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Case No: IP-2019-000119

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

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

Date: 5/2/2020

Before :

Miss Recorder Amanda Michaels
(Sitting as a Deputy Judge of the Intellectual Property Enterprise Court)

Between :

CAROLINE NGOZI UKOUMUNNE

Claimant

- and -

- (1) THE UNIVERSITY OF BIRMINGHAM**
(2) PAUL WARMINGTON
(3) IAN GROSVENOR
(4) KEVIN MYERS
(5) ADAM TICKELL
(6) INFORMA UK LIMITED
(trading as Taylor & Francis Group)

Defendants

The Claimant in person
Sam Carter (instructed by **Kennedys Law LLP**) for the 1st to 5th Defendants
Maxwell Key (instructed by **Taylor Wessing LLP**) for the 6th Defendant

Hearing date: 5 December 2019

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.

Miss Recorder Amanda Michaels:

1. This is a claim brought against the University of Birmingham, four past or present members of its academic staff, and an educational publisher. The claim is primarily for infringement of copyright and breach of confidence, but allegations are also made of breach of contract, professional negligence, and racial harassment, bullying and sex discrimination, and 'loss of earnings.'
2. On 5 December 2019, I heard two applications on the part of the Claimant, for transfer of the claim to the QBD and for disclosure, and separate applications to strike out the claim on the part of the 1st to 5th Defendants and the 6th Defendant. The 6th Defendant is named in the claim form as "Routledge Taylor and Francis" but I was told that Informa UK Ltd trades under the name Taylor & Francis Group, and Routledge and Taylor & Francis are brands used by that group, so that the claim form ought to be amended to identify the 6th Defendant properly.

Background

3. The Claimant, Ms Caroline Ngozi Ukoununne, has acted in person throughout these proceedings, apparently without the benefit of any legal advice. I take account of the fact that she is not a lawyer and I make appropriate allowances. The Claimant addressed me at the hearing, and I have before me a considerable body of written material from her, in the Particulars of Claim, a Part 18 Response and witness statements, as well as copies of the lengthy works on which she relies. She is an intelligent and articulate woman and I am sure that she understands the need for accuracy and clarity in the way she puts her case. The following facts are set out in the Particulars of Claim or in the additional documents to which I refer, and as I understand it, for the purposes of this application at least, they are not disputed by the Defendants.
4. Ms Ukoununne is an academic who has worked as a lecturer at Manchester Metropolitan University and later in the Department of Education and Community Studies at the University of Greenwich.
5. In 2007, Ms Ukoununne enrolled as a PhD student at the University of Birmingham. The 3rd Defendant, Professor Ian Grosvenor, was the main supervisor of her studies, although the 4th Defendant, Dr Kevin Myers, was also one of her supervisors. The 2nd Defendant was a senior lecturer within the School of Education at the University but not a supervisor of her studies. He is described in the book mentioned below as the

Deputy Director of the Centre for Research in Race and Education at the University of Birmingham. The Particulars of Claim did not identify the role of the 5th Defendant, Professor Tickell, but I was told that in 2011 he was the Pro-Vice Chancellor of the University who was involved with the investigation of the Claimant's complaint of plagiarism.

6. Ms Ukoununne submitted chapters of her PhD in draft at various dates between January 2008 and September 2011 and a complete draft thesis in October and December 2011. The title of the thesis is "Black Activism in Education: Lessons from the Unheard." An email sent (probably) in November 2012 from Professor Grosvenor showed that at that stage he considered that further amendment of the draft was required, but as I understand it the Claimant's position is that this complaint prevented her from finalising the thesis. The PhD has not been awarded and the Claimant seeks an Order awarding her the PhD with distinction as part of her prayer for relief in this case.
7. In about August 2011, the Claimant found out about the publication of two articles of which she complains. The first of these was an article written by Dr Myers entitled "Immigrants and ethnic minorities in the history of education" and had been published in 2009 by the 6th Defendant in the journal "*Paedagogica Historica*" *International Journal of the History of Education* ("the Myers Article"). The second article, written jointly by Professor Grosvenor and Dr Myers was entitled "Exploring supplementary education: margins, theories and methods" ("the Grosvenor/Myers Article"). It was published by the 6th Defendant in the journal *History of Education* in 2011.
8. In January 2012, the Claimant found out about the publication of the third article of which she complains. This was an article written by Dr Warmington entitled "A tradition in ceaseless motion: critical race theory and black British intellectual spaces" ("the Warmington Article"). This was published by the 6th Defendant, in 2012, in the journal *Race, Ethnicity and Education*.
9. Later in 2012 the Claimant became aware that Dr Warmington was intending to publish a book to be entitled *Black British Intellectuals and Education: Multiculturalism's hidden history* ("the Book"). This was published in 2014, again by the 6th Defendant.
10. On 8 October 2012, Ms Ukoununne raised a complaint "of research misconduct" with the University about the Warmington Article and the intended publication of the Book. A formal complaint ensued. The University carried out some investigations and rejected the complaint of plagiarism. In particular, it told her that its investigations showed that Dr Warmington had prepared his work prior to submission of the complete thesis.
11. The Particulars of Claim set out the Claimant's dissatisfaction with the procedures followed by the University in 2012, including her concerns about an alleged lack of consultation with her. This led to her lodging a complaint on 29 July 2013 with the Office of the Independent Adjudicator ("OIA") about the University's investigation of her original complaint of plagiarism. The complaint submitted to the OIA included the following points:

“My original complaint to the University was an allegation of plagiarism against a member of staff in the School of Education, Dr Paul Warmington. I believe that an article published in the journal, "Race, Ethnicity and Education" authored by him and entitled "A tradition in ceaseless motion: critical race theory and black intellectual spaces", published online in January 2012, bears an extremely close resemblance to the original ideas and work that I had submitted towards my PhD thesis to my supervisors between 2007 - 2011. I also raised an additional concern that Dr Warmington had submitted a book proposal to Routledge publishers which I believe substantively bears an almost identical outline and content to my work related to the black British activism in education the 1960s onwards. ... the theoretical framework, the use of sources and the substantive ideas that appear in the draft thesis and completed thesis that I submitted in December 2011 are almost identical to the article written by Dr Warmington and are outlined in the book proposal submitted by him to Routledge publishers. I've also been previously concerned that original work/draft chapters that I submitted to my supervisors towards my thesis had been reworked by them in two articles that were later published in journals. These include [the Myers and Grosvenor/Myers Articles]. I was not invited to contribute to his articles and my original work, although unpublished, was not acknowledged in the list of references or elsewhere. ... I did not want to and was not able to raise my concerns with my previous supervisors regarding my concerns of the plagiarism of my work ...”

Much of the rest of the complaint related to the procedures adopted by the University in relation to her complaint. In particular, she said:

“It is very problematic that the investigation of my concerns of plagiarism was undertaken at a very simplistic level. Professor Wolff ran the article by Dr Warmington and my submitted thesis through Turnitin. I had not published the work, therefore, the Turnitin tool was not an appropriate tool to undertake an investigation of plagiarism. I had submitted the draft thesis as evidence; this was never evaluated against the article written by Dr Warmington ... This draft thesis and particularly the introductory chapter constituted the substantive evidence for the claim of plagiarism. Turnitin is a tool that can highlight similarities between texts, but its central purpose is to evidence where textual materials have been lifted verbatim with little or no alteration from an original text. Plagiarism that refers to the substantive replication of ideas and sources will require a more sophisticated form of investigation.”

