

Neutral Citation Number: [2019] EWHC 640 (Ch)

CLAIM No.IL-2018-000124

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

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

Date: **21st March 2019**

Before: DEPUTY MASTER HENDERSON

BETWEEN:-

NADIM AL-HASANI

Claimant

-and-

(1) RONALD NETTLER

(2) THE CHANCELLOR, MASTERS AND SCHOLARS OF
THE UNIVERSITY OF OXFORD

Defendants

The Claimant in person, Oliver Isaacs (instructed by Bower & Bailey LLP), counsel for the First Defendant, Zoe Gannon (instructed by Bevan Brittan LLP), counsel for the Second Defendant

Hearing date: **1st November 2018**

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

DEPUTY MASTER HENDERSON

Introduction

1. This is my judgment on 5 applications which were listed for hearing before me at 11.00 on 1st November 2018.
2. In chronological order of their time of issue, the applications were as follows:
 - 2.1. An application notice dated 17th September 2018 by which the Claimant applied under CPR 3.3(5)(a) to set aside a costs order made against him by Chief Master Marsh on 4th September 2018.

- 2.2. An application notice dated 19th September 2018 by which the Claimant applied for permission to amend his Particulars of Claim pursuant to CPR 17.1(1) or (2) in the form of an attached document (“the Proposed Particulars”).
 - 2.3. An application notice dated 24th September 2018 by which the Second Defendant applied for an order striking out all or any of the Claimant’s claims and/or summary judgment against the Claimant.
 - 2.4. An application notice dated 25th September 2018 by which the Claimant applied for summary judgment pursuant to CPR 24.2(ii) against the Defendants.
 - 2.5. An application notice dated 9th October 2018 by which the First Defendant applied for an order striking out all or any of the Claimant’s claims and/or summary judgment against the Claimant.
3. At the hearing, in response to questions from me, the Claimant explained that the only claim which he wished to make in these proceedings was a claim for infringement of copyright. The infringement is alleged to have been effected by the First Defendant publishing as his own name in 1998 and/or 1999 a research paper of the Claimant’s. A major issue in respect of the applications before me is whether the Claimant has a real prospect of establishing that s.32 Limitation Act 1980 applies so as to cause the ordinary 6 year limitation period for claims for infringement of copyright to have started less than 6 years before these proceedings were issued.
 4. A chronology of substantive events with various comments by me is as follows:
 - 4.1. The Claimant studied Arabic at the School of African and Oriental Studies (“SOAS”) in London in the early 1990’s. As part of his degree at SOAS he wrote a research paper (“the research paper”) on Ibn al-‘Arabi’s concept of ontological/universal Mercy. This was entitled “Ibn al-‘Arabi’s Concept of Mercy; the Chapter on Zakariyya”. The Defendants do not admit that the Claimant wrote such a paper, but for the purposes of these applications no real doubt has been thrown on that, and the remainder of this judgment is written on the footing that the Claimant has at least a real prospect of establishing that he wrote such a paper.
 - 4.2. In 1993 the Claimant was offered a place by the Second Defendant to study for a D.Phil in medieval Arabic Philosophy. The Claimant says that the offer was conditional on his obtaining a 2:1 from SOAS and completing the research paper. On that footing, both of these conditions must have been satisfied because the Claimant was accepted on to the D.Phil programme at the Second Defendant.
 - 4.3. Upon the Claimant’s admission to the Second Defendant in 1993, the First Defendant was appointed his academic supervisor.
 - 4.4. The Claimant says that in the first month of his supervision by the First Defendant (so in or about October 1993) the First Defendant asked him for a copy of the research paper. The First Defendant says that he has no recollection of the research paper.
 - 4.5. In 1994 the Claimant was unable to secure funding for the second year of his D.Phil. He asked the Faculty for temporary leave in order to secure funding. His request was granted.

- 4.6. In 1998 the Claimant obtained funding and says that his request to resume with his D.Phil was granted by the Faculty in 1998.
- 4.7. By a letter dated 24th September 1998 the Claimant was accepted on to an M.Phil course in Medieval Arabic Thought at the Second Defendant. The first three sentences of the first paragraph of that letter read (I take this as hearsay evidence from the judgment of Gage J in the proceedings which the Claimant brought against the Second Defendant for judicial review in 2000; bearing in mind that statements in the judgment which are statements of fact are admissible as hearsay evidence but that statements based on the Judge's exercise of his judgment are of no weight as such in these separate proceedings unless they give rise to issue estoppels or arguments as to abuse of process):
- “I am pleased to inform you that the Board of Faculty of Oriental Studies has accepted you for the M.Phil course in Medieval Arabic Thought, under the supervision of Dr Zimmerman, with effect from Michaelmas Term 1998. You will be required to pass a qualifying examination in the course of your first year.”
- 4.8. The Claimant says that “on his return to the Faculty” the First Defendant unexpectedly asked him to consider embarking on a 2 year taught Master's course (M.Phil) in medieval Arabic philosophy. If the Claimant is correct as to this, he must have returned to the Faculty before the 24th September 1998 letter was written. The Defendants agree that in 1998 the Claimant embarked on a 2 year M.Phil course. The First Defendant says that he had no further involvement with the Claimant after 1995. There is therefore a dispute of fact as to whether the First Defendant asked the Claimant to consider embarking on the M.Phil course. The Claimant goes further and alleges that his consent to the change of course was “only procured through duress whereby the First Defendant claimed he could not continue to supervise the Claimant until or unless he first embarked on a 2 year M.Phil course” (paragraph 25 of the Proposed Particulars).
- 4.9. The Claimant says that in 1998 the First Defendant published in his (the First Defendant's) own name, the research paper or part of it as an article in a book for commercial purposes, without permission or authorisation from the Claimant. In his existing particulars of claim the Claimant alleges two publications by the First Defendant of the research paper; one in 1998 and one in 1999. The First Defendant “denies the Claimant's claim in its entirety” (paragraph 1 of his Defence) and “[puts] the Claimant to proof that he has infringed any copyright in the research paper (paragraph 5 of his Defence). The First Defendant does not specifically state whether or not he published the allegedly infringing publications.
- 4.10. The Claimant confirmed acceptance of the 24th September 1998 offer by a letter dated 29th September 1998.
- 4.11. In the judicial review proceedings the Claimant stated that, after the M.Phil course started, his supervisor, Dr Zimmermann, first told him that he would not have to sit a qualifying examination in Arabic, but subsequently during the Trinity Term 1999 told him that he would have to do so. The Michaelmas, Hilary and Trinity terms at Oxford University and at some other educational institutions are the approximate equivalents of, respectively, autumn, spring and summer terms at more modern institutions.

4.12. There were two other students on the M.Phil course. On 10th June 1999 all three sat the examination. The examination was invigilated by Dr Zimmermann and involved translating four passages of text from Arabic into English. One of the passages had not been covered in classes held by Dr Zimmermann. This fact was pointed out to Dr Zimmermann and, in the course of the examination, he provided some other text. At a meeting between the Claimant and Dr Zimmermann on 17th June 1999 Dr Zimmermann told the Claimant that he had failed the examination. There was a dispute about what was said at that meeting and what was said at a subsequent meeting on 24th June 1999. The Claimant states that Dr Zimmermann, in rather unpleasant language, tried to discourage him from continuing his studies on the course.

4.13. The Claimant wrote to Professor Thomson, Director of Studies at the University's Oriental Institute, on 5th July 1999. He asked to be permitted to continue the course without taking any further examination. He complained that the examination of 10th June was fundamentally flawed. He also sought the assistance of the Dean of his college and on 27th July 1999 wrote a letter to the University Proctors.

4.14. As a result of this action and the actions of others involved two things happened. First, the Claimant's papers were re-marked by Professor van Gelder. Again the Claimant was failed. Second, he was invited to take another examination on 24th September 1999. The Claimant sat this examination which was assessed by Professor van Gelder and Professor Jones. Their conclusions are set out first in a letter from Professor van Gelder to Professor Jones dated 27th September 1999. That letter contains the following paragraph:

“It is my impression that compared with the first test there is some improvement. Yet I am not at all certain that the level of Arabic that he displays is sufficient for qualifying for entering on the M.Phil, which is his intention, as I was given to understand. The Grey Book (1998, p.619) speaks of a qualifying examination for the course ‘Medieval Arabic Thought’ which ‘shall be of such a nature as to satisfy the board that the candidate is capable of using Arabic philosophical texts’. Now does the present test of Mr Ahmed function as the qualifying examination mentioned above? Or is it only a preliminary test? I suppose Fritz and Robert Thomson have told me one thing and another about this, but it takes a while for me to let all these rules and regulations sink in. In any case, it seems to me that Mr Ahmed cannot be said to be ‘capable of using Arabic philosophical texts at this stage’.”

4.15. The Claimant was informed that he had failed the second test by a letter dated 7th October 1999. The letter stated that the Claimant had not reached the level of Arabic sufficient for qualifying for entry into the second year of the M.Phil course.

4.16. By a letter dated 20th October 1999 the Claimant wrote to the Senior Proctor, Professor Jenkyns, making a formal complaint about:

“(i) the inadequate preparation which I received from my supervisor for my end of year assessment.

(ii) the improper and unfair assessment on the basis of two informal tests.”

4.17. After some correspondence and a meeting Professor Jenkyns provided a detailed adjudication dated 17th November 1999. Gage J set out the following two paragraphs from that adjudication:

“In sum: The test of 24th September 1999, which was marked by both Professor van Gelder and Professor Jones, appears to me fully satisfactory in academic terms, but is flawed as a qualifying examination under the Examination Decrees and Regulations on other grounds.”

“Having ruled that the Year 1 qualifying examination was flawed, I have instructed the Faculty Board of Oriental Studies to reinstate Mr Ahmed on the Register of Graduate Students, appoint a supervisor, and arrange for a new examination to be set by different examiners. However, I note again that the test of 24 September 1999, assessed by two very experienced Arabists, appears to me fully satisfactory in academic terms, and hope that Mr Ahmed will now take thought about whether this M.Phil course is best suited to his interests and abilities.”

4.18. The reference to “Mr Ahmed” is a reference to the present Claimant who subsequently changed his name to his present name.

4.19. The conclusions in the adjudication were that the examination of 10th June 1999 was flawed because the test was set by the course supervisor, it had not been double marked, and it was not held in accordance with the Examination Decrees and Regulations. So far as the examination on 24th September 1999 is concerned, Professor Jenkyns found that that also was flawed on the ground that: first, the Claimant had asked if it was to be a qualifying examination or an informal test, and that that question had not been answered; secondly, in correspondence it was referred to as an informal test. An informal test does not meet the requirements of the qualifying examination. The other complaints made by the Claimant were rejected.

