



Neutral Citation Number: [2020] EWHC 2799 (Ch)

Case No: IL-2019-000148

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

The Rolls Building  
7 Rolls Building  
Fetter Lane  
London EC4A 1NL

Date: 19 October 2020

**Before :**

**MASTER TEVERSON**

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**Between :**

**SHAZAM PRODUCTIONS LIMITED**

**Claimant**

**- and -**

**(1) ONLY FOOLS THE DINING EXPERIENCE  
LIMITED**

**Defendants**

**(2) IMAGINATION WORKSHOP PTY  
LIMITED (a Company incorporated in  
Australia)**

**(3) ALISON GAY POLLARD-MANSERGH**

**(4) PETER GORDON MANSERGH**

**(5) KATHERINE MARY GILLHAM**

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**JONATHAN HILL** (instructed by **Ashfords LLP** solicitors) for the **Claimant**  
**THOMAS ST QUINTIN** (instructed by **Brandsmiths** solicitors) for the **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup>**  
**Defendants**  
**The 4<sup>th</sup> Defendant acting as a litigant in person**

Hearing date: 3 June 2020  
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**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.

Covid-19 Protocol: This judgment was handed down without attendances required at  
10.30am on Monday 19 October 2020.

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MASTER TEVERSON

**MASTER TEVERSON:**

1. I have before me two applications for these proceedings to be transferred to the Intellectual Property Enterprise Court (“the IPEC”). The first was made on behalf of the Fourth Defendant by application notice dated 27 January 2020. The Fourth Defendant now acts in person. He was previously represented by Virtuoso Legal Solicitors. The second application made by notice dated 31 January 2020 is made on behalf of the First, Second, Third and Fifth Defendants who are all represented by Brandsmiths Solicitors. I shall refer to them together as “the Brandsmiths Defendants”.
2. This is a claim for copyright infringement and passing off. The Claimant is a company that was established by John Sullivan through which to exploit his works and the intellectual property rights subsisting in them. John Sullivan is best known as the creator and scriptwriter of the sitcom “Only Fools and Horses” (“the Sitcom”). The Sitcom was originally broadcast on the BBC between 1981 and 2003. Following John Sullivan’s death in 2011, the Claimant is controlled by members of his family.
3. The claim relates to an interactive theatrical dining experience called Only Fools The (cushty) Dining Experience (“the Show”) created and put on from September 2018 at various venues around the United Kingdom. The Show is a part-scripted, part-improvised dramatic performance which takes place while the audience eats a three-course dinner and involves interactions between the cast and the audience.
4. The First Defendant, Only Fools The Dining Experience Limited, is a company registered in England and Wales. It is a corporate entity through which the Show was operated. The proposed Sixth Defendant, Imagination Workshop Limited, was used to operate the Show immediately following its launch. The proposed Seventh Defendant, Imagination Workshop Festival Limited, put on the Show at festivals.
5. The Second Defendant, Imagination Workshop PTY Limited is a company incorporated in Australia. It is the main company through which interactive theatre productions have been presented by the Third Defendant. The Fourth Defendant is the estranged husband of the Third Defendant. The proposed Eighth Defendant is the son of the Third Defendant (but not the Fourth Defendant). The Fifth Defendant is not a family member. She has been identified by the Claimant as an author of the Show from author metadata for the scripts for the Show. She was stated to be a co-deviser of the Show in website material.
6. The Third Defendant owns a theatre business called Interactive Theatre International which is the trading name of the Second Defendant. This business has operated for some considerable time in both Australia and the United Kingdom. It has had over a number of years substantial success with a show called “Faulty Towers the Dining Experience”, a show similar to the Show and built upon the sitcom Fawlty Towers. That show launched in 1997 in Australia and in 2007 in the United Kingdom.
7. The Claimant contends that it owns copyright in
  - (1) each script used in the Sitcom;
  - (2) The body of scripts for the Sitcom taken together, which collectively establish the characters, stories and imaginary “world” of Only Fools and Horses;

(3) the principal characters featuring in the Sitcom (“the Characters”), namely Del Boy, Rodney, Marlene, Cassandra, Uncle Albert, Boycie, Trigger and DCI Roy Slater; and

(4) the lyrics of the opening theme of the Sitcom.