I was not told the result of any investigation undertaken by the OIA, but plainly the Claimant was left unsatisfied with the situation. She pleaded that its investigation was closed in May 2014.

12. The Claimant first contacted the 6th Defendant by email in January 2014. On 29 January 2014 she wrote to the commissioning editor at "Routledge Taylor and Francis" to inform her that she had

"lodged a complaint relating to plagiarism in relation to a book that has been commissioned in the Education Subject area and which is due to be published shortly. The complaint that I have lodged has been ongoing and is currently being reviewed by the Office of the Independent Adjudicator. ...”

The Claimant did not identify the book but asked for information as to the correct procedure to raise a complaint with the publisher. It seems to me that she cannot have

seen the book at that stage, as it had not been published, although the complaint to the OIA suggests that she may have seen a synopsis or book proposal.

13. The Claimant wrote again to the 6th Defendant on 17 February 2014. At that point she identified the Book and also raised concerns regarding the Warmington Article. She explained that she had raised concerns about plagiarism with the University and had filed the complaint with the OIA. She attached a copy of the document she had filed with the OIA. She said "I'm writing to supply you with all of the documents that verify the complaint in order to inform you that this complaint is ongoing and may lead to legal action in the future. This email is therefore formal notification of this possibility." She also sent the 6th Defendant copies of her thesis and the individual chapters submitted to the University.
14. The 6th Defendant's in-house counsel wrote back on 28 February 2014, noting that the University had concluded that she had not established a prima facie case in her complaint of "misattribution" against the Warmington Article and that the matter was in the hands of the OIA. In those circumstances, the publisher said that it intended to await the decision of the OIA. As to the Book, the 6th Defendant said that without details of her allegations, it was not possible to look further into the matter.
15. There was no further correspondence between the Claimant and the 6th Defendant before issue of the claim form in January 2019. On the other hand, it is clear that there was continuing communication between the University and the Claimant at least until January 2019. In particular, by a letter dated 6 August 2018 the University offered to carry out further investigations into the circumstantial evidence surrounding the submission of her material and how (if at all) that was accessed by Dr Warmington. However, the letter stated that the Warmington Article was date-stamped as finished by 16 March 2011 and the book proposal had first been discussed with the 6th Defendant in January 2011, before submission of the thesis, although not before the submission of the individual chapters. It seems that the Claimant did not take the University up on that offer, but continued to threaten proceedings. The Claimant has, therefore, been corresponding about this matter with the Defendants for over 7 years. No limitation point was taken by the Defendants.

Procedural History

16. This claim was issued in the Queen's Bench Division on 15 January 2019. It was served on the 1st to 5th Defendants on 14 May 2019 and on the 6th Defendant on 15 May 2019. The 1st to 5th Defendants filed an acknowledgement of service and then applied for transfer of the claim to the multitrack of the Intellectual Property Enterprise Court. They also sought an extension of time for service of their Defence.
17. The solicitors acting for the 1st to 5th Defendants wrote to the Claimant on 31 May 2019 complaining that the Particulars of Claim were deficient in a number of respects, in particular because she had failed to
 - a. provide copies of the copyright works on which she relied;
 - b. identify with any particularity which parts of her copyright works were alleged to have been copied;
 - c. provide particulars of the contract(s) on which she relied and of the terms which were said to have been breached.

18. An order was made on 24 June 2019 for transfer to the IPEC, and extended time for the 1st to 5th Defendants to file their defence to 23 July 2019. However, on 17 July the 1st to 5th Defendants issued their application to strike out the claim.
19. The solicitors acting for the 6th Defendant had written to the Claimant on 7 June 2019 with a Part 18 Request seeking further information as to the scope of the claim against it, seeking details of the copyright works relied upon and of the alleged acts of copying, as well as details as to the basis of the claim for breach of confidence against the 6th Defendant. No response was received to that letter.
20. The 6th Defendant filed a defence dated 12 June 2019. On 12 July 2019, it applied for an unless order requiring the Claimant to provide a response to the Part 18 Request. The application was served on the Claimant on 23 July 2019 and, on 30 September 2019, after transfer of the matter to the IPEC, HHJ Hacon granted an unless order in the terms sought. The Claimant provided a Response, together with copies of her thesis and the chapters she relied upon, and three tables of alleged similarities between her works and the allegedly infringing works.
21. The applications which were before me were:
 - a. an application by the Claimant to set aside the order transferring the claim to the IPEC,
 - b. an application by the Claimant for initial disclosure by the Defendants in accordance with PD 51U,
 - c. an application to strike out the claim by/as against the 1st to 5th Defendants; and
 - d. an application to strike out the claim by/as against the 6th Defendant.

The Law

22. The application made by the 1st to 5th Defendants is based upon CPR 3.4(2)(a) and/or (c) which provide:

"The court may strike out a statement of case if it appears to the court –

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; ...
- (b) ...
- (c) that there has been a failure to comply with a rule, practice direction or court order.

The application was supported by 2 witness statements of their solicitor, Ms Makin.

23. The application made by the 6th Defendant was based upon CPR 3.4(2)(a) or for summary judgment upon the basis that the Claimant's case has no real prospect of success and there is no other compelling reason why it should be disposed of at trial, pursuant to CPR 24.2. The latter provision provides:

"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

 - (a) it considers that—
 - (i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

The application was supported by a (2nd) witness statement from the 6th Defendant’s solicitor, Mr Yates.

24. There is a considerable overlap between the court's powers under CPR Part 24 and CPR 3.4 (see White Book paragraph 3.4.7) and the court has a discretion to treat an application made under CPR 3.4 (2) (a) as if it were an application under Part 24. In this case, it seems to me that there is no practical distinction in the test to be applied in both applications. Lewison LJ set these out in *Mellor v Partridge* [2013] EWCA Civ 477:

"3 ... Our task is not to decide whether the claimants are right. Our task is to decide which parts of the case (if any) are fit to go to trial. If I may repeat something I have said before (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), approved by this court in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098):

"The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so

affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

25. I also bear in mind that, as explained by Tugendhat J in *Inn Soo Kim v. Youg Geun Park* [2011] EWHC 1781 (QB) at [40]:

"...where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

The strike out applications

26. The Particulars of Claim set out Ms Ukoumunne's case against the University and the 2nd to 4th Defendants in relation to copyright infringement and breach of confidence by referring to the three Articles and the Book and stating at paragraph 22:

"(a) Professor Grosvenor and Dr Myers caused the Claimant's research material to be disclosed to third parties and failed adequately or at all to prevent the confidential material submitted to them from being used by third parties.

(b) Professor Grosvenor and Dr Myers used work that had been submitted to them without the prior knowledge or consent of the Claimant.

(c) Dr Warmington used the Claimant's work in breach of confidentiality.

(d) Dr Warmington, Professor Grosvenor and Dr Myers used a substantial part of the copyright protected materials produced by the Claimant.

(e) Professor Grosvenor, Dr Warmington and Dr Myers failed to attribute or recognise the Claimant's original work in their publications

(f) The First Defendant is vicariously liable for the act of its employees in the infringing activity and failed to take all reasonable steps to prevent the infringing behaviour."