4.20. Professor Jenkyns subsequently went on to make an adjudication on what was the second part of the complaint. That adjudication is dated 20th December 1999. The passages quoted by Gage J from that adjudication were as follows:

“Mr Ahmed has complained that in Michaelmas Term 1998 he was told by his supervisor that he was not going to sit an examination in the first year of his course, that he was not invited to join grammar classes until Hilary Term 1999, and that his supervisor told him in Trinity Term that he was expected to sit the qualifying examination but did not inform him of the importance of this test in relation to entry to the second year.”

“It appears, therefore, that Mr Ahmed should have been in no doubt that he was required to pass a qualifying examination before the end of his first year; he was indeed explicitly told this in writing before he began the course. Mr Ahmed states in his complaint that he was not informed about the qualifying examination, that it was not made clear to him whether he would be required to sit it, and that he was not informed about its importance in relation to entry to the second year. These claims are unsustainable.”

“However, the Proctors have a concern to seek out and mend problems which extends beyond the boundary of formal complaints, and there remain some

matters into which we shall wish to enquire further. We shall speak to Dr Zimmermann on his return to enquire about the flawed examination conducted in June and to seek his comments on other matters raised by Mr Ahmed.”

- 4.21. At paragraph 23 of his judgment Gage J stated that the upshot of the two adjudications was that the Proctor, Professor Jenkyns, directed that the Claimant sit another examination as a qualifying examination for the second year. Gage J said that the Claimant had rejected that requirement, and by his application for judicial review sought an injunction ordering the University to continue his course without him having to take any further examination.
- 4.22. The appointment of a supervisor directed by Professor Jenkyns in his adjudication dated 17th November 1999 was initially implemented by Professor Van Gelder volunteering to act as the Claimant’s supervisor during December 1999.
- 4.23. In a witness statement made in the County Court proceedings mentioned below, Professor Sir Michael Dummett explained that in February 2000 he was approached by the Claimant who expressed his concern about delays in the appointment of a new supervisor for him. Professor Dummett says that Professor van Gelder was unable to confirm whether he would remain the Claimant’s supervisor. In a letter dated 22nd February 2000 Professor Dummett wrote to the Director of Graduate Studies at the Oriental Institute to express his distress at the Claimant not having a supervisor. Professor Dummett received a response dated 1st March 2000 in which the Director of Graduate Studies stated that he could not enter into any correspondence because the Claimant had initiated legal proceedings against the University.
- 4.24. By his application for judicial review made in the year 2000 the Claimant challenged Professor Jenkyns’ decision that the Claimant should take a qualifying examination before continuing his studies at the University on the M.Phil course. The Claimant sought an injunction ordering the University to continue his course without him having to take any further examination.
- 4.25. The Claimant’s application for judicial review was disposed of by Gage J in a judgment dated 7th November 2000. Gage J rejected the challenge and refused the application. In paragraph 23 of his judgment Gage J recorded that the Claimant had rejected Professor Jenkyns’ requirement that he take a qualifying examination. There is no mention in Gage J’s judgment of the present First Defendant.
- 4.26. In paragraph 30 of the Proposed Particulars the Claimant says that he was “prohibited from continuing with his studies”. It is unclear from the material before me exactly when the Claimant ceased his studies at Oxford University. The implication from the above is that the Claimant ceased his studies at Oxford University at or around the time of Gage J’s judgment of 7th November 2000. In her first witness statement Ms Tschobotko for the Second Defendant says that the Claimant’s student status at the University lapsed in 2001.
- 4.27. In June 2001 the Claimant commenced a claim in the Oxford County Court against the University and Dr Zimmermann alleging discrimination and victimisation on racial grounds. In the statement of facts in the copy of the Weekly Law Report of the appeal in this case ([2003] 1 WLR 995) exhibited to Ms Tschobotko’s second witness statement it is said that the claim form was issued on 22nd December 1999.

Paragraph 1 of Waller LJ's judgment in the report states that the claim was started in June 2001. For present purposes nothing turns on this difference.

- 4.28. The County Court claim came on for trial on 28th March 2002. The trial lasted for some seven days before Judge Playford QC and two assessors appointed by virtue of s.67(4) Race Relations Act 1976. On 22nd April 2002 Judge Playford QC dismissed the claim. The Judge rejected 8 of the Claimant's 9 complaints. He found that in one area only, the failing of the examination or test set in June 1999, there had been discrimination; but he held that in discriminating Dr Zimmermann was not in any way motivated by race.
- 4.29. The Claimant appealed against that judgment seeking a reversal of the judge's finding or a remittance of his claim for a rehearing before a differently constituted tribunal. The appeal was heard by the Court of Appeal on 9th and 10th December 2002. Waller LJ handed down the judgment of the Court of Appeal on 20th December 2002. The appeal is principally concerned with the role of the assessors at the trial and in respect of the Judge's judgment. It appears from the report of the Court of Appeal's judgment that the complaints made by the Claimant in the County Court proceedings were about Dr Zimmermann, the 1999 tests and the University's systems and arrangements. There is no mention in the report of the present First Defendant.
- 4.30. The Court of Appeal held that the Judge had misunderstood the role of the assessors in respect of the preparation of his judgment. Specifically, the assessors did not perform any role in the preparation by the Judge of his judgment, when, as the Court of Appeal held, they should have done. However, the Court of Appeal considered that there was no serious risk that the Claimant had suffered a miscarriage of justice and dismissed the appeal.
- 4.31. On 18th December 2015 the Second Defendant advertised for a fixed term post of Departmental Lecturer in Islamic Studies, in the Oriental Studies Faculty.
- 4.32. The Claimant applied for the post on 3rd February 2016.
- 4.33. On 12th February 2016 the Claimant was informed that his application for the post had not been successful.
- 4.34. On 29th March 2017 the Claimant made a complaint in the Employment Tribunal against the present Second Defendant. His complaint was of discrimination on the grounds of race. The copy of the decision of Employment Judge Gumbiti-Zimuto dated 29th January 2018 exhibited to Ms Tschobotko's second witness statement records that in section 8.2 of the claim form the Claimant stated:
- “I successfully won an appeal against my potential employers as a research student in 2002 for racial discrimination. The university department has refused me employment as a result of my successful litigation against it and has provided false and inaccurate information as to why the employment was refused”.
- 4.35. The statement that the Claimant “successfully won” his 2002 appeal was incorrect. The Claimant's appeal was dismissed. The best gloss that can be put on it from the Claimant's perspective is that the Court of Appeal accepted that the County Court Judge had not made proper use of the assessors and made no order as to costs

except for a Legal Services Commission public funding order. The Claimant's inaccurate description of the result of the appeal was pointed out by the Employment Judge at paragraph 2 of the Decision where he says that the present Second Defendant had pointed out "correctly, that the claimant did not successfully win the appeal as he alleged in his claim form".

- 4.36. The Claimant sought feedback and entered into correspondence with the University. On 26th February 2016 the Claimant sent an email to the Vice Chancellor of the University which concluded with the following passage:

"I have recently applied for a Departmental Lectureship position in the Faculty of Oriental Studies in the field of Islamic Studies, on the assumption that my previous complaints against the Faculty would not prejudice my application. I have only just received a reply indicating that I was unsuccessful in my bid. I have subsequently written back to the Department asking for reasons as to why my application was turned down but I have not yet received a reply. I am deeply concerned about the current situation and worried about the completion of my doctorate. My parents are now very old and it seems they too will not never get to see me completing my doctorate securing my academic future at Oxford."

- 4.37. That passage indicates that as at 26th February 2016 the Claimant had yet to complete his doctorate.

- 4.38. On 12th October 2016, John Fernandes of the Council for Academic Freedom and Academic Standards wrote to the University's Registrar, Professor Mc Kendrick. Paragraph 15 of Employment Judge Gumbiti-Zimuto's decision states that this letter sets out Mr Fernandes's understanding in respect of the background to the Claimant's case. Paragraph 16 of Employment Judge Gumbiti-Zimuto's decision states that in that letter the Claimant made a complaint of plagiarism against his supervisor.

- 4.39. Paragraph 17 of Employment Judge Gumbiti-Zimuto's decision states that on 18th October 2016 the Claimant himself wrote to Professor McKendrick giving further information regarding the allegation of plagiarism. The following quotation from that letter is set out in the decision:

"I regard this matter as extremely serious as the research paper in question forms the basis of both my acceptance by the Faculty as well as my ongoing research at the University. I consider this as theft of my intellectual property and have now reported it as fraud. I only discovered the publication of this paper following my application for a departmental lecturer position at the Faculty of Oriental Studies and which was subsequently turned down on the basis that I did not supply sufficient evidence of research experience."

- 4.40. On 29th March 2017 the Claimant made a complaint in the Employment Tribunal against the present Second Defendant.

- 4.41. On 11th September 2017 the Claimant issued proceedings in the Chancery Division against (1) the current First Defendant and (2) the Faculty of Oriental Studies (of the University of Oxford) ("the First Chancery Proceedings").

- 4.42. By his decision dated 29th January 2018 Employment Judge Gumbiti-Zimuto struck out and dismissed the Claimant's employment tribunal claim on the grounds that it was out of time and that it would not be just and equitable to extend time.
- 4.43. Further to a notice of appeal lodged by the Claimant, the Registrar of the Employment Appeal Tribunal wrote to the Claimant on 29th May 2018 to say that the Claimant's appeal had been referred to HHJ Richardson in whose opinion it disclosed no reasonable grounds for bringing the appeal, and so no further action would be taken on it. The Claimant requested an oral hearing which was due to be heard on 24th September 2018. At paragraph 23 of his statement dated 26th September 2018 the Claimant says that the Employment Appeal Tribunal has now granted him permission to appeal.
- 4.44. On 6th July 2018 the present proceedings were issued.
- 4.45. On 11th July 2018 Master Teverson ordered that the First Chancery Proceedings stand dismissed on the basis that it appeared that the claim had not been served within 4 months of issue on either Defendant.
- 4.46. There is no evidence as to what the Claimant was doing between 2001 and 2016 or as to whether or why he could or could not with reasonable diligence have been able to discover during that period the alleged infringement of his copyright.