8. An important issue in the case will be whether copyright protection can extend to categories (2) and (3) above. The issue is of importance to the Claimant because if decided in favour of the Claimant it will enable it to protect John Sullivan’s creative work in conceiving of the characters, world and theme of the Sitcom, which may be used without any of John Sullivan’s actual text being used.
9. The Particulars of Claim in Annexes 2 and 3 set out by analysis of two sample scripts used in the Show what is alleged to be the extensive use in the Show of the characters and their settings and vocabulary of the Sitcom.
10. In their Defence, the Brandsmiths Defendants deny that the taking of the alleged thematic elements can give rise to copyright infringement. They allege that many of the phrases relied on by the Claimant as examples of copying are phrases in common usage. They deny any copyright infringement. They do not admit that any of the themes or features alleged to have been copied were copied or that any material has been copied from the scripts for the Sitcom.
11. The Brandsmiths Defendants also rely on the defences of fair dealing for the purposes of parody or pastiche under s.30A of the Copyright, Designs and Patents Act 1988.
12. The Fourth Defendant confines his positive defence to contending that he was not personally involved in the acts alleged to be acts of copyright infringement but was a nominal director of the First Defendant installed by the Third Defendant to shield her from personal liability.
13. The passing off claim for the use of the name of the Show and domain name is accepted by the Claimant as being relatively straightforward and conventional. A specific point taken by the Brandsmiths Defendants is that the passing off claim is precluded by the fact that the BBC has registered two trade marks for “Only Fools and Horses”. There is also a passing off claim based on substantial goodwill attaching to the name and characters and the world of the Sitcom (“the Indicia”). This is recognised on behalf of the Claimant as being in legal terms much less straightforward. The Brandsmiths Defendants deny passing off and allege that it would have been understood that the show was created in homage to the Sitcom.
14. There will also be joint liability issues. This concerns the position of the Fourth Defendant, the Fifth Defendant and the proposed Sixth, Seventh and Eighth Defendants. The Third Defendant admits that she is jointly and severally liable for any liability of the First, Second and Third Defendants for copyright infringement and passing off.
15. A recent summary of the IPEC and its case management was provided by Floyd L.J. in *Kogan v Martin* [2019] EWCA Civ 1645 at [16]:-

*“The IPEC is a court with a special jurisdiction for intellectual property cases, the successor to the Patents County Court. The rationale for the creation of the IPEC and*

*its predecessor was to provide access to justice for individuals, and small and medium sized enterprises, who would not be able to pay the costs normally associated with intellectual property litigation in the High Court under the CPR. The special rules which govern the IPEC seek to achieve this objective by providing for a highly focused, intensively case-managed procedure. Two significant differences from the general procedure under the CPR should be noted. First, the rule about statements of case in the IPEC requires a party to plead “all the facts and arguments” on which he relies, in contrast to pleading only material facts: see CPR 63.20. Secondly, the default position is that, unless the judge orders them at the case management conference (“CMC”), there are to be no witness statements, experts’ reports or cross-examination at trial. Only in exceptional circumstances will the court allow additional matters to be relied on which are not provided for by the order made at the CMC”.*

16. When considering whether to transfer proceedings to or from the IPEC, the court will have regard to the provisions of Practice Direction 30: CPR 63.18(2). This is a cross-reference to PD 30 paras 9.1 and 9.2. Para 9.1 reads:-

*“When deciding whether to order a transfer of proceedings to or from [the IPEC] the court will consider whether-*

*(1) a party can only afford to bring or defend the claim in [the IPEC]; and*

*(2) the claim is appropriate to be determined by [the IPEC] having regard in particular to-*

*(a) the value of the claim (including the value of an injunction);*

*(b) the complexity of the issues; and*

*(c) the estimated length of the trial.*

Para 9.2 reads:-

*“Where the court orders proceedings to be transferred to or from [the IPEC] it may-*