27. The Particulars of Claim went on to describe the contact between the Claimant and the 6th Defendant in 2014, and said:
“37. [The 6th Defendant] failed in their legal responsibility to ensure that the article and book authored by Dr Warmington do not infringe copyright or infringe rights of confidence.
...
39. The publishers have made copies of the articles and book authored by the Second, Third and Fourth Defendants and have caused them to be distributed nationally and internationally.”
28. The 6th Defendant's Part 18 Request sought particulars of the alleged infringement of copyright and in particular asked for identification of the parts of the works alleged to have been copied in the Articles and Book and of the similarities between them and the Claimant's copyright works. It also sought details of the allegations of breach of confidence, such as the basis upon which it was alleged that the 6th Defendant owed the Claimant an obligation of confidence, and identification of the confidential information. As explained, HHJ Hacon made an unless order for provision of a response to the Request, and the Claimant provided her response on 22 October 2019. She provided copies of her works and said in relation to copyright:
- “2. I have alleged that the parts of my work that have been copied are the expression of the idea relating to black activism and the activities of black intellectuals in the field of education in the post-war period. I have provided a list, which is not exhaustive due to the scale of the sources, of the instances of similarities that have been copied.
3. I have attached three documents, for the book and two articles. I have not attached a separate list for the [Myers Article]. The pages of concern to me in that article are pages 812-813 that reference the work that I have undertaken but have failed to attribute my work as a source. The offence is qualitative, rather than qualitative [*sic*] as the thesis explicates an original idea relating to the activism of black intellectuals in British education.”
29. She attached three tables to the Response, relating separately to the two Articles and the Book. She identified 22 points in relation to the Warmington Article, 17 in relation to the Grosvenor/Myers Article and 155 in relation to the Book. The tables contained three columns headed “Similarities,” “Original” or “Original sources” and “Copy.” Some of the rows in the “Copy” column were in fact blank.
30. In relation to confidence, the Claimant said:
- “4. Your client received information that was confidential. They were informed that the copyright to my works had been infringed and as such they may be considered to be in breach of confidence as third-party ...
- 4.3 Your client should have known that it received confidential information, because I informed them that the work was a thesis.”
31. In addition, the Claimant filed a witness statement dated 26 November 2019 in response to the 6th Defendant's application. This set out the history of the matter in some detail, and commented on the Part 18 Response. I comment on certain points raised in it where appropriate below.

32. The full scope of the Claimant's case against the 6th Defendant appeared on the pleadings to extend beyond infringement of copyright and breach of confidence, but she told me at the hearing that she did not make further allegations against it.
33. The position of the 1st to 5th Defendants is not the same as that of the 6th Defendant: much broader allegations on different legal bases are made against at least the 1st Defendant, the allegation of breach of confidence is rather different, and the position of the 5th Defendant requires special consideration. In addition, I bear in mind that no previous unless order has been made in favour of the 1st to 5th Defendants, who base their application to strike out upon the Claimant's failure to plead her case properly, and her continuing failure to provide adequate particulars following correspondence from their solicitors asking for clarification. They say that her position was not adequately clarified by the witness statement dated 23 July 2019 which she filed in response to their strike-out application or by the Part 18 Response, or the documents filed in response to the 6th Defendant's application.

Copyright infringement

34. It does not seem likely that there will be any issue between the parties as to the subsistence of copyright in the Claimant's works, although she was put to proof by the 6th Defendant in its Defence; subsistence and ownership of copyright must be accepted for the purpose of the current applications. The real issue is whether there is an arguable case that there was infringement of her copyrights. The Copyright Designs & Patents Act 1988 (as amended) defines copying as doing that act in relation to a copyright work as a whole or any substantial part of it. The Act is to be construed in conformity with Directive 2001/29, the Information Society Directive. The CJEU has consistently stated that copyright protects the expression of the author's ideas, not the ideas as such. See Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [33] ff., and more recently Case C-683/17 *Cofemel - Sociedade de Vestuario SA v G-Star Raw CV* in which the Court said:

“27 Under Article 2(a) of Directive 2001/29, Member States are required to provide that authors have the exclusive right to authorise or prohibit reproduction of their works.

28 The term 'work' referred to by that provision is also to be found in Article 3(1) and Article 4(1) of Directive 2001/29, on the exclusive rights granted to the author of a work with respect to its communication to the public and its distribution, and in Articles 5, 6 and 7 of that directive, the first of those provisions concerning the exceptions or limitations that may be applied to those exclusive rights, and the latter two provisions concerning the technological measures and information measures that ensure the protection of those exclusive rights.

29 The concept of 'work' that is the subject of all those provisions constitutes, as is clear from the Court's settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exist an original subject matter, in the sense of being the author's own intellectual creation. Second, classification as a work is reserved to the elements that are

the expression of such creation (see, to that effect, judgments of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 37 and 39, and of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899, paragraphs 33 and 35 to 37 and the case-law cited).” (emphasis added)

35. In *Infopaq* the CJEU had held that it is possible for relatively short parts of a longer work to be protected from copying where those parts of themselves form an expression of the author's intellectual creation. The position is helpfully summarised in paragraph 7-11 of Copinger and Skone James on Copyright, 17th ed:
“(1) For the right to be infringed, two elements have to be established, (a) a sufficient degree of objective similarity between the copyright work and the alleged infringing work and (b) that this was the result of the copyright work having been copied, i.e. that there is a causal connection between the two;
(2) The exclusive right relates not only to the entire work but also to any substantial part of it, that is to any part that contains elements that are the expression of the intellectual creation of the author of the work;”
36. A similar comment was made in *Martin v Kogan* [2019] EWCA Civ 1645, [2020] F.S.R. 3 at [34]:
“Copyright, of course, does not subsist in mere ideas, but in their expression. That proposition is a well-established one in English law, and is now also to be found in a number of international treaties and EU Directives: see art.9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) and art.2 of the WIPO Copyright Treaty. The ideas/expression dichotomy has, however, been described as “notoriously slippery” ...”
37. By the Part 18 Response, the Claimant effectively withdrew her allegation of infringement of copyright by the Myers Article, as she complains only of his failure to mention her work. I see that despite her concerns about it she cited the Myers Article at FN 11 to her thesis.
38. The Claimant does not allege copying in terms of the reproduction of a substantial part or parts of the text of her copyright, whether copied verbatim or by paraphrasing her language. She had previously complained that the plagiarism detection tool Turnitin, used in the University’s investigations of her complaint, was not relevant to her complaint because it detects copying of textual material and not the "replication of ideas and sources." The Claimant told me that her case was not one of textual copying, but of rewriting her ideas and using sources which were not necessarily in the public domain, for which she had “joined the dots.” The Claimant also told me that the Book was structured in a similar manner to her thesis, running chronologically from and to the same dates, with chapters roughly covering decades, and with a separate chapter on the position of women towards the end. She said that the overall subject matter of the Book was the same as that of the thesis, that is to say it related to black activists, rather than (as suggested by the title) black British intellectuals.
39. Textual copying is not the only kind of reproduction which may be relevant, for substantial copying of the original collection, selection, arrangement, and structure of literary material may also infringe, as long as that amounts to copying of the expression of the author’s ideas, not simply of the ideas or theories found in the

copyright work. Counsel for the 6th Defendant referred me to *Baigent v Random House Group Ltd* [2007] EWCA Civ 247, [2007] FSR 24, in which the allegation was of infringement by taking the central themes of the Claimants' book, rather than of direct textual copying. The case was decided prior to *Infopaq*, but in my judgment Mummery LJ's comments are nevertheless helpful in this case. At paragraph 124, Mummery LJ enumerated a number of issues likely to arise for decision in a case of alleged infringement of literary copyright, and relied in particular upon these questions:

“(1) What are the similarities between the alleged infringing work and the original copyright work? Unless similarities exist, there is no arguable case of copying and an allegation of infringement should never get as far as legal proceedings, let alone a trial. The 1988 Act confers on the owner the exclusive right “to copy the work” either directly or indirectly (s.16). This is not an exclusive right to prevent the publication of a work on a similar subject or a work which happens to contain similar material, thematic or otherwise.