Application for adjournment

5. By an email to the court dated 1st November 2018 timed at 10:03 the Claimant applied for an adjournment of the hearing. The Claimant's application for an adjournment was supported by a witness statement made by him dated 1st November 2018, together with a short exhibit. This application was further advanced by oral submissions made by the Claimant at the hearing. I refused the application for an adjournment for the reasons given by me in an oral judgment. In brief summary that was because in my judgment the detriment that the Claimant might suffer through the hearing going ahead while he was not legally represented and pending the outcome of his application for Legal Aid and the inequality of arms as between him as a litigant in person and the Defendants who were both represented by counsel were outweighed by the considerations that he had chosen to start the proceedings without Legal Aid or representation and the prejudice to the Defendants and the court's resources if the hearing, listed as it was for 4 hours, was adjourned at short notice.

Procedural History and Analysis

6. After I had refused his request for an adjournment the Claimant expressed his concern that he was not prepared for his request for an adjournment not to be granted and said that that refusal and the proceedings made him emotional. However, in the event the Claimant articulated his submissions clearly.
7. The Claim Form was originally issued on 4th July 2018. It was amended pursuant to CPR 17.1 and re-issued on 17th July 2018. In her skeleton argument Ms Gannon, counsel for the Second Defendant, suggested that the Claimant had issued two claim forms. That appears not to be the case. The Claimant issued one, then amended it under CPR 17.1 before service. That is apparent on the face of the two versions of the Claim Form in the Hearing Bundle, both of which have the same claim number. The second, that issued or re-issued on 17th July 2018, is endorsed "Pursuant to CPR 17.1(1) Amended Claim

Form”. There were some significant amendments, including: (i) changing the name of the Second Defendant from “Faculty of Oriental Studies” to “The Chancellor, Master and Scholars of the University of Oxford”; and (ii) increasing the amount claimed from £418,000 to £764,260.

8. The Claimant signed a certificate of service on 18th July 2018. The Claimant states by the certificate of service that he served the Claim Form on the Defendants by first class post on 18th July 2018, and that the date of service was 19th July 2018. In fact CPR 6.14 provides that a claim form served within the UK in accordance with Part 6 is deemed to be served on the second business day after completion of the relevant step under CPR 7.5(1). The relevant step under CPR 7.5(1) when service is effected by first class post is the posting the claim form. 18th July 2018 was a Wednesday, so the deemed date of service of the Amended Claim Form was Friday 20th July 2018.
9. In a witness statement made on 15th August 2018 Ms Tschobotko, the solicitor having the day to day conduct of this matter on behalf of the Second Defendant, states that the claim form as served was not a copy of the sealed version and that in breach of CPR 7.8 a response pack was not enclosed with it when it was served. The second of these points was not pursued before me save very indirectly in the skeleton argument of Ms Gannon. Ms Gannon’s skeleton stated that the Second Defendant relied on the statement of Ms Tschobotko filed in support of an application dated 15th August 2018. The application dated 15th August 2018 was an application by the Second Defendant for an unless order that unless the Claimant filed and served an amended claim form and particulars of claim which complied with the relevant requirements of the CPR and Chancery Guide within 14 days, the claim stand struck out and dismissed and, in the alternative, an extension to the period of time for serving the Second Defendant’s Defence. It was the application of 15th August 2018 which led to the costs order of 4th September 2018 which is the subject matter of the Claimant’s application notice dated 17th September 2018.
10. The fact that the claim form as served was not a copy of the sealed version and that in breach of CPR 7.8 a response pack was not enclosed with it when it was served are matters which, in all the circumstances, in my view are of little weight in relation to the matters which I have to decide:
 - 10.1. As regards the failure to serve a sealed copy of the Claim Form: the rules on their face are not clear that it is a sealed copy which is required to be served. CPR 7.2(1) provides that proceedings are started when the court issues a claim form at the request of the claimant. CPR 2.6(1)(a) provides that the court must seal the claim form on issue. CPR 7.5(1) provides that where the claim form is served within the jurisdiction, the claimant must complete the step required by the table set out (e.g. putting in the first class post) before midnight on the calendar day 4 months after the date of issue of the claim form. In my judgment without looking at the authority to the contrary which exists, all these rules at least well arguably indicate that a document may be a “claim form” before as well as after sealing and issue. That argument is supported by reference to paragraph 5.1 of CPR Practice Direction 5.1 which states that proceedings are started when the court issues a claim form at the request of the Claimant (CPR 7.2) but “where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is “brought” for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date. That earlier date is the date the claim form is received by the court office and may be before the date on which the claim form is

sealed. It is only when note 6.2.3 in the White Book or the authorities there referred to are looked at that it becomes clear that when serving by post or otherwise by hardcopy in England and Wales, what is required to be served is a sealed version of the claim form as issued by the court. I consider that a litigant in person is not greatly at fault for not noticing this point. Further, the Second Defendant was not prejudiced in that it filed its acknowledgment of service on 1st August 2018, well within the 14 day period permitted. Ms Tschobotko exhibited a copy of the Claim Form which was served on the Second Defendant. Except that it did not bear the Court's date stamp or seal; this was in the form of the amended claim form which was re-issued on 17th July 2018.

- 10.2. As regards the failure to enclose a response pack: again the Second Defendant does not appear to have been prejudiced. That is because it filed its acknowledgment of service on 1st August 2018, well within the 14 day period permitted. Further, the failure to comply with the CPR 7.8 requirement to serve a response pack does not invalidate the service of the Claim Form. It is a breach of a rule to which CPR 3.10 applies and there was, in my view wisely, no application under that rule to invalidate service on this ground.
11. An acknowledgment of service was filed on behalf of the First Defendant, also on 1st August 2018. Both the First and Second Defendant's acknowledgements of service contained ticks in the box "I intend to defend all of this claim".
12. CPR 7.4(1) provides that particulars of claim must either (a) be contained in or served with the claim form; or (b), subject to CPR 7.4(2), be served on the defendant by the claimant within 14 days after service of the claim form.
13. Ms Gannon submitted in her skeleton argument that the Claimant had failed to serve the particulars of claim on the Second Defendant. In my judgment writing purporting to be the particulars of claim was contained in the Claim Form as required by CPR 7.4((1)(a) and therefore the particular of claim were served with the Claim Form. That is for the following reasons:
 - 13.1. The Amended Claim Form was in Form N1. It comprises a single sheet of A4 with print and handwriting on both sides.
 - 13.2. On the front, after various formal parts, there is a printed heading "Brief details of claim". Under this are some 12 or 13 handwritten lines of text.
 - 13.3. On the back of the Form N1 before it was completed by the Claimant there was a printed heading which read: "Particulars of Claim (attached)(to follow)". This was followed by a blank space which is plainly intended to permit the particulars of claim to be set out there. If particulars of claim were set out there, they would be particulars of claim "contained in" the Claim Form as envisaged by the first option under CPR 7.4(1)(a).
 - 13.4. On the Claim Form served by him the Claimant struck through the printed words "(to follow)", so that the printed heading on the back of the form reads: "Particulars of Claim (attached)(~~to follow~~)". The Claimant has then set out in what had been the blank space below those words some 17 lines of handwritten text which go at least some way to explaining the nature of the Claimant's claim. In my judgment it is apparent from (i) the Claim Form; (ii)

the content of the 17 lines of handwritten text; and (iii) the fact that there was no other document attached to the Claim Form; that the 17 lines of handwritten text were intended to be the particulars of claim, and there can have been no real doubt in the Defendants or their solicitors but that that was what was intended.

- 13.5. If the Claimant had also deleted the word “(attached)” the position would have been crystal clear; but the insertion of the 17 lines of handwritten text; its content, and the absence of any attached document would make no sense unless the 17 lines were intended to be the particulars of claim. Accordingly, in my judgment the Claimant did serve writing purporting to be the particulars of claim in the Claim Form
14. If the 17 lines had been so different from anything capable of being described as particulars of claim, it might be argued that they did not constitute particulars of claim at all. That argument was not advanced before me by counsel for either Defendant. In my judgment they were right not to do so. The particulars of claim may be defective, but they are not so defective as not to merit the description “particulars of claim”. What was argued by the Defendants was that the particulars of claim were defective in both substance and form.
15. The Brief Details of Claim set out on the front page of the amended Claim Form are as follows:

“In 1993 the claimant was admitted by the Faculty of Oriental Studies to complete his doctorate (D.Phil) in Medieval Arabic Philosophy. The Faculty is a division of the Second defendant. This admission was based on the claimant having successfully completed an advanced research paper on the same subject of his D.Phil under supervision from the School of Oriental and African Studies (SOAS) in LONDON. The claimant is the sole author of the research paper and enjoys exclusive copyright as it also forms an integral research component of the claimant’s Honours degree. The First defendant was an employee of the Second defendant and was appointed by the later to supervise the claimant for the completion of his D.Phil. Mr Nettler asked the claimant for a copy of the research paper and in 1998, without permission or acknowledgement, published the contents of the paper in his own name.

Loss of earnings since 1998 are calculated at £38,213 (P.A.) for a Grade 30S Associate Professor and £22,781 for a Faculty Lecturer respectively. The amount claimed is £764,260.00 at the higher rate.”

16. Against “Amount claimed” near the bottom of the front page of the Amended Claim Form and under a “£” sign is written: “764,260.00”.
17. The 17 handwritten lines of the particulars of claim on the back of the Amended Claim Form read:

“The Claimant’s advanced research paper entitled ‘Ibn al. ‘Arabi’s Concept of Mercy; the Chapter on Zakariyya’ was completed under the supervision of Dr. Arthur Irvine, Professor of Classical Arabic at the School of Oriental and African Studies (SOAS) in 1993 and approved by the Faculty of Oriental Studies as the basis for continuous research in the Faculty at D.Phil level.

The first defendant, Mr Nettler published without acknowledgement or permission the claimant's research paper, after requesting a copy, in his own name in Chapter Three of 'Consciousness and Reality: Studies in memory of Toshihiko Izutsu, (Brill, 1999) and in 'Toshihiko Izutsu Memorial Proceedings: Consciousness and Reality Studies in 1998 (Tankoban, Japan, 1998)

These publications of the claimant's research paper were followed by a series of unlawful assessments in 1999 within the Faculty and later approved by the first defendant in sworn affidavit. The unlawful nature of the assessments resulted in the Claimant being deemed 'disqualified' from completion of the Doctorate. The claimant's philosophical beliefs as contained in the research paper and D.Phil proposal are protected under s.10 of the Equality Act 2010. As a result, the claimant is claiming damages in respect of the loss of earnings, copyright infringement and moral prejudice arising from publication and subsequent violations of the claimant's civil and Human Rights aimed at preventing him from pursuing his career in keeping with his religious beliefs."