*(1) specify terms for such a transfer; and-*

*(2) award reduced or no costs where it allows the claimant to withdraw the claim.”*

17. The principles covering transfer to and from the IPEC were recently summarised by HHJ Hacon in *Kwikbolt v Airbus* [2019] EWHC 2450 (IPEC). Judge Hacon at paragraph [3] referred to the CPR provisions set out above and to his summary of the relevant principles in his earlier decision in *77M Limited v Ordnance Survey Limited* [2017] EWHC 1501 (IPEC). Judge Hacon then made some further helpful general observations at [4] to [9]. He said at [5] that there were some proceedings that have far too many issues and would plainly take too much time at trial to be heard in the IPEC. He said where that is the case, even important matters such as access to justice cannot assist a party who wants the case heard in IPEC. He continued:-

*“Unsurprisingly, applications to transfer into or out of IPEC rarely concern such cases. More characteristically, one side insists that the case will take four, five or six days, whereas the other side has no doubt that the trial can easily be completed within*

*two. In assessing the time the trial is likely to take, the court must take into account the extent to which the proceedings can fairly be case-managed to focus the issues between the parties, which will include preventing a proliferation of issues which are marginal at best and may even have been raised to improve the chances of having the case transferred out of IPEC or to resist it being transferred into IPEC.”*

18. At paragraph [6] Judge Hacon said if the proceedings were of a nature such that they could be heard within 2 to 3 days, possibly following some focussing of the issues, by far the most important factor was to ensure that parties with limited means were afforded access to justice. He said that where access to justice is likely to be available only in IPEC that is a very powerful factor. At paragraph [7] Judge Hacon said that the value of the claim should not be confused with the cap on damages. Where the value of an injunction was well in excess of £500,000 that does not by itself mean that the claim cannot be heard in IPEC. In paragraph [9] Judge Hacon said the approach to the litigation taken by the parties seeking to have the claim heard in the IPEC is relevant.
19. In support of his application, the Fourth Defendant refers to personal circumstances and lack of means. He says he is in the process of divorce proceedings with the Third Defendant. He says he is living in temporary rented accommodation in Australia and works as an Uber driver earning around £500 per week before expenses. He says there is limited equity in their former matrimonial home. He estimates the value of his share at £70,000. The Fourth Defendant says he believes the First Defendant made ticket sales in the tens of thousands at most rather than the hundreds of thousands. He says the issues in dispute are relatively simple.
20. The Brandsmiths Defendants submit that the value of the claim is likely to be less than the High Court minimum claim figure for damages of £100,000 and well below the IPEC damages cap of £500,000. Mr Lee in his first witness statement in support of the application of the Brandsmiths Defendants says that the show was created in 2018, first performed in September 2018, and had been running for less than a year before the letters sent on behalf of the Claimant to venues caused the show to be suspended. He exhibits a profit and loss account which is for a four month period, (and not a year as he states) ending 31 January 2020. It shows a total income for that period of £250,598.10 and a net loss of £51,417.78.
21. Mr Lee asserts that the Brandsmiths Defendants cannot afford to defend this claim in the High Court. He says the corporate Defendants are small businesses without significant financial resources. He says the Second Defendant has been in existence for 13 years and that its flagship show “Faulty Towers The Dining Experience” has run for 22 years to millions of people around the globe. Mr Lee says that in 2019, the Second Defendant had two significant pieces of litigation in respect of that show and as a result of that litigation and market uncertainty the revenue fell from previous years and expenses increased. He says they are hopeful a resolution will be finalised soon and that in consequence the Second Defendant should perform better in the next financial year and thereafter. He says that for the year to July 2019, the Second Defendant made an operating loss of around £210,000. Mr Lee says that the additional costs of defending this claim is very likely to stifle the Defendants’ wish to defend this claim and that he has been told it could be ruinous for them. Mr Lee says the Third Defendant is presently earning a salary of around Aus\$1,530 per month. He says the Third Defendant does not have any personal savings or liquid assets. He says she has been separated from the Fourth Defendants for 6 months. She owns a property jointly with the Fourth Defendant

subject to a mortgage which is the subject of a matrimonial dispute and cannot be liquidated to fund this litigation.

