although Sky's representatives attending the important 8 April 2010 meeting had no very helpful recollection of what occurred, this was to be contrasted with the recollection of Mr Steinberg of Princess, whom the judge found (at paragraph 41) to be a good witness. No other part of Ms Michalos's analysis of the "no gaps" point was even as initially persuasive as (before hearing Mr Baldwin) it had appeared to be in relation to the 8 April meeting.

### **Burden of Proof**

51. This was a short point, and Ms Michalos's submissions about it commendably followed suit. In my judgment, it was not a good point.
52. The submission is based upon the judge's description, in paragraph 120, of the combined effect of the "tell tale indications" as not amounting to "strong evidence to support the inference that aspects of Must Be The Music were derived from The Real Deal." The submission was that this showed the judge failing to apply the civil standard of proof, namely balance of probabilities.
53. The judge's reference to "strong evidence" must be read in context. He had, throughout, demonstrated a wholly appropriate perception that, in weighing contrasting evidence, it is constantly necessary to have regard to its strength or weight. Thus at paragraph 59 he said:

"One may end up testing the cogency of the evidence of independent derivation against the strength of the inference of copying."

At paragraph 99 he found that there was sufficient in the time-line coupled with the similarities between the two programmes to give rise to an inference of copying, but he said:

"However this inference cannot be taken too far. The inference has some substance but it is not at all overwhelming."

His analysis of the tell tale indications from paragraphs 107 to 119 is replete with nuanced assessments of the strength or weakness of the various matters relied upon, in the context of a conclusion that, prima facie, Sky had discharged the burden of showing independent creation (paragraph 101), but not without leaving open the

possibility of sub-conscious copying (paragraph 106), so that it was necessary to see whether Sky's positive case had been overturned by evidence of any sufficient strength (paragraphs 120-121). Indeed, his overall conclusion about the evidence, at paragraph 121, was that, balancing all of it and considering its weight he was not "in any real doubt about the right conclusion in this case". In other words he found Sky's positive case of independent creation to have been proved to a standard well in excess of a mere balance of probabilities.

### **Wrong Inferences**

54. For the legal basis of these submissions Ms Michalos relied upon the same passages from *Assicurazioni Generali Sp v Arab Insurance Group* [2003] 1 WLR 577 as are referred to in the citation from the *Okotoks* case above, as having been approved by the Supreme Court in *Datec Electronics Holdings Limited v United Parcel Service Limited* [2007] 1WLR 1325, by Lord Mance, at paragraph 46. He cites at greater length from the *Arab Insurance* case than does Lewison LJ in the *Okotoks* case, but the substance is to the same effect.
55. Ms Michalos's point was that where a challenge is made to inferences drawn by the trial judge, then the appellate court may not be as inhibited from a departure from the trial judge's conclusions as it would be in a case where everything depends upon the relative credibility of evidence given and challenged orally. This may be true up to a point, where for example inferences are drawn from unchallenged primary facts. But even then, the appellate court must give real respect to the trial judge's multi-factorial assessment.
56. In the present case by contrast, the task for the judge was to balance what he regarded as a relatively weak inference of copying (whether sub-conscious or not) from the combined effect of the apparent similarities between the two programmes and the time-line with the mainly primary fact evidence of independent creation put forward by Sky's witnesses, all but two of whom gave their evidence orally and were cross-examined, and about whose credibility the judge thought it important to reach conclusions. To my mind, the result is that this court is affected both by the undoubted advantage which the judge had in hearing and seeing the witnesses on the one hand, and the respect due to him in his conduct of what, balancing that evidence against inferences, was on any view a multi-factorial exercise of judgment. When there are added to those factors the additional points that, first, this judge was very experienced in the field of intellectual property and secondly, that the judgment, read as a whole, has inherent weight as a logical, careful, detailed and perceptive analysis, this limb of the claimants' appeal has to surmount very serious hurdles.
57. Ms Michalos focussed her written and oral submissions on three specific findings of the judge. The first was (or was alleged to be) the judge's conclusion that the pop chart eligible downloading of songs performed on a talent show during the run of the show was not an original feature in MBTM. The allegation that it was original was the necessary stepping stone to the inference that it must therefore have been copied from TRD, as portrayed in the deck. Her criticism was focussed upon paragraphs 87-88 of the judgment, where the judge addresses it as one of the alleged key similarities between the two programmes. He concludes, at paragraph 87, that Sky, and particularly Mr Gray when giving evidence, were wrong not to accept that chart eligible downloading in MBTM was a first, in terms of UK prime-time talent shows,

having been described in July 2010 by the Independent newspaper as an idea “nothing short of genius”. But in paragraph 88 he continued:

“This is not inconsistent with the fact that the general idea of downloads from a music talent show was not new or original.”