18. The Claim Form concludes with a statement of truth signed by the Claimant.
19. On 15th August 2018 a Defence was filed on behalf of the First Defendant. This was within the 28 days after service of the Particulars of Claim permitted by CPR 15.4(1)(b) in a case where, as here, the Defendant has filed an acknowledgment of service.
20. The First Defendant's Defence contains a general denial of "the Claimant's claim in its entirety". That general denial is not compliant with the requirements of CPR 16.5 because it does not state the Defendant's reasons for denying the allegations. Further, a denial of each and every allegation would be inconsistent with paragraph 5 of the Defence where the Defendant "for the avoidance of doubt" puts the Claimant to proof as to the existence of any copyright and/or that the First Defendant has infringed any copyright in the Claimant's work.
21. Paragraph 2 of the First Defendant's Defence alleges that the claim should be struck out as an abuse of process on the grounds that the claim is res judicata, and/or subject to an issue estoppel and/or under the rule in *Henderson v Henderson* (1843) 3 Hare 100.
22. Paragraph 3 avers that the claims should be struck out as time-barred under s.2 Limitation Act 1980 and under s.118 Equality Act 2010.
23. In paragraph 4 the First Defendant avers that the claim is wholly inadequately particularised; that he is unable to plead to it and that it should be struck out.
24. In paragraph 5 the First Defendant "puts the Claimant to proof as to the existence of any copyright and/or that the First Defendant has infringed any copyright in "Ibn al Arabi's Concept of Mercy: the Chapter on Zakariyya."
25. In sub-paragraph 5(a) of the First Defendant's Defence the First Defendant states that he was the Claimant's supervisor for the academic year 1993 – 1994 and officially for 1994-1995 despite what he alleges were "the Claimant's significant absences" in the latter year. The First Defendant says that he has "a recollection that the Claimant struggled academically and decided to withdraw from his D.Phil course". He says that he had no further involvement with the Claimant after 1995.

26. In sub-paragraph 5(b) of the First Defendant's Defence the First Defendant states that he believes that the Claimant returned to academic study in the year 1998 – 1999 and entered the M.Phil course in Arabic Philosophy.
27. In sub-paragraph 5(c) of the First Defendant's Defence the First Defendant states that he did not teach the Claimant during that time and had no involvement in any assessment in 1998/1999, nor any knowledge as to what are referred to as the "unlawful assessments".
28. In sub-paragraph 5(d) of the First Defendant's Defence the First Defendant states that he has no knowledge of any "disqualification", was not on any panel to consider disqualification and did not therefore determine that the Claimant should be removed from the D.Phil course. The Claimant does not suggest that he was removed from the D.Phil course. He alleges that the First Defendant by duress and undue influence caused him to stop his D.Phil course while he took the 2 year M.Phil course. He alleges that he was disqualified from and not permitted to continue the M.Phil course.
29. In sub-paragraph 5(e) of the First Defendant's Defence the First Defendant denies that any loss claimed is recoverable as a matter of law. He says that he has no knowledge of how it is alleged that any breach prevented the Claimant from pursuing his career in keeping with his religious beliefs.
30. In paragraph 6 of the First Defendant's Defence the First Defendant alleges that the Equality Act 2010 claim is misconceived and not understood.
31. On 15th August 2018, by the application notice of that date mentioned above, the Second Defendant applied for an unless order that unless the Claimant filed and served an amended claim form and particulars of claim which complied with the relevant requirements of the CPR and Chancery Guide within 14 days, the claim stand struck out and dismissed and, in the alternative, an extension to the period of time for serving the Second Defendant's Defence. The box on the N244 application notice indicating that the Second Defendant wanted the application dealt with without a hearing had been ticked.
32. A Schedule of Costs was filed with the application dated 15th August 2018. This specified £1,422.72, comprising £1,185.60 plus VAT £237.14 as the amount which did not exceed the costs of the application for which the Second Defendant was liable. The work done was described as: "Work done on Documents". "4.8 hours at hourly rate of £247 preparing the application, including work on application notice, draft order and statement." A point which I did not notice when pre-reading or during the hearing is that the statement of costs is signed "Bevan Brittan LLP", not by a partner or person having control and management of the partnership business as required by CPR 44PD1.2, 44PD 9.5(3) and 22PD3.10.
33. The Second Defendant's application notice dated 15th August 2018 was supported by the witness statement of Ms Tschobotko made on 15th August 2018 mentioned above. In this statement Ms Tschobotko describes briefly the various sets of previous proceedings which I have explained above and identifies what she says were the failures by the Claimant to comply with the CPR and the Chancery Guide.
34. The complaints made by Ms Tschobotko in her witness statement of 15th August 2018 as to what she says were the failures by the Claimant to comply with the CPR and the Chancery Guide were:

- 34.1. The service of an unsealed copy of the claim form. I have dealt with this above. In the circumstances I do not consider that this was a serious or significant breach of the rules.
 - 34.2. The non-attachment of the particulars of claim. I have dealt with this above. I consider that the particulars of claim were contained in the claim form.
 - 34.3. In breach of CPR 16.2(a) the claim form did not contain a statement of the nature of the claim made against the Second Defendant.
 - 34.4. In breach of CPR 16.2(b) the claim form did not specify the remedy which the claimant sought. Specifically, it did not explain the basis on which the £764,260.00 was claimed or what proportion of it was claimed in respect of each Defendant.
35. On 17th August 2018 a Defence Form was filed on behalf of the Second Defendant. This was filed at 12.30 pm and so just within the 28 days after service of the Particulars of Claim permitted by CPR 15.4(1)(b) for the service of a Defence. There was no attempt by the Defence Form to comply with the requirements of CPR 16.5(1) as to which of the allegations the Second Defendant denied; which it was unable to admit or deny and which it admitted. The Defence merely alleges, with some particulars of the alleged defects and non-compliance, that the claim form and particulars of claim are “entirely defective and non-compliant with the CPR and Chancery Guide.”
36. There is no evidence before me one way or the other as to whether the Second Defendant’s application notice dated 15th August 2018 was served on the Claimant.
37. Chief Master Marsh made the order dated 3rd September 2018 on the Second Defendant’s application dated 15th August 2018, part of which is the subject matter of the Claimant’s application notice dated 17th September 2018.
38. The order dated 3rd September 2018 recited the application of the Second Defendant; the reading of the witness statement of Ms Tschobotko and the making of the order without a hearing. The operative parts of the order were as follows:
- 38.1. “1. The Second Defendant, having filed a defence on 15 August 2018 taking asserting that the claim is defective, shall file and serve by 4pm on 24 September either its amended defence or an application to strike out the claim.
 - 38.2. 2. The Claimant must pay the Second Defendant’s costs of and occasioned by the Second Defendant’s application dated 15 August 2018 summarily assessed in the sum of £1,200.
 - 38.3. 3. This order shall be served by the Second Defendant on the Claimant and the First Defendant.”
39. By his application notice dated 17th September 2018 the Claimant applied under CPR 3.3(5)(a) to set aside the costs order of 4th September 2018. The application notice is supported by a statement of truth and states that the order of 4th September 2018 was received by the Claimant by recorded post on 15th September 2018.
40. By his application notice dated 19th September 2018 and issued on that date, the Claimant applied for permission to amend his statement of case pursuant to CPR 17.1(1) or (2). On

the footing that the claim form and particulars of claim had been served, as held by me above, the reference to CPR 17.1(1) was misconceived. That is because that sub-rule only permits amendment of a statement of case at a time before it has been served on any other party. CPR 17.1(2)(b) is in point because, where a statement of case has been served, it may be amended with the permission of the court.

41. The application notice dated 19th September 2018 stated that it should be served on the Defendants. It stated that the amended Statement of Case was attached. Unfortunately neither the application notice nor the draft amended statement of case were served on the Defendants. It was apparent from my pre-reading that this might be the case. I printed copies of the application notice and of the Claimant's document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant]" ("the Proposed Particulars") and provided them to the Defendants' counsel. The Defendants' counsel were able to read these documents over the lunchtime adjournment. Having done so, they then, in accordance with the parties' duty under CPR 1.3 to help the court to further the overriding objective, withdrew their objections to my having regard to those documents, thereby enabling me to deal at the hearing and in this judgment with the substance of all five of the application notices which had been listed.
42. The document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant]" is in substance a composite document. The first 7 paragraphs comprise evidence and argument as to why the Claimant should be given permission to amend his Particulars of Claim. There then follows the heading "Amendments". Paragraphs 8 to 40 are recognisably particulars of a claim, albeit that, as I explain further below, parts of them plead evidence and parts of them are irrelevant or misconceived or potentially abuses of process. Paragraphs 41 to 48 are in the nature of a reply to the First and Second Defendants' Defences. Paragraphs 49 and 50 at first sight appear to raise a claim of unjust enrichment against the First Defendant. The last paragraph, paragraph 51, is a request to the court to allow the amended statement of case.
43. The document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant]" concludes with the words "Statement of Truth", the Claimant's signature and the words: "Signed: Nadim Ahmad Al-Hasani". This does not comply with the requirement of CPR 22PD 2.1 that the form of the statement of truth verifying a statement of case should be in the form: "I believe that the facts stated in this [document] are true". Nor does it comply with the requirement of CPR 22PD 2.2 that the form of the statement of truth verifying a witness statement should be in the form: "I believe that the facts stated in this witness statement are true." The fact that the Claimant has signed under the words "Statement of Truth" implies to me that he intended to confirm the truth of the contents of the facts stated in the document, and I construe it in that way. CPR 3.10(a) provides that where there has been an error of procedure such as a failure to comply with a rule or practice direction, the error does not invalidate any step taken in the proceedings unless the court so orders. If I had not construed the document as including a confirmation of the truth of the case stated in it, CPR 3.10(a) would not have been greatly in point because there would not merely have been an error of procedure, but there would have been a substantive failure to confirm the truth of the facts. For the purposes of this judgment I proceed on the basis that this was a properly endorsed witness statement.
44. By an email dated 20th September 2018 the Claimant sent Ms Tschobotko a copy of a Notice of Hearing for 27th September 2018 in respect of the Claimant's applications dated 17th and 19th September 2018.