22. Mr Lee then sets out the position and personal circumstances of the Fifth Defendant. She is an actor and producer. She is unable to afford to rent and has to live on her parents' land in an annex. She owes her parents £35,000 in loans which she is slowly paying back from an irregular income. Mr Lee contrasts the financial position of the Defendants with the financial strength and resources of the Claimant whose last filed accounts he says show a £6m cash balance.
23. In relation to the complexity of the issues, Mr Lee says that the Defendants have agreed a sampling exercise in relation to the Defendants' scripts used for the show in relation to the copyright infringement claim. He says that in addition to "the standard defences to a copyright claim", the Defendants intend to run defences based on section 30A of the Copyright Designs and Patents Act 1988. Mr Lee accepts that the introduction of these defences into the legislation is relatively new. He recognises there are also issues of joint liability. He says the IPEC is accustomed to dealing with issues of this type. He agrees with the Fourth Defendant's former solicitor that the case can be tried in 2 days. He says the issues of personal liability might be hived off to any damages' inquiry or account of profits. The Third and Fifth Defendants filed witness statements confirming that the facts and matters stated in the paragraphs of Mr Lee's statement relating to them respectively are true. Neither the statement of Mr Lee nor the Third Defendant referred expressly to the Third Defendant's ownership of the shares in the Second Defendant or other companies.
24. Evidence in answer to the applications was filed by the Claimants' solicitor Mr Carl Steele in his second witness statement in the proceedings dated 19 May 2020. In relation to the complexity of the issues, Mr Steele states that at the time of the transfer applications, the Defendants had yet to file their Defences. He refers to the Defences filed on 17 February 2020 by the Fourth Defendant and on 18 February 2020 by the Brandsmiths Defendants. Mr Steele says this has led to requests for further information being made. He says the replies received on behalf of the Brandsmiths Defendants were unsatisfactory. He says this has led to an application for further information regarding their defence being issued on 7 May 2020.
25. Mr Steele exhibits to his witness statement the Particulars of Claim filed on behalf of Faulty Towers The Dining Experience Limited and the Second Defendant as Co-Claimants in Claim Number IL-2019-000006. The claim relates to interactive theatre experiences under the name "Faulty Towers The Dining Experience". In the Particulars of Claim it is pleaded that in 2017 turnover from that show was £1.395m with turnover for 2018 provisionally estimated at £1.664m. The claim is brought against six Defendants alleging the commission of a series of economic torts. In the claim it is alleged that following the incorporation in Australia of the Second Defendant (Imagination Workshop PTY Ltd) the goodwill of that show was transferred by Peter Gordon Mansergh and Alison Pollard-Mansergh to the Second Defendant. Following the incorporation in January 2011 of Faulty Towers The Dining Experience Limited, the goodwill of that show in the UK was transferred to Faulty Towers The Dining Experience Limited. The goodwill of that show outside the UK was retained by the Second Defendant. The turnover of that show within the United Kingdom between 2015 and 2018 is given as being in excess of £5m. The turnover outside the United Kingdom is not given. The Particulars of Claim in that action also plead that since September

2018 there has been “extensive trade” by those Claimants in the “Only Fools and Horses” name.