...

(3) Did the author of the alleged infringing work make some use in his work of material derived by him, directly or indirectly, from the original work?

(4) If the defendant contends that no such use was made, what is his explanation for the similarities between the alleged infringing work and the original copyright work? Are they, for example, coincidental? Or are they explained by the use of similar sources? If the latter, what are the common sources which explain the similarities? How were the sources used by the authors of the respective works?

(5) If, however, use was made of the original copyright work in producing the alleged infringing work, did it amount, in all the circumstances, to “a substantial part” of the original work? The acts restricted by the copyright in a literary work are to the doing of them “in relation to the work as a whole or any substantial part of it”. See s.16(3)(b) of the 1988 Act.

(6) What are the circumstances or factors which justify evaluating the part copied in the alleged infringing work as “a substantial part” of the original copyright work?”

40. Mummery LJ went on:

“145. It is more sensible to ask whether there exist in this case the necessary and sufficient conditions for characterising the parts copied from the original work as “a substantial part” of the original work. The decided cases help in identifying the relevant necessary and sufficient conditions for substantiality. Thus, it is not necessary for the actual language of the copyright work to be copied or even for similar words to be used tracking, like a translation, the language of the copyright work. It is sufficient to establish that there has been substantial copying of the original collection, selection, arrangement, and structure of literary material, even of material that is not in itself the subject of copyright.

146 It is not, however, sufficient for the alleged infringing work simply to replicate or use items of information, facts, ideas, theories, arguments, themes and so on derived from the original copyright work.

...

155 Of course, it takes time, effort and skill to conduct historical research, to collect materials for a book, to decide what facts are established by the evidence and to formulate arguments, theories, hypotheses, propositions and conclusions. It does not, however, follow, as suggested in the claimants' submissions, that the use of items of information, fact and so on derived from the assembled material is, in itself, "a substantial part" of HBHG simply because it has taken time skill and effort to carry out the necessary research.

156 The literary copyright exists in HBHG by reason of the skill and labour expended by the claimants in the original composition and production of it and the original manner or form of expression of the results of their research. Original expression includes not only the language in which the work is composed but also the original selection, arrangement and compilation of the raw research material. It does not, however, extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about."

41. The points made by the Claimant as to copying of the chronological structure of her thesis in the Book (which are not identified in the Particulars of Claim or the Part 18 Response) did not seem to me to amount to an original selection, arrangement and compilation of the raw research material. The structure seems to me to be banal, and adds nothing to her copyright claim.
42. The more significant aspects of alleged copying were to be found in the numerous examples given in the tables annexed to the Part 18 Response. Counsel for the 6th Defendant had colour-coded those tables, categorising each of the elements alleged to have been copied as falling into three categories: references to sources, references to names or descriptions of individuals, organisations or events, and references to ideas or themes. The Claimant did not accept that this was a fair or accurate categorisation and apart from confirming that there was no allegation of textual copying I did not find that categorisation especially helpful in assessing the merits of the Claimant's allegations of copyright infringement.
43. It seemed to me more relevant to conduct a comparison of the passages identified by the Claimant in her thesis which she said had been infringed by parts of the Articles or Book. Given the large number of instances of alleged copying which she had identified, I invited the Claimant to take some time over the lunch adjournment to choose a reasonable number of her best examples of copying on which to address me. I suggested that 5 or 10 examples would be helpful. In the event, the Claimant addressed me only on these examples:
 - 1) Example 135 in the table relating to the Book read "Black women's intersectional oppressions, triple oppression; gender, race and class." The Claimant invited me to look at pages 231-233 of her draft thesis and compare it to pages 112-113 of the Book. She explained that by "intersectionality" she meant the relationship between gender, race and class which intersect in oppression, and referred to black women being invisible in British academic scholarship. She also referred to black feminist groups such as OWAAD.

The heading on page 112 of the Book is "Gender, race and class: triple oppression" and the passage beneath it describes the 'departures' made by OWAAD and other black British feminists. There is also mention of the concept of triple oppression by gender, race and class. These themes appear to me to be expanded upon in the ensuing sections of the Book.

There is therefore similarity of subject matter between the passage in the thesis and this section of the Book. Both refer to some of the same sources. However, this does not strike me as surprising or necessarily as indicative of copying, given the subject matter of both works, and both authors' interests, as well as Dr Warmington's academic role. The way in which the Claimant and Dr Warmington approached the subject appears to me to have been individual and there is nothing which raises concerns of copying or which in my view reproduces the Claimant's expression of the subject matter.

- 2) The next example chosen by the Claimant was Example 136 in the table relating to the Book. This read "Color-blind white feminism and critique of white feminism by black women." The Claimant relied on pages 241-244 of her draft thesis and (again) pages 112-113 of the Book.

At page 241, the Claimant wrote that she wished to explore the manner in which colonialist ideas of the black family became embedded in post-war British education policy, with particular reference to the Moynihan Report, and to white feminists ignoring the impact of racism on the black family.

Again, there is some similarity between this and pages 112-3 of the Book, in terms of their reference to what Dr Warmington calls the pathologization of black families in the education system, and the differences between black and white feminists. Both the Claimant and Dr Warmington refer to the arguments of Hazel Carby, who Dr Warmington describes as having made one of the most influential black British feminist statements in a book from 1982.

Again, those similarities do not strike me as surprising or as indicative of copying, especially as I see even less similarity between this passage of the draft thesis and the Book.

- 3) Thirdly, the Claimant took me example No 35 in her table, described as "Highlighting thematic debates and issues within each time period organised by chapter" allegedly copied from two of the Claimant's draft chapters "ILEA policy documents Education Policy and Pedagogic interventions" and "Education Policy and Pedagogic intervention 1970s and 1980s." The Claimant told me that her work was based upon ILEA documents she had viewed in the archive of the Institute of Education, and this was copied in Dr Warmington's references to the ILEA at pages 76-77 of the Book. Certainly, the first of the Claimant's chapters and pages 76-77 of the Book both discuss ILEA policy and reports, but again this does not strike me as indicative of copying, in context, nor do I discern any closer similarity in terms of the selection, arrangement and compilation of the research materials used by the Claimant, which could possibly be said to amount to the reproduction of the expression of the Claimant's ideas.
- 4) Lastly, the Claimant pointed me to her use of the term "activist/ intellectuals" at page 17 of her thesis. She said that the term was also used by Dr Warmington at page 56 of the Book (in the form "activist intellectuals") and that this indicated copying.