45. By an email dated 21st September 2018 Ms Tschobotko informed the Claimant that the Second Defendant was intending to issue an application. She attached a copy of the unissued application, draft order, grounds and a further statement in respect of the same. Ms Tschobotko pointed out that the time estimate for the Second Defendant's application was 4 hours. She asked for the Claimant's agreement and proposed that "the application" due to be heard on 27th September 2018 be adjourned to be heard with the Second Defendant's proposed application.
46. Ms Tschobotko sent the Claimant a reminder on 24th September by email timed at 11:24. At 15:27 on the same day she sent the Claimant a copy of the Second Defendant's application dated 24th September 2018 for summary judgment and/or strike out and accompanying judgment.
47. On 24th September 2018 at 15:34 the Claimant sent Ms Tschobotko an email asking her to "note" that he had already submitted his amended statement of case to the court and would be serving the Second Defendant with it as soon as he returned home.
48. 24th September 2018 is the date on the application notice issued by the Second Defendant seeking strike out and/or summary judgment on the ground that the Claimant's claims disclosed no reasonable grounds, are an abuse of the court's process or that he is in breach of a rule or practice directions or that the Claimant has no real prospect of success and there is no other compelling reason why the case should be disposed of at a trial.
49. The Second Defendant's application dated 24th September 2018 is supported by a second witness statement of Ms Tschobotko. This statement is concerned with past proceedings and the "unlawful assessments" referred to by the Claimant in his claim form.
50. Neither the Second Defendant's application notice dated 24th September 2018 nor the witness statement in support contain the statement which is required by CPR 24PD 2(3)(b) if the applicant is going to maintain a case that the evidence, as opposed to a point of law or provision in a document, means that the claimant has no real prospect of succeeding. The statement required under CPR 24PD 2(3)(b) is a statement that the application is made "because the applicant believes that on the evidence the respondent (in this case the Claimant) has no real prospect of succeeding" on the claim. This is a material omission, because the relevant evidence which has been filed by the parties is very sparse. The omission of the statement gives rise to a suspicion that there might be relevant evidence which is not before the court.
51. With the Second Defendant's application notice in the hearing bundle is a copy of a 3 ½ page document settled by the Second Defendant's counsel which identifies concisely various points of law or provisions in documents on which the applicant relies as required by CPR 24PD 2(3)(a). These Grounds appear to have been served with the application notice. In the First Defendant's statement dated 9th October 2018 he refers to and exhibits the document as "Grounds". In my judgment whether these "Grounds" were incorporated in the application notice is not of great importance. That is because they were undoubtedly served and the points of law relied upon can be dealt with equally well under the strike out element of the application, to which CPR 24 PD 2(3)(a) does not apply.
52. The Grounds are not supported by a statement of truth on behalf of the Second Defendant. Insofar as they raise points of law or refer to provisions in documents that does not matter, but insofar as they contain allegations of fact which are not repeated elsewhere the lack of a statement of truth means that I can attach no more weight to them as statements

of fact than I could to submissions of counsel on instructions. However, as I explain below, on the applications before me, broadly, I cannot properly attempt to effect anything like a fine weighing of the strength or otherwise of statements that are not corroborated or contradicted by clear documentary evidence. The statements of fact in the Grounds are partly endorsed by the First Defendant in that in his statement dated 9th October 2018 in support of his application for strike out and/or summary judgment he says that he endorses the factual contents of the Grounds “insofar as they are known” to him. The problem with that statement is that it does not identify which of the factual contents are known to him; though it is apparent from their subject matter that certain of them must or are likely to have been known to him.

53. In paragraph 4 of the Grounds under the heading “Claims for breach of copyright” it is asserted that the Second Defendant has no knowledge of whether the Claimant authored the research paper in 1993 or whether he gave a copy of it to the First Defendant. It is asserted that given the passage of time, there is no plausible way of investigating or defending this allegation. I am not convinced by this assertion. A comparison of the Claimant’s research paper with the allegedly infringing publications might well enable conclusions to be drawn as to whether there had been copying. Paragraph 4 of the Grounds then asserts that the claim is some 12 years out of time.
54. Paragraphs 5 and 6, 7 and 8 of the Grounds deal respectively under the appropriate headings with “Claims under Human Rights Act 1998”; “Claims under the Equality Act 2010” and “Unlawful Assessments”. The Claimant told me that he was only claiming for infringement of copyright in these proceedings, so there is no need for me to consider at any length the claims under these headings as possible causes of action. I consider them in that regard very briefly here. The claims under the Human Rights Act and the Equality Act are bare assertions and do not disclose a cause of action. They are claims which are so closely related to the claims made in the earlier proceedings described above that they ought to have been made, if at all, in those proceedings and it may well be an abuse of process for them to be made in the present proceedings. In any event they would be time-barred. If the Claimant had sought to pursue them I would have struck them out.
55. The Claimant continues to seek to rely upon the Human Rights Act and Equality Act claims and “unlawful assessments” not because he is advancing a cause of action based on them in these proceedings but because, as I understand it, he considers that they are relevant to his case that s.32 Limitation Act 1980 operates to postpone the start date for the period of limitation applicable to his claim for infringement of copyright.
56. On 25th September 2018 the Claimant issued an application for summary judgment. The application was issued pursuant to CPR 24.2(ii) on the ground that the defendant has no real prospect of successfully defending the claim. The application appears to be aimed at the Second Defendant. The statement in support in the application notice reads:

“It is clear, upon reading the witness statement of Ms Tschobotko representing the Second Defendant and pursuant to CPR Rule 24.2(ii) that the defendant has no real prospect of successfully defending the claim. It is clear enough that the Second Defendant is in breach of a Court of Appeal ruling in respect of the claimant and that by defending this claim has failed to accept the Court’s ruling. In these circumstances and the public sector duty on the Second Defendant to accept, the claimant cannot see how the Second Defendant would be in a position to successfully defend the claim.”

57. There was no ruling of the Court of Appeal for the Second Defendant to be in breach of. The Court of appeal dismissed the Claimant's appeal.
58. The Claimant's application of 25th September 2018 was supported by a witness statement of the Claimant's dated 26th September 2018. This does not comply with the requirement of CPR 22PD 2.2 that the form of the statement of truth verifying a witness statement should be in the form: "I believe that the facts stated in this witness statement are true.". The fact that the Claimant has or has caused the words "STATEMENT OF TRUTH" to be printed on the statement implies to me that he intended to confirm the truth of the contents of the statement. CPR 3.10 was not referred to in this context during the hearing but, in my view the error in failing to comply with the CPR 22PD 2.2 requirement does not invalidate the step taken, and if necessary I would be prepared to waive the irregularity. For the purposes of this judgment I proceed on the basis that this was a properly endorsed witness statement.
59. The Claimant's statement dated 26th September 2018 is made not only in support of his application for summary judgment, but also in opposition to the Second Defendant's application for strike out and/or summary judgment.
60. In his statement dated 26th September 2018 the Claimant takes issue with Ms Tschobotko on a number of points as to the past litigation between him and the University; as to the process which he was subject to by way of examination and as to the Equality Act; rights under the European Convention of Human Rights; breach of fiduciary duty; and unjust enrichment. Paragraphs 28, 29, 31 and, possibly, 39 of this statement contain an important claim by the Claimant to rely on s.32 Limitation Act 1980. I return to this below. Paragraph 30 refers to s.123(3) Equality Act 2010. S.123 Equality Act 2010 is concerned with the extension of time by the employment tribunal of periods for making complaints under that Act.
61. On 26th September 2018, by letters to the court, the Claimant and Ms Tschobotko agreed that the hearing listed for 27th September 2018 should be adjourned. This was done and the applications were re-listed for hearing on 1st November 2018 with a time estimate of 4 hours.
62. On 2nd October 2018 timed at 19:43 Ms Tschobotko sent the Claimant an email asking him for a copy of his amended statement of case/particulars of claim and asking him to confirm that he had obtained the Court's permission to rely on it. Ms Tschobotko repeated these requests in an email to the Claimant dated 8th October 2018.
63. On 9th October 2018 the First Defendant issued his application for strike out or summary judgment. The application notice was in substantially the same form as the Second Defendant's application notice dated 25th September 2018. The information which the form stated that the First Defendant would be relying on in support of his application were (i) his attached witness statement and (ii) the statement of case.
64. The witness statement in support of the First Defendant's application notice is a statement made by the First Defendant himself dated 9th October 2018. In paragraph 3 of his statement the First Defendant states that he has reviewed "the Application Notice, Witness Statement of [Ms Tschobotko] (with exhibits) and the Grounds for the Second Defendant's strike out/summary judgment Application". In paragraph 4 the First Defendant says that he endorses the factual contents so far as they are known to him and repeats the terms of his Defence. In the first sentence of paragraph 5 the First Defendant

states that he exhibits “the aforementioned documents” as RLN1. These include the “Grounds”. In the second sentence of paragraph 5 he says:

“I reiterate that I vehemently and categorically deny any wrongdoing whatsoever”

65. The Claimant sent an email to Ms Tschobotko on 9th October 2018 timed at 16:21. In this the Claimant thanked Ms Tschobotko for her email (that of 2nd October 2018) and stated:

“The Court has only today confirmed and approved the amended statement of case/particulars. Consequently, I will send you a copy shortly.”

The statement that the court had approved the amended statement of case/particulars was untrue. The issue of whether the amended particulars should be approved was the issue raised by the Claimant’s application notice dated 19th September 2018 and is one of the issues which I have to determine. The Claimant did not explain why this untrue statement was made.

66. On 18th October 2018 Ms Tschobotko sent an email to the Claimant asking him for a copy of the amended statement of case/particulars, and any associated court order. She also sent a draft index for the hearing bundle and invited the Claimant’s comments on that by 22nd October 2018.

67. On 22nd October 2018 timed at 15:00 the Claimant sent an email to Ms Tschobotko. He said that he was still in the process of obtaining legal advice from a firm of solicitors “in relation to my legal matter and in relation to the representation of this claim.” He said that once that process was completed he would instruct the firm to send a copy of his amended statement of case immediately.

68. On 23rd October 2018 timed at 16:29 Ms Tschobotko sent an email to the Claimant. She asked the Claimant to confirm whether the court had granted him permission to rely on an amended statement of case. She asked him, if so, to provide a copy of the court order and the amended statement of case “immediately”.

69. On 23rd October 2018 timed at 16:50 the Claimant sent an email to Ms Tschobotko. The Claimant said that he could confirm that the court had granted permission to amend the statement of case. This remained untrue. Otherwise the email repeated what was said in the email of 22nd October 2018.