26. In a second High Court claim relating to “Faulty Towers the Dining Experience” show between the same active parties, the Second and Third Defendants along with Faulty Towers The Dining Experience Limited are defending a claim relating to an alleged exclusive licence to adapt the scripts of that show. The point made by Mr Steele on behalf of the Claimant is that this litigation indicates a willingness and financial ability on behalf of the Second Defendant and Faulty Towers The Dining Experience Limited to litigate in the High Court when it suits them.
27. The Third Defendant is the sole shareholder in the Second Defendant. She is also the sole shareholder of Faulty Towers The Dining Experience Limited. Mr Steele says therefore that the Third Defendant is presumably the person likely to benefit from the profits made by that show. He says the company is not required to file audited financial statements for the period that that show has been performed. He says he does not know what profits were made and that this information has not been provided by the Third Defendant. He says the only financial information that is available is it is an unaudited balance sheet dated 31 January 2019 for Faulty Towers The Dining Experience Limited. It shows shareholders’ funds of £3003 at that date. The figure for the prior year is shown as £24,462.
28. In relation to the value of the claim, the Claimant points to the fame and success of the sitcom “Only Fools and Horses”. The Claimant is seeking injunctions as well as monetary relief. It argues that the injunctions are very valuable to it. The value of injunctive relief is not the same as the damages cap. It does not of itself prevent transfer to the IPEC.
29. In a second witness statement dated 28 May 2020, Mr Lee says that the Second Defendant’s show “Faulty Towers The Dining Experience” has been closed in Australia since 23 March 2020 due to the Covid-19 pandemic. He says that approximately 90 performances have been cancelled up until at least 3 September 2020. He says that the Second Defendant owes Aus\$ 81,432.25 to the Australian Taxes Office and Aus\$ 37,500 to the Stamford Plaza Adelaide. He says the Second Defendant applied for a loan under the Australian Government Covid-19 scheme of \$250,000 and that this was rejected by the Queensland Rural and Industry Development Authority. The loan request was rejected on the basis that the Second Defendant’s trading results “*are not considered to reflect a business that has demonstrated its capacity to be viable under normal business conditions*”. The 2019 trading loss is referred to as \$408,593. The 2018 trading loss is referred to as \$18,076. This is said to be compounded by a trading loss of \$27,900 from 1 July 2019 to 31 March 2020.
30. Mr Lee states that the other High Court litigation is still alive but subject to a stay. It is hoped he says that there may be a resolution soon. Mr Lee says that the Covid-19 pandemic has had a drastic effect on the ability of the corporate Defendants to operate at all. Mr Lee says the individual financial positions of the Third and Fifth Defendants have worsened. He says that the proposed additional Defendants who have consented to be joined cannot themselves afford to defend High Court proceedings.



31. In the present case both sides presented different estimates of the trial length and different assessments of the complexity of the issues. In assessing the likely time the claim is likely to need to be tried, the court must take into account the extent to which the proceedings can be case-managed fairly to focus the issues between the parties.
32. On behalf of the Claimant, it was submitted that the copyright claim was comparable in complexity to the well-known *Da Vinci Code* case, *Baigent v Random House Publishing* [2006] EWHC 719 (Ch) which took 11 days to try with an appeal lasting 4 days. I do not consider this case is comparable either in terms of evidential weight or value. Reference was also made by the Claimant to *Kogan v Martin* [2019] EWCA Civ 1465. That case concerned a dispute about the authorship of the screen play of a film. That case was tried in the IPEC over 2 days. The Court of Appeal allowed an appeal. It directed a re-trial before a different judge in the IPEC. It did not state that the case should not have been tried in the IPEC.
33. The totality of the evidence before the Court does in my view show that the individual Defendants can only afford to defend this claim in the IPEC. The evidence first filed in support of the application of the Brandsmiths Defendants was incomplete so far as it related to the shareholdings of the Third Defendant. I consider that the Claimant was entitled to draw attention to the existence of the High Court litigation involving the FTTDE show and to the Third Defendant's presumed entitlement to the profits made from that show through the co-Claimants in Claim Number IL-2019-000006.
34. The further evidence put before the Court by Mr Lee in his Second Witness Statement supports the statements made in his first witness statement (but not supported by documentary material) that as a result of the litigation and market uncertainty revenue from the FTTDE experience fell and expenses increased. As matters stand, the evidence is in my view sufficient to demonstrate that the Third Defendant is not in a position to defend this claim in the High Court by taking out dividends or profits or distributing cash to herself from the Second Defendant or from Faulty Towers The Dining Experience Limited. It is true that the Court has not been supplied with the material submitted in support of the loan application made in Queensland by the Second Defendant but the Court has evidence of the refusal of the loan on the ground of trading losses over two years.
35. On the totality of the evidence now before the court, I consider it is shown that the Defendants including the proposed additional Defendants will only be able to afford to defend the claim if it is transferred to the IPEC.
36. By letter dated 2 June 2020, the Claimant's solicitors proposed as a practical solution to deal with the involvement of the 4<sup>th</sup>, 5<sup>th</sup> and proposed 8<sup>th</sup> Defendants that the claim remain in the Intellectual Property List of the High Court on terms that the Claimant would not (in respect of legal costs and expenses incurred by the Claimant after 3 June 2020) seek costs orders against any of the 4<sup>th</sup>, 5<sup>th</sup> or proposed 8<sup>th</sup> Defendant for sums which would exceed the sums it would obtain in the IPEC, if the case were transferred to the IPEC on 3 June 2020. The Claimant made clear that no costs protection was being offered to any of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants nor to the proposed 6<sup>th</sup> and 7<sup>th</sup> Defendants.
37. In my judgment, without costs protection being in place for all the Defendants including all the proposed additional Defendants, there is a real risk of access to justice not being