44. In my judgment, none of the examples chosen by the Claimant at the hearing raises a *prima facie* case of copyright infringement. Each of the passages in the Book strikes me as very different in their content and approach from the identified parts of the Claimant's works. The authors emphasise different sources. Use (if any) by the Defendants of any of the information, facts, ideas, theories propounded by the Claimant in her works would not (as explained in *Baigent*) have sufficed to infringe her copyright. Dr Warmington was not the Claimant's supervisor, but might, I assume, have had access to her work if he had been given access to it by her supervisor(s). However, nothing in the passages I have discussed leads me to think that Dr Warmington copied the thesis, or the earlier chapters submitted by the Claimant, whether in terms of ideas, theories or sources, or the Claimant's original selection, arrangement and compilation of the raw research material, nor can I discern any copying of her original expression of any of those subjects.
45. Where the instances of copying identified in her Part 18 Response related to an idea or a theme (according to the 6th Defendant at least) it was not clear to me that it emanated from the Claimant (as opposed to from one of the numerous sources she cited) nor could I discern any evidence of copying of any ideas or themes. In her witness statement of 26 November, the Claimant said "The constituent parts ... may not in themselves be protectable in law. However, the substantive theme, that is clearly evidenced and elaborated through the chapters and thesis is eligible for copyright protection." Unfortunately, I cannot see that the Claimant has identified her "substantive theme" nor is it clear to me that there is a *theme* which is eligible for copyright protection. In my view none of the documents submitted by the Claimant suggest copying of the theme of her work. In my judgment, the level of similarity between the Claimant's works and the Book is not indicative or probative of copying. The similarities do not appear to me even to indicate that Dr Warmington had used "items of information, facts, ideas, theories, arguments, themes and so on" derived from the Claimant's works.
46. As for the sole identified example of alleged textual copying, whilst Dr Warmington does refer to influences amongst "activist intellectuals" the suggestion that this shows that there has been copyright infringement strikes me as unrealistic. Even if (and there was no evidence to this effect) the phrase was coined by the Claimant, it seems to me of little inherent originality, and Dr Warmington could have come up with it independently. In the absence of any other, more substantial evidence of copying, this single example does not strike me as indicative of copying, still less of copying of a substantial part of the Claimant's works. It does not, in my view, amount to reproduction of a substantial part of any of the Claimant's works, or the expression of the Claimant's intellectual creation.
47. For the sake of completeness, and especially as the Claimant was unrepresented, I have looked at a number of further examples of alleged copying identified by the Claimant in her Part 18 Response in respect of the Warmington and Grosvenor/Myers Articles. I found some of the examples hard to trace through in the documents, in some cases because the references in the Part 18 Response are inaccurate, but more generally because I did not find the sources or ideas identified by the Claimant plainly or directly reproduced in the alleged copy. In some cases, I could see no resemblance. At the highest, the examples I looked at referred to some of the same people, writers or sources, or the same sociological or educational theories or trends. None of the

examples appeared to me to reflect copying of the Claimant's selection, arrangement, compilation or indeed treatment of any research material. I could not discern any copying of her expression of this material.

48. In my view the Claimant has provided no evidence of copying or reproduction of a substantial part of any of her works. I am very conscious of the fact that I have no evidence before me from any of the 1st to 5th Defendants explaining the derivation of the Articles and the Book. Nevertheless, looking at the examples of alleged plagiarism, it did not seem to me that there was any evidence that any of the Defendants made use of material derived either directly or indirectly from the Claimant's works. I am certainly not persuaded that Dr Warmington must have had access to the Claimant's works. There is in my judgment far from a sufficient degree of objective similarity between the Claimant's works and the Articles and the Book to suggest that there was any copying.
49. As a litigant in person, I appreciate that the Claimant may have had difficulty in formulating her case on copyright infringement. However, she has had several years to analyse the ways in which she considers that her works have been copied, and was able to produce in her Part 18 Response a significant number of examples which she considered indicated that her copyright had been infringed. She has had an opportunity of clarifying her case and produced lengthy tables of similarities. Even if those were not complete, doubtless the Claimant will have chosen her best examples of similarity or copying. There is no reason to believe that she will be in a position to improve her case if given more time or the opportunity to amend, as she suggested in her witness statement of 26 November. In my judgment, this would simply delay the inevitable, whilst running up further costs, and that would be unfair to the Defendants, who have been dealing with this claim, on and off, for years.
50. In the circumstances, it does not seem to me that this is a case which ought to go to trial so that the allegations of copyright infringement can be further investigated. I am satisfied that all the evidence was before me which was necessary for the proper determination of the question of whether the Claimant has a real prospect of succeeding in her copyright infringement claim. For the reasons given above, I conclude that she has not got a real prospect of success.
51. The Claimant accepted at the hearing that no allegation of copyright infringement was made against the 5th Defendant. Although no unless order has yet been made in favour of the 1st to 4th Defendants, I can see no merit in permitting the Claimant to amend or provide further information in order to pursue the copyright claim against them. As presently put, the case for copyright infringement does not have a reasonable prospect of success against them or against the 6th Defendant. There was no evidence before me to suggest that there is any realistic prospect that the Claimant will be able to raise a copyright infringement claim in terms which do have a reasonable prospect of success. I will strike out the copyright infringement claim against all of the Defendants.

Breach of confidence

52. The three elements of an action for breach of an equitable obligation of confidence were set out in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, where Megarry J said at p. 419:
- “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.
- ... However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. ...”
53. Hirst J, in *Fraser v Thames TV* [1984] QB 44 said at page 66 that in order to be capable of protection the idea must “have some significant element of originality not already in the realm of public knowledge.” In *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289 at page 374 Laddie J said:
- “It is a commonplace that valuable and novel ideas may be produced by the judicious selection and combination of a number of items which, separately, are in the public domain. No one would suggest that such ideas are incapable of being the subject of an obligation of confidence. But, to adopt Megarry J.'s words, there must be some product of the skill of the human brain. A mere non-selective list of publicly available information should not be treated as confidential even if putting it together involves some time and effort. No relevant skill is employed.”
54. Literary information may be the subject of confidentiality where it is the result of the Claimant’s mental input. In *Fraser v Thames Television* [1984] 1 QB 44 Hirst J said at p. 66 “Unquestionably, of course, the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a significant twist or slant to a well known concept (*Talbot's case*). This is, I think, by analogy, consistent with the statements in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, 65 R.P.C. 203 and *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, that novelty in the industrial field can be derived from the application of human ingenuity to well known concepts.”
55. The information must not only have the necessary element of originality, but must be confidential because it is not public knowledge. Sharing the information with a limited number of persons does not necessarily destroy the confidential nature of the information; whether it amounts to publication destroying confidentiality is a question of degree, see *Associated Newspapers v Prince of Wales* [2007] 3 WLR 222.
56. A duty of confidence arises when confidential information comes to the knowledge of someone who is on notice that the information is confidential or should reasonably have realised upon reasonable grounds that the information was being given to him in

confidence. As Hirst J said in *Fraser (supra)* “Copyright is good against the world generally, whereas confidence only protects against those who receive information or ideas in confidence.” An obligation to treat information as being confidential may also be imposed upon indirect recipients of the confidential information.