70. At the hearing, in response to questions from me, the Claimant explained that the only claim which he wished to make in these proceedings was a claim for breach of copyright. He also explained that his complaint was that the First Defendant had taken and made use of his ideas about Ibn al-Arabi’s concept of mercy as set out in the Claimant’s research paper. He said that the First Defendant had taken his idea and had run or developed it. This was seized upon by the Defendants’ counsel as indicating that the Claimant did not have any real prospect of success in a claim for breach of copyright because the law of copyright does not protect ideas but only the expression of ideas in words, drawings, sketches, notations and by other means. After it had been pointed out to the Claimant that ideas were not protected by the law of copyright the Claimant said that his idea had been taken and had been expressed in the same terms. He said his complaint was about his expression of his ideas. He said his work had its own sound or pattern, like a melody in a piece of music. However, in his reply the Claimant partly reverted to his original position; saying that the First Defendant had taken the main idea or concept from his (the

Claimant's) research and had used similar expressions in his (the First Defendant's) work. He said that the First Defendant had taken an original idea in what was a very niche area of philosophy.

71. When gently pressed by me as to what part or parts of his research paper the Claimant said were copied in the First Defendant's publications, surprisingly the Claimant indicated that he was uncertain whether he had copies of the First Defendant's publications and that he had issued the claim without having looked (again) at his research paper. That was surprising in the context of a claim for infringement of copyright, because an essential part of such a claim would be a comparison between the Claimant's research paper and the First Defendant's published works. However, I was not conducting a mini-trial, merely trying to ascertain what the Claimant's case was. What the circumstances were in which he came to be able to allege copying of his work without a copy of the allegedly infringing copies were not explored. It may be that there is some explanation for this. It is however an oddity of both the Claimant's and the Defendants' cases on the applications for strike out and summary judgment that none of them have attempted to exhibit the whole or relevant extracts from the Claimant's research paper or from the allegedly infringing copies.
72. Having regard to (i) the incomplete way in which the Claimant was asked about his copyright claim during the hearing; (ii) to the fact that he was acting in person, and may not have fully understood the sometimes subtle distinction in law between copying ideas and copying expressions of ideas; (iii) to the Claimant's retrenchment to put his case on the basis of his expression of ideas; and (iv) to the fact that the Defendants' applications to strike out and for summary judgment were based on the documents, not on the evidence; I do not think it would be fair and just to bar the Claimant from advancing his claim for breach of copyright on the basis merely that in the course of the hearing he said that his complaint was about the taking of his ideas.
73. Except for the fact that the Claimant says that it was in 2016 that he discovered that his research paper had been copied when he applied to the Second Defendant for a job; he does not and did not explain how or where he made this discovery, and none of his applications, statements of case, draft statements of case, or witness statements give any such explanation or any explanation as to why he did not or could not have made the discovery earlier.
74. The Claimant's stated intention that his current claim should be restricted to a claim for breach of copyright is confirmed by his witness statement dated 1st November 2018 in support of his application for an adjournment. Again that statement does not comply with the requirement of CPR 22PD 2.2 in that the form of the statement of truth verifying a witness statement should be in the form: "I believe that the facts stated in this witness statement are true." There is no such statement on the witness statement, but I construe it as containing such a statement. In paragraph 20 of the statement the Claimant refers to "the current copyright claim" which indicates that the current claim is indeed a copyright claim, and not an attempt to run or re-run claims arising out of or relating to the examinations which the Claimant took in 1999.
75. A large amount of the evidence, allegations and cross-allegations in the pleadings, draft amended statement of case, witness statements and their exhibits is concerned with disputes about the Claimant's treatment by the Second Defendant in and after 1999; the Second Defendant's failure to employ him in 2016 and the past and continuing litigation

about those matters. On the footing that the only kind of claim in the present claim proceedings is a claim for breach of copyright, in my judgment all those matters; the litigation about them; and the results of that litigation are of no possible relevance except, just possibly, as matters going to the possible extension of the limitation period for the breach of copyright claim under s.32 Limitation Act 1980 and as to loss.

Material features of the law of copyright

76. I consider briefly the essential features of a claim for infringement of copyright which are relevant to the applications I am dealing with where the alleged infringement is the copying of a literary work in 1998 or 1999.
77. S.1(1) Copyright, Designs and Patents Act 1988 (“CDPA 1988”) provides that copyright is a property right which subsists in accordance with Part I of the Act in an original literary work.
78. S.1(3) CDPA 1988 provides that copyright does not subsist in a work unless the requirements of Part I of the Act with respect to qualification for copyright protection are met.
79. S.153(1) CDPA 1988 provides that copyright does not subsist in a work unless the qualification requirements of Chapter IX CDPA 1988 are satisfied as regards (a) the author (see s.154), or (b) the country in which the work was first published (see s.155).
80. There are no allegations either way as to whether the Claimant, as the author of his research paper, qualified under s.154 CDPA 1988. Under s.154 CDPA 1988 as it existed in 1998 and 1999 a literary work qualified for copyright protection if the author was “at the material time” a qualifying person; that is (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas), a British Overseas citizen, a British subject or a British protected person within the meaning of the British Nationality Act 1981; or (b) an individual domiciled or resident in the UK or another country to which the relevant provisions of Part I extended. There is no evidence or allegations one way or another before me on those points, but given that the Claimant was student at SOAS and then at Oxford University it is probable that he was domiciled or resident in the United Kingdom.
81. Under s.155 CDPA 1988 as it existed in 1998 and 1999, a literary work qualified for copyright protection if it was first published (a) in the United Kingdom, or (b) in another country to which the relevant provisions of Part I CDPA 1988 extended. By s.175 CDPA 1988 in Part I CDPA 1988 “publication”, in relation to a work (a) means the issue of copies to the public, and (b) includes, in the case of a literary, dramatic, musical or artistic work, making it available to the public by means of an electronic retrieval system. . There is no evidence or allegations one way or another before me as to whether the Claimant’s research paper was published within the meaning of s.155 CDPA 1988, but given the probability that the Claimant qualified under s.154; for the purposes of the applications before me that is of no importance.
82. So far as relevant to the present case, s.16(1) CDPA 1988 provides that the owner of the copyright in a work has the exclusive right to do the following acts in the UK: (a) to copy the work; (b) to issue copies of the work to the public; (e) to make an adaptation of the work or do any of the above in relation to an adaptation.

83. By s.16(2) CDPA 1988 copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.
84. By s.16(3) CDPA 1988 references in Part I CDPA 1988 to the doing of an act restricted by the copyright in a work are to the doing of it: (a) in relation to the work as a whole or any substantial part of it, and (b) either directly or indirectly.
85. By s.17(1) CDPA 1988 the copying of the work is an act restricted by the copyright in every description of copyright work. By s.17(2) copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.
86. By s.18(1) CDPA 1988 as it existed in 1998 and 1999, the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work. By s.18(2) references in Part I CDPA 1988 to the issue to the public of copies of a work were to- (a) the act of putting into circulation in the EEA copies not previously put into circulation in the EEA by or with the consent of the copyright owner, or (b) the act of putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere. However, although this distribution right is defined in terms of the act of putting copies into circulation in the EEA, which might appear to be an exception to the s.16(1) rule restricting the exclusive rights to acts in the UK, s.18(2) does not give any rights in respect of activities outside the UK. This was so held by Roth J as part of his decision in *Lilley v Chartered Institute of Management Accountants* [2013] EWHC 1354 (Ch) at para.24 and is the view expressed in *Copinger on the Law of Copyright* (17th ed) at paragraph 21-169. I did not hear argument on this point, but mention it because one of the two publications relied upon by the Claimant appears to have taken place in Japan.
87. Chapter IV of the CDPA 1988 is headed “MORAL RIGHTS”. Its first section is s.77. By s.77(1) CDPA 1988 the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in the section; but the right is not infringed unless it has been asserted in accordance with s.78 CDPA 1988. By s.77(2) the author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work has the right to be identified whenever - (a) the work is published commercially, performed in public, broadcast or included in a cable programme service; or (b) copies of a film or sound recording including the work are issued to the public; and that right includes the right to be identified whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made.
88. By s.78(1) CDPA 1988 a person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions of the section so as to bind him in relation to that act. By s.78(2) the right may be asserted generally, or in relation to any specified act or description of acts - (a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or (b) by instrument in writing signed by the author or director. By s.78(4)(b) an assertion made by the latter method is binding only on persons to whose notice the assertion is brought. There is no allegation or evidence of any such an assertion by the Claimant in respect of the research paper.

89. By s.96(1) CDPA 1988 an infringement of copyright is actionable by the copyright owner.
90. By s.97(2) CDPA 1988(2) the court may in an action for infringement of copyright, having regard to all the circumstances, and in particular to - (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require. There is no allegation as to such additional damages in the current particulars of claim. Paragraph 49 of the Proposed Particulars contains an allegation that the First Defendant has unjustly enriched himself at the expense of the Claimant. If established, such enrichment would bring the claim within the scope of s.97(2)(b).
91. By regulation 3 of the Intellectual Property (Enforcement etc) Regulations 2006/1028, implementing art.13(1) of Directive 2004/48/EC: (1) where in an action for infringement of an intellectual property right the defendant knew, or had reasonable grounds to know, that he engaged in infringing activity, the damages awarded to the claimant shall be appropriate to the actual prejudice he suffered as a result of the infringement. (2) When awarding such damages - (a) all appropriate aspects shall be taken into account, including in particular (i) the negative economic consequences, including any lost profits, which the claimant has suffered, and any unfair profits made by the defendant; and (ii) elements other than economic factors, including the moral prejudice caused to the claimant by the infringement; or (b) where appropriate, they may be awarded on the basis of the royalties or fees which would have been due had the defendant obtained a licence. The existing particulars of claim do not contain any allegation that the First Defendant knew or had reasonable grounds to know that he was engaged in infringing activity. In paragraph 21 of the Proposed Particulars there is an allegation that the First Defendant knew or had reasonable ground to know that he was engaging in infringing activity.