afforded. This is in my view a powerful factor in favouring of transferring the claim to the IPEC.

38. I do not consider that it can be seen with sufficient clarity and certainty at this stage that the proceedings, by reason of their likely length and complexity, are unsuitable for trial in the IPEC. The Defendants will be under an obligation to tailor their case so as to ensure that all the issues in the case can be tried in at most 3 days.
39. This does not require the Defendants to abandon any of their legal defences to the claim. It does require them to make their factual case clear in particular on the manner in which and by whom the Show and its scripts were created.
40. The most important consideration is in my view to ensure this case can be tried fairly with all parties having access to justice. On balance, I have come to the conclusion that the overriding objective is likely to be better served by my ordering the claim to be transferred to the IPEC for a case management conference at which any outstanding issues on the Claimant's application for further information can be determined. It will be open to the judge at the IPEC hearing the case management conference to give case management directions which will focus the issues between the parties. If the Defendants do not participate in that process and help the court strip away peripheral issues between the Defendants they will expose themselves to the real risk of the case being transferred out of the IPEC.
41. In directing the claim to be transferred to the IPEC, I have been principally concerned to ensure that all parties to this claim have access to justice. It must clearly be understood by each of the Defendants and by their advisers, that they will be under an obligation to tailor the defence of their claim. If there is a failure so to do, I would expect the IPEC case management Judges to have no hesitation in transferring this claim back to the High Court. Their experience and expertise will be of great importance in this respect.
42. In my judgment, the potential value of injunctive relief to the Claimant is not of itself a reason for declining to transfer the claim to the IPEC. The value of the injunctive relief does not mean the claim cannot be tried in the IPEC. Likewise, the potential importance of the copyright claim in other cases is not of itself a sufficient reason to decline to transfer the claim. Judges in the IPEC are IP specialists. In any event, that factor is outweighed by the consideration that on the evidence before the court, it is clear the Defendants will only be able to afford to defend the claim in the IPEC. These applications were made before the Covid-19 pandemic caused theatres in England and Australia to close. Whilst it is to be hoped this closure will be of limited duration, its continuation makes it unlikely there will be a significant improvement in the financial position of any of the Defendants in the next few months during the preparation of this claim for trial.
43. This judgment will be handed down without attendances required on Monday 19 October 2020 at 10.30am. I would be grateful to receive typographical corrections by 4pm on 16 October 2020. My provisional view is that the costs of the applications for transfer should be costs in the claim. If any party wishes to argue for a different costs order, they are to file and serve short written submissions by 4pm on 23 October 2020. If any party wishes to apply for permission to appeal they must file short written grounds by 4pm on 23 October 2020. The time for appealing will be extended to run

from 23 October 2020. I would be grateful to receive a minute of order by 4pm on 23 October 2020.