57. Potentially, in a case such as this, despite there being no infringement of copyright, because the expression of the Claimant’s ideas has not been reproduced by the Defendants, there may nevertheless have been a breach of confidence. Such a case might be made out if there was unauthorised use by one or more of the Defendants of some identifiable confidential information found in the Claimant’s works.
58. It is clear that the Claimant put a great deal of work into researching and writing the individual chapters in evidence, as well as the complete draft thesis. For that purpose, she made use of many sources, both published works and archived material such as the ILEA documents mentioned above. An extensive bibliography running to some 30 pages is annexed to the draft thesis. She told me that some of those sources were not readily available, but I presume that others could also have accessed them.
59. The Claimant’s case is that the Articles and the Book replicate some of her original research work, ideas and expression, but she has not pleaded any details of what research work has been used, what original ideas are said to have been replicated and (as discussed in relation to the allegations of copyright infringement) no examples of copying of any expressions of her ideas were identified. The 6th Defendant submitted that none of the alleged similarities in the Part 18 Response were identified by the Claimant as being her original ideas, whilst some of them plainly were not ideas but references to individuals, events, etc. or to source materials. The 6th Defendant therefore complained that the Part 18 Response took matters no further in enabling it to understand the basis and scope of the case against it for breach of confidence. It submitted that as a result the Claimant had not complied with the unless order which required her to identify the allegedly confidential information, so that the claim should be struck out against it.
60. Whilst I accept that the Claimant took issue with the manner in which the 6th Defendant categorised the examples in her tables of similarities, I think that the 6th Defendant was right to say that the Part 18 Response identified themes or areas of discussion in the Claimant’s works, together with common sources, rather than details of any original research work or any particular ideas original to her which she maintains were copied by the Defendants. The Response did not, therefore, fully comply with the unless order, as she did not specify which (if any) of her examples she claimed as her confidential information, nor did she explain why any such items were confidential, other than to say that her work was a thesis. On the other hand, as discussed below, the Part 18 Response was supplemented by the Claimant’s witness statement dated 26 November 2019.

Breach of confidence by the 6th Defendant

61. The 6th Defendant submitted that the Claimant had not fixed it with an obligation of confidence prior to publication of the Book because in the correspondence in January and February 2014 she did not assert breach of confidence, or say that any of the material in her thesis was confidential, although by that stage she had seen the

Articles. It claimed not to have been aware of any allegation of breach of confidence until the proceedings were served upon it. All that the Claimant said in her Part 18 Response on this point was that it “should have known that it received confidential information, because I informed them that the work was a thesis.” The Claimant said in her witness statement of 26 November that it would not be unreasonable to expect an academic publisher to know that postgraduate theses are treated in confidence until after examination of the thesis. She added that the 6th Defendant should have been aware that, if the allegations were of infringement of copyright in the thesis, there was likely to be a possibility of unauthorised use of her confidential information. However, the Claimant did not identify any particular part or parts of her works as being original and capable of being her confidential information. It seems to me that she claims that the whole thesis is confidential.

62. It may well be that the 6th Defendant as a specialist publisher might have understood that a PhD thesis would in principle contain original ideas of the candidate, but it seems to me that merely telling an innocent third party in non-specific terms that there has been a complaint of plagiarism, without saying that confidential ideas have been copied, and without identifying those ideas in any way, would not put that third party on notice sufficient to impose a duty of confidence upon it. The fact that the Claimant provided the 6th Defendant with copies of her works in 2014 does not, in my judgment, change the position. Those works are substantial. According to the Claimant’s witness statement dated 23 July 2019, they run to over 2000 pages. Yet in 2014 she did not identify any particular parts of her works which she said were confidential, or any parts of the Book/Articles which she alleged made use of that confidential information, whilst (as I have found) comparing the documents, even when looking at specific passages identified by the Claimant, does not suggest copying. The 6th Defendant might have been put on notice that it was in possession of confidential information by the claim form or Particulars of Claim, but those documents still failed to identify the information and, as I have said, the Part 18 Response did not improve the position. In the circumstances, I conclude that the Claimant still has not put the 6th Defendant on notice of the basis of her claim to confidence such that its continued publication and sale of the Book or Articles might be restrained by the Court.

Breach of confidence by the 1st to 5th Defendants

63. The Claimant accepted at the hearing that she was not alleging breach of confidence by the 5th Defendant. As for the 1st to 4th Defendants, she referred in her witness statement of 26 November to her belief that it is “accepted by academics that student’s academic work is communicated to them with the implicit and shared assumption that the works are communicated in confidence and are communicated with the expectation that the works are considered to be confidential information.” I accept for present purposes that it is arguable that one would expect an academic to treat his student’s work as confidential. An obligation of confidentiality might therefore arise in the case of the 3rd and 4th Defendants, and might equally apply to the University as their employer. By a letter to the Claimant dated 6 August 2018, the University accepted that it had not investigated whether (and if so how) Dr Warmington might have had access to her works, which presumably would have been through the agency of one of her supervisors, and potentially as a result of breach of an obligation of confidence. Had Dr Warmington been supplied with copies of any of

the Claimant's works, it seems to me that it is arguable that he would have received them in circumstances which would have imposed a duty of confidence upon him.

64. However, the existence of an obligation of confidentiality does not mean that the Claimant's work had, in whole or in part(s), the necessary quality of confidence about it to sustain an action for breach of confidence. As one would expect of a thesis referencing earlier works in the field, it seems to me that many points discussed in her work are already in the public domain, and it is not clear to me at this stage whether Claimant will be able to distinguish elements of her works which she would say set out her confidential and original ideas. I do not consider that the Claimant has yet satisfactorily identified the part or parts of her works which she says does/do have that quality.
65. In a letter of November 2012 apparently written to someone at the University, the Claimant said "... the substantive ideas relating to the exploration of the work of black British intellectuals and their contribution to black activism in Britain are my original idea." If that is her "substantive theme" I do not believe that it would, without more, have the necessary quality of confidence.
66. In her witness statement of 26 November, the Claimant pointed to a number of comments in the Articles/Book which she said demonstrated the paucity of earlier works on the subject of her thesis, and she claimed that she had "uncovered a "hidden history" and the substantive theme as illustrated in the extensive work the Claimant produced ... demonstrate a creative expression that is explicated in a fixed form. It requires extensive skill and labour to bring together the extensive sources and to apply creativity of expression to form sources, themes and arguments and produce original elements out of these." I do not doubt the skill and hard work necessary to produce a satisfactory PhD thesis. However, the witness statement still failed to identify which parts of the Claimant's works consisted of original ideas, information or elements or to properly identify the "substantive theme" of the thesis.
67. However, there are two points raised in her witness statement of 26 November 2019 which suggest that she may be able to identify the confidential information upon which she relies, if given a further opportunity to set out her case. First, in paragraphs 60-67 of that witness statement the Claimant referred to statements made in the Articles/Book suggesting that those works were presented as having a degree of originality, in bringing to public attention an exploration of the theme of black activism in education which had previously been overlooked. If that is the same as the Claimant's "substantive theme" those comments perhaps suggest that it – or parts of it – if properly identified, may have the necessary quality of confidence for protection.
68. Secondly, in paragraph 68 of that witness statement the Claimant referred to some comments on her draft thesis provided by Professor Grosvenor, the 3rd Defendant, in a letter or email sent in November 2011 (or possibly in 2012) which the Claimant relies upon as indicating that her thesis did include some elements which might have the necessary quality of confidence. Professor Grosvenor wrote:

"This a very interesting piece of writing and it comes out of a valuable project. The conviction that there are lessons to draw from past experiences of education, and particularly activist forms of education, is a refreshing one. ... In some sections there are *clear new contributions to knowledge* based on

archival or published sources. Taken together the project has the potential to make a substantive contribution to the field of education by bring [*sic*] together, in a new and interdisciplinary fashion, education and postcolonial research. So there is much that is very promising here." (emphasis added)

Professor Grosvenor went on to indicate some areas in which he considered that further work would be required on the thesis.