58. This assessment needs to be read in conjunction with paragraphs 68-70 of the judgment, in which the judge concluded that chart eligible downloading from a talent show was a well known idea by 2010, having been considered, but rejected, for inclusion in the X Factor because of the practical impossibility of combining chart eligible downloading during the run of the show with a process of elimination based upon the “whittle” system. In short, if the public can see by reference to the pop charts how competing performers’ songs downloaded from the show are doing then all the excitement generated by the whittle process is lost.
59. The model for TRD put forward in the deck proposed both a whittle process for elimination and chart eligible downloading, but with no explanation how that difficulty of using them in the same talent show could be resolved. The evidence before the judge (particularly from Mr Green of Princess) was that he had been aware of this conundrum, and of the use of non-chart eligible downloads in the American talent show “American Idol”, and had some experience of the techniques of downloading from a previous but rather different show called “Orange Unsigned Act” in which he had been involved. The evidence amply demonstrated, and the judge was entitled to conclude, that the “genius” embodied in the use of chart eligible downloading in MBTM arose not from its having been the first time when the idea was conceived of, but the first occasion when the solution to the problem of associating it with a TV talent show had been identified, namely using some process for elimination other than whittle.
60. In my judgment that analysis of the judge was both rational and firmly based upon evidence which he was prepared to believe, so that it is unchallengeable on appeal.
61. The second allegedly wrong inference was the judge’s conclusions, at paragraphs 93 and 110-114, that the fact that Sky and Princess toyed with the phrase “The Real Deal” and made use of the word “Real” in connection with MBTM was only a “small point” in favour of an inference of copying and, although “striking”, in fact “nothing more than a coincidence”.
62. The underlying uncontroversial facts were that the phrase “The Real Deal” was considered by Sky among a very long list of other potential candidates as a name for what ultimately became MBTM, and that the word “real” was used more than once in MBTM as a way of connoting authenticity, and distancing its content from talent shows such as the X Factor. At paragraph 112 the judge acknowledged the possibility that the phrase “real deal” or “The Real Deal” might have derived from the claimants, but there was evidence before him that it did not in fact, and his conclusion on balance that the phrase was independently conceived of as one of a large number of potential ways of pointing to authenticity was neither vitiated by any error of principle or lack of reasonableness. His separate conclusion that the use of “real” to denote authenticity is a perfectly ordinary means of expressing the point, giving rise to nothing more than the smallest indication of similarity with TRD, seems to me to be unassailable. More generally, the phrase “The Real Deal” was not in the event



actually used in the promotion or televising of MBTM although the word “real” was. All in all, this seems to me to be, as the judge said, such a small point as to form no real weight in his decision making, and no real substance in a challenge to his overall conclusion by way of appeal.

63. The third wrong inference put forward by the appellants relates to the common use, both in TRD and MBTM, of badges as part of the branding of the programmes. The deck illustrated circular (probably metal) lapel badges as a constant branding feature in the promotion of TRD, using the phrase “The Real Deal” on the badges themselves. The slides promoting MBTM did no such thing, but the later advertising material for the programme itself did from time to time depict campaigning badges of a broadly similar shape being used to try and help artists achieve chart positions for their music and containing phrases such as “help us to get to number 1”.
64. Having dealt (at paragraph 96) with the claimants’ allegation that the temporary removal of the MBTM badges from its publicity after their complaint suggested an acknowledgment by Sky that it had been copied and rejected it on primary evidence from Sky which he accepted, the judge concluded as follows:

“97. I think the badges argument is a better point than the “real” point but it is not strong. The lapel badges used for Must Be The Music are not like the branding badges in the deck for The Real Deal”. The similarity is simply the idea of badges.”

65. This conclusion formed part of the judge’s detailed analysis of the points pointing towards or away from an inference, based on time-line and similarities, that there had been copying. It was a point in favour of the claimants’ case rather than against it, and the judge found in the event that the inference was made good, for the purpose of shifting the evidential burden of proof: see paragraph 99.
66. The real complaint in this part of the appeal is therefore about the weight which the judge ascribed to the badging point, rather than to any wrong inference. But considerations of weight in a multi-factorial assessment of this kind are pre-eminently a matter for the trial judge, with which an appellate court will only interfere with caution. For my part, I cannot see any substance in the criticism. The question whether the use of badging in MBTM raised a prima facie inference of copying was pre-eminently a matter for the trial judge. Even without the benefit of the oral evidence that there was in fact no copying, I would have been hard put to have given the point any greater weight in the overall balance than did the judge. On any view, his analysis disclosed no error of principle, and the outcome cannot sensibly be described as beyond any reasonable range of legitimate responses to the evidence about this point presented to him.

### **The Respondent’s Notice**

67. My conclusion that none of the grounds of appeal have been made good by the appellants makes it unnecessary for me to address the content of the Respondent’s Notice. It follows from a conclusion that the judge was entitled to find that all elements in MBTM were independently created, rather than copied, consciously or sub-consciously, from TRD, that it is just as unnecessary for me, as it was for the judge, to deal with the perhaps quite difficult question whether any particular

combination of the factors relied upon by the claimants as enjoying the necessary quality of confidence satisfied that condition.

68. It is also unnecessary for me to reach any conclusion about the alternative submission from Sky that a challenge to independent creation was disabled by a failure of cross examination. The real question is not simply whether there was or was not the requisite cross examination, still less whether cross examination is a merely professional obligation not affecting litigants in person. The real question is whether it would be fair or just to conclude issues against a party or its witnesses on grounds of which they had no real notice. It appears that, albeit expressed with considerable brevity, the judge did not think that the combination of Mr Wade's efforts as a litigant in person and his own questioning of the witnesses gave rise to any potential injustice in his addressing the real issues in the case. I would only say that it would have taken rather more persuasion than Mr Baldwin attempted to lead me with any confidence to a contrary conclusion.

### **Conclusion**

69. For the reasons given above I would dismiss this appeal.

### **Lord Justice Floyd:**

70. I agree.

### **Lord Justice Christopher Clarke**

71. I also agree.