The strike out applications in respect of the existing particulars of claim

92. The elements of the Defendants' strike out applications which are based on CPR 3.4(2)(c); that is to say failures by the Claimant to comply with a rule, practice direction or court order exist whether or not I grant permission to the Claimant to amend his particulars of claim. Further, even if they would not justify strike out if they were the only matters which I had to consider; their existence and my views on them are relevant to the exercise of my discretion under the other possible heads for strike out. In the context of an application to strike out for failure to comply with a rule, practice direction or court order the three stage test for relief from sanctions has a direct bearing; but subject to the important difference that generally in a relief from sanctions application the suitability of the sanction will already have been considered and, usually, determined; whilst in a strike out application the nature of the appropriate sanction, if any, is in issue.
93. The failures to comply relied upon by the Defendants and my conclusions in respect of them and on related points as to whether the existing particulars disclose reasonable grounds for bringing the claim (CPR 3.4(2)(a)) or are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings (CPR 3.4(2)(b)) are as follows:
- 93.1. The service of an unsealed copy of the amended claim form. I have considered this above. In my judgment this failure was not serious or significant. The Claimant's reason for the failure is not explained by him, but in my view is

explicable on the general ground relied upon by the Claimant that he was a litigant in person.

- 93.2. The failure to serve a response pack. I have considered this above. In my judgment this failure was not serious or significant. The Claimant's reason for this failure is not expressly explained by him, but in my view is explicable on the general ground relied upon by the Claimant that he was a litigant in person.
- 93.3. The existing particulars of claim are not divided into numbered paragraphs as required by CPR 5PD 2.2(5). In my judgment because the existing particulars of claim are so short, this failure is not a serious or significant.
- 93.4. The failure of the particulars of claim to include "a concise statement of the facts on which the claimant relies" as required by CPR 16.4(1)(a). In my judgment the existing particulars of claim do not satisfy this requirement for the following reasons.
- 93.5. The existing particulars of claim do set out reasonably clearly and concisely most of the main elements, as they stood in 1998 and 1999, of a claim for infringement of copyright by the First Defendant. They identify the Claimant as the author of the research paper by implication from the allegation that it was his advanced research paper. They identify the literary work. They allege publication of the work without the Claimant's knowledge or permission. They allege when and how that publication was effected. They do not allege that the work was an original work; but in my judgment that can be inferred from the description of the Claimant's work. They do not allege that the publication complained of took place in the UK; on the contrary the implication from the current particulars of claim is that the 1998 publication took place in Japan. In my judgment, except possibly in respect of the last point, the existing particulars of claim would enable the First Defendant to know the case that he had to meet in that regard. These omissions might be cured by further particulars and in my view are not of themselves serious or significant.
- 93.6. From what the Claimant said in the course of the hearing, looked at most positively from the perspective of his claim, it became clear that the Claimant did not allege the insertion of the whole of his research paper into the First Defendant's works, but only the insertion or use of part or parts or "ideas" or expressions of ideas. Hence, submitted the Defendants, the allegation in the existing particulars of claim that the First Defendant "published ... the claimant's research paper" was inaccurate because it alleged a publication of the whole. It was, submitted the Defendants, therefore not a statement of the Claimant's case. There are some moderately old authorities under the pre-CPR rules of pleading which deal with issues of this nature. I was not referred to them by the parties. One of those authorities which is fairly nearly in point is *Oliver v Dickin* [1936] 2 All ER 1004 (Bennett J). That was a decision that a plea that the defendant's works were infringing copies of the plaintiff's works and that the defendant had authorised the reproduction of the plaintiff's works was sufficient to include a claim that the reproduction was only of substantial parts of the plaintiff's work; albeit that the method adopted had been an undesirable method of pleading the plaintiff's case. In my judgment that authority has been overtaken by the CPR which, by the overriding objective, put greater emphasis than was previously the position on dealing with matters fairly and at proportionate cost and hence on the importance of a statement of case identifying the

facts relied upon and the case which the defendant has to meet. In my judgment the failure to specify that it is only copying of parts of the Claimant's work or copying of his ideas or expression of ideas that is complained about, and the failure to identify the part or parts said to have been copied are serious and significant failures to comply with the requirements of CPR 16.4. It is important that the defendant to a copyright infringement claim should know what copying is alleged to have taken place. In my judgment, for that reason, this failure is also an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b).

93.7. The existing particulars of claim do not allege any facts which would make the Second Defendant liable for the First Defendant's alleged infringements of copyright. There are the allegations as to unlawful assessments, but without more it is wholly unclear whether or how these are meant to be relevant to the claim for copyright infringement. The allegation in the "Brief details of claim" on the front of the amended claim form that the First Defendant was an employee of the Second Defendant is not repeated in the existing particulars of claim. Thus, the existing particulars of claim disclose no cause of action against the Second Defendant in respect of infringement of copyright and do not contain a concise or any statement of the facts on which the claimant relies as against the Second Defendant so as to make it vicariously liable for the First Defendant's acts. In my judgment, even viewed against the background of the "Brief details of claim", this is a serious and significant failure. It means that the statement of case discloses no reasonable grounds for bringing the claim against the Second Defendant within the meaning of CPR 3.4(2)(a) and in my judgment is also an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b). The mere fact that the First Defendant was the Second Defendant's employee is insufficient by itself to establish vicarious liability. It would also have to be established that there was a sufficiently close connection between the alleged wrong and the First Defendant's alleged infringement. Whether the publication by an academic such as the First Defendant in the field in which he was employed was sufficiently closely connected with his employment would be fact sensitive and the relevant facts should be set out in the particulars of claim. The Claimant's reason for this failure is not expressly explained by him, but in my view is explicable on the general ground relied upon by him that he was a litigant in person.

93.8. The relevance of the allegation in the existing particulars of claim as to the unlawful assessments and the resulting disqualification of the Claimant from completion of his doctorate to a claim for infringement of copyright is not explained in the existing particulars of claim. That allegation cannot be a statement of facts relied upon in respect of a claim for infringement of copyright. If it is intended to be relied upon in support of an allegation that there was a deliberate breach of duty so as to enable the Claimant to invoke s.32 Limitation Act 1980 that is not explained. If and insofar as it is or was intended to specify a cause of action separate or different from infringement of copyright, it discloses no cause of action. The "making of unlawful assessments" without more is not a cause of action known to the law. In my judgment this failure is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b). In my judgment it also represents a failure to comply with the CPR 16.4 requirement as to a concise statement of the facts relied upon. That is because either the allegation is irrelevant, in which case it should not be included in a concise statement of facts, or

it is relevant, in which case the facts relied on for establishing its relevance are not stated. In my judgment this is a serious and significant failure. The allegation sets running issues as to “unlawful assessments” without any indication of why or where they lead in terms of infringement of copyright; yet, as the material put in evidence by the Claimant and the Second Defendant on the applications shows, the question of unlawful assessments is one about which both sides have strong views and which is a question on which significant costs are capable of being expended. The Claimant’s reason for this failure is not expressly explained by him, but in my view is explicable on the general ground relied upon by him that he was a litigant in person.

93.9. Similarly the relevance of the allegations as to s.10 Equality Act 2010 and subsequent violations of civil and human rights to the Claimant’s claim for copyright infringement is not explained. Insofar as these allegations are or were intended to specify claims other than claims for infringement of copyright, the facts relied on in support of them are not specified. The existing particulars of claim do not specify how as a matter of fact these allegations relate to the earlier allegations or to s.32 Limitation Act 1980. In my judgment this failure is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b). In my judgment it also represents a failure to comply with the CPR 16.4 requirement as to a concise statement of the facts relied upon. That is because either the allegation is irrelevant, in which case it should not be included in a concise statement of facts, or it is relevant, in which case the facts relied on for establishing its relevance are not stated. In my judgment these are serious and significant failures. The allegations are so open ended that they give no real idea of what case it is that the Defendants have to meet under these heads. The Claimant’s reason for this failure is not expressly explained by him, but in my view is explicable on the general ground relied upon by him that he was a litigant in person.

93.10. Towards the end of the existing particulars of claim there is a reference to damages for moral prejudice arising from publication. The existing particulars of claim fail to make it clear whether that is intended to be a reference to moral rights or a claim in defamation or to compensation recoverable for moral prejudice under regulation 3 of the Intellectual Property (Enforcement etc) Regulations 2006/1028. The earlier allegation in the existing particulars of claim that the First Defendant published the Claimant’s research paper without acknowledgement is an indication that breach of the moral rights protected by Chapter IV of the CDPA 1988 might be intended to be referred to. The very fact that it is unclear what is intended means that there is not a concise statement of the facts relied on for a claim under any of the heads mentioned. Further there is no allegation that the requirements of s.78 CDPA 1988 were satisfied so far as a moral rights claim is concerned and there is no allegation of knowledge so far as regulation 3 compensation is concerned. In my judgment these failures are an abuse of the court’s process or are otherwise likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b). They also represent a failure to comply with the CPR 16.4 requirement as to a concise statement of the facts relied upon. That is because if a moral rights claim was going to be made a fact which would have to be relied upon would be that which meant that s.78 CDPA 1988 was satisfied and if moral prejudice compensation was going to be sought, knowledge would need to be alleged. In my judgment this is a serious and significant failure because it is important that the Defendant should know

the factual basis of an allegation that the Claimant is entitled to the moral rights claimed or to compensation for moral prejudice.

94. I have focussed above on the breaches of the rules and practice directions as they apply to a claim for infringement of copyright. At the hearing the Claimant said that his claim was only for infringement of copyright. However, the existing particulars of claim mention various other possible heads of claim. Specifically they mention: (i) protection under the Equality Act 2010; (ii) damages in respect of loss of earnings; this is listed as a separate item from copyright infringement; (iii) moral prejudice arising from publication; (iv) subsequent violations of the Claimant's civil and human rights aimed at preventing him from pursuing his career in keeping with his religious beliefs. None of these are supported by a sufficient statement of the facts on which the Claimant relies as required by CPR 16.4(1)(a). The nearest that the current particulars of claim come to doing that is in the part of the current particulars of claim which refers to the series of unlawful assessments, the unlawful nature of which is alleged to have resulted in the Claimant being "deemed 'disqualified' from completion" of his doctorate; but that is far from being a sufficient statement of the facts relied upon.
95. In paragraph 2 of the document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant" (the Proposed Particulars) the Claimant says that he understands from Ms Tschobotko's witness statement that his original statement of case failed to particularise the claim adequately and that this constitutes a failing sufficient to warrant a strike out. Even without that acceptance, and notwithstanding the Claimant's status as a litigant in person, in my judgment in the circumstances the grounds for strike out identified above and the furtherance of the overriding objective of dealing with the case justly and at proportionate cost, and in particular the objectives, so far as practicable, of saving expense; dealing with the case in ways which are proportionate; ensuring that the case is dealt with expeditiously and fairly; and enforcing compliance with rules, practice directions and orders; demand that the existing particulars of claim be struck out. That judgment is supported, not only by the Claimant's apparent acceptance of that position, but also by the request in his application of 17th September 2018 to the effect that his existing particulars of claim should be replaced by the Proposed Particulars as set out in the document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant".