69. I must decide whether, in these circumstances, it would be right to give the Claimant another chance to set out her case on confidentiality properly. Her failure to do so may stem from her apparent belief that it is for the Defendants to justify their position, and to prove that they did not use her confidential information. If the Claimant is to make out her case of breach of confidence, she must identify the confidential information which she says has been misused. Indeed, she should have realised that was the case in the light of the correspondence from the Defendants' respective solicitors and the Order made by HHJ Hacon. The Claimant has, in my judgment, failed to do that so far in these proceedings. Indeed, strangely, at paragraph 28 of her witness statement of 23 July 2019, the Claimant "categorically" denied that the claims were about the "stealing of her ideas."
70. I have considered carefully whether it would be right to strike out the breach of confidence claim against the 1st to 4th Defendants at this stage. Plainly, I should not make a final decision now if there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge, even if giving the Claimant another opportunity to clarify her case will impose a further burden upon the Defendants. This is the first application by these Defendants, although the Claimant has been given a fair opportunity to identify any confidential elements of her works and I am sure thought that she had done so in her Part 18 Response and her two witness statements. All three of those documents reflect a great deal of work on her part, and expand in some respects upon the Particulars of Claim, but it seems to me that the Claimant concentrated heavily upon answering the questions asked by the Defendants in relation to the copyright claim, and did not understand the need to identify clearly and specifically the confidential information upon which she relies and which she alleges has been used by the Defendants in breach of a duty of confidence towards her.
71. Taking all of these matters into consideration, and bearing in mind my conclusions in relation to the Claimant's claim for breach of contract discussed below, it seems to me that the right course is to permit the Claimant a final opportunity to identify the alleged confidential information properly. She needs to identify the original ideas in her works with sufficient clarity and particularity for it to be possible for the Court to assess whether there is any force in her allegation that the 1st to 4th Defendants made use of those ideas in the Articles/Book. I do not know how many such ideas the Claimant may say have been used, but if they are numerous, it may be that the sensible and proportionate approach would be for her to identify a limited number of her best examples which could, if appropriate, go to trial. Subject to that point, I will make an unless Order for provision of details of the confidential information.
72. As I have already explained, I consider that the claim for breach of confidence against the 6th Defendant as it now stands is devoid of merit and is liable to be struck out. Moreover, as the Articles and the Book have been in the public domain and, more

particularly, available to those in the relevant academic field, for some years, it does not seem to me that the Claimant is likely to be able to obtain an injunction against the 6th Defendant, even if one or more of the other Defendants is found to have misused her confidential information. On the other hand, if the Claimant were to succeed against the 1st to 4th Defendants, I do not think that I can at present exclude the possibility that she might have a claim to some other remedy against the 6th Defendant. It seems to me that it would be unfair to require the 6th Defendant to take an active part in the proceedings until liability is established against one or more of the other Defendants for breach of confidence, at which point the 6th Defendant's position can be reconsidered. I therefore propose to stay the proceedings against the 6th Defendant in respect of the breach of confidence claim, on condition that the 6th Defendant undertakes to be bound by any findings of the Court.

Breach of contract

73. The Claimant's case based upon breach of contract is currently extremely unclear. In paragraph 7 of the Particulars of Claim she mentions a written agreement made with the University when she enrolled for her PhD in 2007. She pleads that the terms of the agreement were set out in the policies, procedures and codes of practice of the University. She then identifies a number of such policies. However, many of these post-date 2007, such as the Student Concerns and Complaints Procedure (2011). The Claimant sets out a number of express or implied terms of that Procedure, without saying which terms are express and which implied. She also refers to provisions relating to research misconduct in the Code of Practice for Staff on Plagiarism, also from 2011. She then pleads that the 2nd to 4th Defendants used her work in breach of those contractual agreements, and that the Defendants, their employees and agents failed to apply the appropriate procedures to her complaint of plagiarism.
74. In a letter of 31 May 2019, the solicitors for the 1st to 5th Defendants asked the Claimant to provide particulars of the contract on which she relied, as well as the terms alleged to have been breached and the acts alleged to breach each such term. In her witness statement of 23 July 2019 responding to the request for particulars of that claim, the Claimant said "The contract on which the Claimant relies upon is a contract that is instituted when a student enrolls for a course of study at a university... not comprised of a single document but is grounded in a range of policies, procedures, statutes and codes of practice that underpin the relationship between the student and the institution and set out the rights, responsibilities and obligations of both parties." She mentioned the Student Complaints and Concerns Procedure and the University's Code of Practice on Research, but gave no further details of any terms relied upon or said to have been breached.
75. Counsel for the 1st to 5th Defendants said that this claim for breach of contract was hopelessly vague and deficient and should be struck out as it does not disclose the case that the Defendants will have to meet at trial. He also pointed out that the Particulars of Claim and witness statement do not suggest that the Claimant entered into a contract with any of the 2nd to 5th Defendants so that the claim against them for breach of contract should be struck out. At the hearing, the Claimant said that she was not alleging breach of contract against the 5th Defendant. I am satisfied that no basis for bringing a claim for breach of contract has been shown against the 2nd to 4th Defendants either, and I do not consider that there is any indication that the Claimant

would be able to formulate an arguable claim against them for breach of contract. That claim should be struck out against them.

76. The position of the University is somewhat different. The Claimant has identified a number of documents which she says are contractual and governed her relationship with the University, but again she appears in her witness statement to have taken the approach that it is for the University to refute her case, rather than to give proper particulars of the case that she says it has to meet. It does not seem to me (as counsel suggested) that at paragraph 30 of her witness statement dated 23 July she restricted the terms on which she relies to those pleaded at paragraphs 7-9 of the Particulars of Claim. It is possible that her claim is wider than that. I accept that as presently pleaded the claim for breach of contract is insufficiently particularised, or, where particulars of an alleged breach of contract are given (e.g. paragraph 29(a) of the Particulars of Claim) they do not obviously match the contractual terms pleaded. Some of the complaints appear to relate to the alleged breach of confidence, so may add nothing to that claim, and others to the manner in which the University processed the Claimant's complaint of plagiarism. The parts of the claim which assert failings in the University's complaints system, or its engagement with the Claimant's complaint to the OIA, appear likely to be outside the jurisdiction of this Court, unless the Claimant can show that they amounted to breach of a contract.
77. Counsel submitted that the Claimant had not made out an arguable case for breach of contract because she had not identified any (or any adequate) loss flowing from any breach. The loss currently pleaded is not clear, but that alone would not, it seems to me, prevent the Claimant from pursuing her claim, even if she can only claim nominal damages for any breach which is established. It remains to be seen whether such a claim would pass the usual cost-benefit analysis applied in IPEC case management.
78. The Claimant has sought to turn the tables on the Defendants, complaining that she requires documentation from them before she is able to plead her case in further detail. I do not consider that she is entitled to an order for disclosure in the terms which she currently seeks, which appears to be to be something of a fishing expedition. It is plain from the Particulars of Claim that she has been able to identify some documents which she says are relevant to her alleged contract with the University. In the circumstances, on balance it seems to me that the Claimant may be able to identify the relevant documents properly, to point to the relevant parts of those documents, and explain how she says the 1st Defendant breached its contractual obligations to her. To some extent, too, the claim for breach of contract is related to the confidence claim. In all the circumstances, despite the time which has already passed, and the inadequacies of the Claimant's existing attempts to reply to the 1st to 5th Defendants' request for particularisation, I consider that it would not be right to strike out this part of her claim against the University at this stage.
79. If the claim for breach of contract is to proceed, she needs to identify all of the contractual documents she relies upon, and if they post-date her enrolment at the University, it seems to me that she needs to explain how they form part of the contract between her and the University. She needs to list all the terms relied upon, and say whether they are express (identifying the relevant parts of the documents) or implied (identifying the basis for implying them into the contract). She needs to explain how the University breached those terms and what damage (if any) that has caused her.

Again, I consider that this is a last chance for the Claimant to plead this part of her case properly and I propose to make an unless Order for proper particularisation of the breach of contract claim.

Professional negligence

80. The claim for negligence is currently inadequately pleaded. The Claimant said at paragraph 8 of the Particulars of Claim that the contract between her and the University placed a common law duty of care on the University “in delivering its educational and pastoral duties.” She did not identify where in any document that duty was set out. Paragraph 49 of the Particulars of Claim sets out some particulars of alleged breaches of “contract/duty/care” relating to the University, such as a complaint that it failed to comply with requests for information from the OIA and sought to withhold information from it. Similarly, in paragraph 55 she complains of the University's failure to provide all relevant documents regarding investigation of the copyright infringement claim when fulfilling her Subject Access Request. Those complaints do not seem to me to amount to allegations of negligence but are part and parcel of the Claimant's claim for breach of contract.
81. In addition, the Claimant did not plead how any duty of care arose on the part of the 3rd, 4th or 5th Defendants, although she alleged at paragraphs 51-2 that each of them “failed to perform to the standards required of them, resulting in damage or loss ...,” and “ ... failed in their professional capacities to exercise due diligence in regard to the duty of care placed upon them.” These allegations are so vague that they give no real idea of what case it is that the 3rd – 5th Defendants have to meet under these heads, quite apart from not giving any basis for saying that those Defendants owed her a duty of care. Undoubtedly, in this respect the Particulars of Claim failed to comply with the requirements of CPR 16.4 to provide a concise statement of the facts relied upon. It does not seem that the Claimant alleges that the 2nd Defendant also owed her a duty of care.
82. The Claimant was again asked by the 1st to 5th Defendants to provide particulars of this claim, and identify any particulars of alleged negligence. However, no clarification of this part of her claim was given in her witness statement of 23 July 2019. The Claimant did not indicate at the hearing that she would be able to plead any additional matters to raise an arguable case of negligence against any of the 2nd to 5th Defendants. To the extent that the pleading raises such a claim against those Defendants, in my view it should be struck out.
83. Equally, I have no reason to think that the Claimant will be able to improve the negligence case currently pleaded against the University. Whilst a duty of care was at least pleaded, it was based on contract, and it is revealing that the particulars given under paragraph 49 are pleaded interchangeably as breaches of contract/duty of care. Nothing in the Claimant's witness statements or in her submissions at the hearing suggested to me that she has more to plead to make out a case of negligence. In those circumstances, it seems to me that this aspect of the claim should be struck out against the First Defendant too.

Racial harassment, bullying and sex discrimination

84. The Claimant referred at paragraph 9 of the Particulars of Claim to the University's policies and procedures relating to bullying, harassment and sex discrimination, saying that this was relevant to the contractual relationship between her and the University. There is nothing else in the Particulars of Claim about any breach of those policies, and the Claimant simply pleaded that all of the facts and evidence were the basis for her claim of racial harassment, bullying and sex discrimination. She did not identify a single example of specific behaviour on the part of any of the Defendants that she said showed bullying, harassment or discrimination.
85. I am satisfied that this claim, as currently pleaded, has no prospect of success. There is nothing in the Particulars of Claim which supports any suggestion that the acts or matters of which the Claimant complains arise out of any harassment, bullying or discrimination of any kind on the part of any of the Defendants. Again, in this respect the Particulars of Claim failed to comply with the requirements of CPR 16.4 to provide a concise statement of the facts relied upon. In her witness statement of 23 July 2019, the Claimant complained that the University had not attempted to make a search of any documents pertaining to sex and race discrimination. She said that in the absence of such documents, it is only possible to infer that the failure of the University to fulfil its contractual obligations to the Claimant is the result of race and sex discrimination. No further clarification was given of the basis of her claim under this head.
86. At the hearing before me, the Claimant did not suggest that she would be able to expand upon these allegations but repeated that the University's failure to follow its procedures led to the discrimination claim. If there is any claim to be made, presumably it would be under one or more sections of the Equality Act 2010, and (as pointed out by Ms Makin in her 1st witness statement) such claims would seem likely to be time-barred, given that the Claimant pleaded procedural failings by the University from about October 2012 to some point in about 2014. Further, it seems to me that the allegations in relation to racial harassment, bullying and sex discrimination are no more than bare assertions, unsupported by any proper particulars. Nothing leads me to believe that the Claimant would, if given the opportunity to amend or provide particulars of this claim, be able to improve her position in this respect. In those circumstances, I will strike out this aspect of the claim.
87. Lastly there is what is pleaded as a claim for loss of earnings. This is misconceived. Any claim to loss must flow from any breach of confidence or breach of contract.

Conclusions

88. I will therefore make an order (in terms to be agreed or discussed):
- a. that unless the Claimant amends her claim for breach of confidence and/or provides proper particulars of her claim, the claims for breach of confidence against the 1st to 4th Defendants and the 6th Defendant shall be struck out forthwith;
 - b. that any surviving claim for breach of confidence against the 6th Defendant shall be stayed;

- c. that unless the Claimant amends her claim for breach of contract and/or provides proper particulars of her claim, the claim for breach of contract against the 1st Defendant shall be struck out forthwith; and
 - d. striking out the claim for breach of contract against the 2nd to 5th Defendants, the claims for infringement of copyright, professional negligence and racial harassment, bullying and sex discrimination, and ‘loss of earnings’ as against all of the Defendants; and (for the avoidance of doubt) all of the claims against the 5th Defendant.
89. The Claimant’s application to return the case to the QBD may need to be considered, if all intellectual property issues are struck out from the case but other issues remain live. I will adjourn it. I will also adjourn her application for initial disclosure, which again may need consideration if the case is taken out of the IPEC.