Permission to amend or strike out of claim

96. My conclusion in the immediately foregoing paragraph as to the striking out of the current particulars of claim is only the first step in the analysis of how I should deal with the remainder of the various applications. Given that the existing particulars of claim will be struck out, I need to consider what else to do in respect of the proceedings and the various applications. The principal options are:
- 96.1. (1) To give the Claimant permission to amend his particulars of claim by replacing them with the document headed "Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant". This is what the Claimant seeks by his application notice dated 19th September 2018.
- 96.2. (2) To give the Claimant permission to amend his particulars of claim by way of a new document which must be compliant with the CPR, practice directions and Chancery Guide, subject to a condition providing that if this is not done by a specified date, the proceedings be struck out (an "unless" order). This is

essentially the first alternative that was sought in the Second Defendant's application notice dated 15th August 2018.

- 96.3. (3) To grant the Claimant summary judgment on his claim. This is what the Claimant seeks by his application notice dated 25th September 2018.
- 96.4. (4) To refuse the Claimant permission to amend his particulars of claim and strike out or summarily dismiss the claim. This is what the Defendants' seek in their application notices dated 24th September 2018 and 9th October 2018.
- 96.5. (5) To strike out or give summary judgment against the Claimant on all his heads of claim except for the claim for infringement of copyright and to permit him to amend his particulars of claim so as only to claim for infringement of copyright, possibly subject to a condition providing that if this is not done by a specified date, the proceedings be struck out (an "unless" order).
97. There is also the possibility of making a conditional order requiring a payment into court by the Claimant. Having regard to the fact of the Claimant's applications for help with fees and for Legal Aid, there must be a serious risk that a condition requiring a substantial payment in by the Claimant would have the effect of excluding the Claimant from justice in breach of the common law, article 6 of the European Convention on Human Rights and the overriding objective. Accordingly if such an order was serious possibility I would need to have further information about its possible impact before making it.
98. In deciding which of the options best gives effect to the overriding objective, I bear in mind that striking out the claim in its entirety is what the authorities refer to as a "draconian" measure and that generally if a defect might be cured by amendment the court should refrain from striking the claim out without first giving the party concerned (in this case the Claimant) an opportunity to amend.
99. On the other hand, strike out may be appropriate where the court is satisfied that the claimant has no intention of trying to put forward a coherently pleaded and intelligible claim or where, following amendment, the claim remains vague and incoherent. Amended claims should only be permitted where the claims have a real prospect of success. Further, it is relatively rare for permission to be given to amend a statement of case otherwise than by way of specified amendments, typically shown in a draft amended statement setting out the desired amended form of the statement of case. That is because without such a specification it would be unclear what amendments might be effected and, in a matter such as the present, whether they would comply with the requirements of CPR 16.4 and not themselves be susceptible to strike out under CPR 3.4. This is a consideration which mitigates against option (2) and, to a significant extent, against option (5).
100. Proceedings can be an abuse of process where it can be demonstrated that the benefit to the claimant in the action is of such limited value that the costs of the litigation will be out of all proportion to the benefit to be achieved. The mere fact a claim is small should not automatically refuse to hear it at all, but if there is no relevant proportionate procedure for judicially determining a very small claim, it might be struck out. It would therefore be necessary to weigh the potential benefit to the Claimant of his infringement claim against the court resources that would have to be devoted to his pursuit of that claim.

101. In *Yu-Ting Cleeves v The Chancellor, Masters and Scholars of the University of Oxford* [2017] EWHC 702 (QB) Whipple J struck out a claim for breach of copyright on the ground that it was abusive in nature and / or otherwise likely to obstruct the just disposal of the proceedings. At paragraph 35 of her judgment Whipple J held, and I agree, that certain authorities to which she was referred established the following propositions:
- i) A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case.
 - ii) One factor for the Court to consider is whether there is a real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, or will be impeded in its defence of allegations which are pursued, or that the Court will not be sure of the case which it must decide.
 - iii) Another factor for the Court to consider is whether the Defendant will be able to recover its costs if successful at the end of the day; and, if not, whether it may well feel constrained to make some sort of payment into Court, not because the case merits it, but simply as the lesser of two evils and for the avoidance of costs.
 - iv) A claim can still be struck out even if it discloses a reasonable prospect of success.
102. The Claimant has put forward draft amended particulars of claim. These are in the form of the document headed “Amended Particulars of Claim under CPR [rule 17.1(1) or (2) by the Claimant”. I have referred to this above in some contexts as “the Proposed Particulars” and continue to do so.
103. If I decide that the Claimant does not have a real prospect of success that would be conclusive in favour of option (4) and against the other options. I therefore consider this next.
104. In assessing at this stage whether the Claimant has a real prospect of success I do so with a view to assessing whether I should give permission to the Claimant to amend his particulars of claim and, hence, for the proceedings to continue.
105. In making the assessment of whether the Claimant has a real prospect of success, the test is the same as for summary judgment under CPR 24. In this context I am not constrained by the absence of the relevant statements as to evidence in the Defendants’ applications for summary judgment because I am considering whether to give the Claimant permission to amend and, if I refuse it, there will be nothing to give summary judgment against. However, I cannot conduct a mini-trial. The test is not “balance of probability” but, “absence of reality (see per Lord Hobhouse in the context of a summary judgment application in *Three Rivers DC v TTE Training Ltd (No.3)* [2003] AC 1 at para.158). The correct approach is set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15 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] 2 All ER 91.
 - ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
 - iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 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."

106. I can take into account the consideration that all parties have had the opportunity to put in evidence, so that it can be presumed that, where they have chosen not to, they are unable to provide evidence which would assist their case. I also bear in mind the absence from the Defendants' applications and evidence of the statement required under CPR 24PD 2(3)(b) that the applications are made "because the applicant believes that on the evidence the respondent (in this case the Claimant) has no real prospect of succeeding" gives rise to a suspicion that there might be relevant evidence which is not before the court. However, these considerations are not rules of law, and I bear in mind that in applications of this nature the absence of relevant evidence or statements might be explained by a failure to realise its importance. Overuse of these considerations in the

present context would, in my judgment, result in a risk of determining issues of fact by way of a mini-trial without oral examination of witnesses, which I should not do.

107. The issues on which the Claimant's case based on infringement of copyright appear weak and potentially give rise to his having no real prospect of success are:

- 107.1. Whether there was copying of the whole or a substantial part of the research paper.
- 107.2. Whether the alleged publication took place in the UK.
- 107.3. Whether the Claimant has suffered any substantial loss as a result of the alleged publication or could otherwise recover substantial damages.
- 107.4. Whether the Second Defendant is vicariously liable for the alleged acts of the First Defendant.
- 107.5. Whether the period of limitation is extended by the operation of s.32 Limitation Act 1980.

108. The inconsistency mentioned above between (i) the Claimant's statements and particulars to the effect that his whole research paper was copied and (ii) his oral submissions, gives rise to serious doubt as to whether the Claimant could establish copying of the whole or a substantial part of the research paper. This doubt is increased by the absence from the evidence of copies of both the research paper and the allegedly infringing documents, or of relevant extracts from them. It is further increased by the Proposed Particulars only referring to the alleged 1998 publication, not to the 1999 publication which is referred to in the existing Particulars. On the other side, the Defendants have put in little or nothing in the way of evidence on this issue. The First Defendant's case on the issue of copying amounts to no more than (i) the general denial contained in his statement in which he says that he "vehemently and categorically" denies any wrongdoing and (ii) his statement that he has no recollection of the research paper. Having regard to (ii), his denial at (i) could mean that generally he did not copy, or that if he did, in his view any copying was not of the whole or of any substantial part of what he copied. There is a conflict of evidence on the issue which I cannot determine summarily on the evidence before me. The paucity of the evidence on this point cuts both ways. In my judgment, there is sufficient evidence in the form of the Claimant's statements that, bearing in mind the Defendants' failure to deal otherwise than in general terms with the substance of the issue, I can and do conclude that the Claimant has a real prospect of success on this issue. Conversely, there is so much doubt that I can and do conclude that the Defendants also have a real prospect of success on his issue.

109. As regards the issue of whether the alleged publication took place in the UK: this issue is not one which was raised by any of the parties in argument before me. The possibility of its existing is only raised by reason to the reference to "Japan" in the current particulars of claim as the place of publication of the alleged 1998 publication. Paragraph 19 of the Proposed Particulars alleges that the First Defendant had published in a book and for commercial purposes "an article in his own name in 1998 and without permission or authorisation from the Claimant his advanced research work on (Ibn al-'Arabi's concept of Mercy: the Chapter on Zakariyya." There is no mention in the Proposed Particulars of the 1999 publication by Brill which is referred to in the existing particulars of claim. Paragraph 24 of the Proposed Particulars refers to circulation in the EEA. The

Defendants have not raised this issue. In the absence of any argument or evidence on this issue I cannot and do not find that it is in fact an issue, let alone that the Claimant has no real prospect of success on it.

110. As regards the issue of whether the Claimant has suffered any substantial loss as a result of the alleged publication: having regard to the following: (i) that on the Claimant's case he did not discover the existence of the alleged infringing publications until 2016; (ii) the absence of any explanation as to how that discovery came about, beyond that it took place in connection with the Claimant's application to the University for an academic post or job; and (iii) the absence in the material before me of any evidence of linkage between the alleged infringement; the Claimant's not having worked as a Faculty Lecturer or Associate Professor for the 17 or 18 years between the time of the alleged infringement and its alleged discovery; and the allegation of loss by reference to a Faculty Lecturer or Associate Professor's salary; in my judgment, subject only to the possibility mentioned in the next paragraph, the Claimant does not have a real prospect of showing that the alleged infringement has caused him any economic loss. The Claimant does not suggest that he would have published the research paper himself.
111. The Claimant suggests that the First Defendant should have asked for his consent before publishing the allegedly infringing publications and suggests (and I paraphrase) that if he had done so, he, the Claimant, would have given his consent subject to the work being acknowledged as his; the First Defendant would have accepted that condition; the work would have been published with an acknowledgment of the Claimant's contribution and he and his career would have been far more successful than they have been. One flaw with this suggestion is that in assessing loss it is not a question of what the First Defendant "should have done", but of what loss the Claimant has suffered as a result of the wrong. In the present context the question is: how has the Claimant's work or life been adversely affected as a result of the wrong done to him? This might result in an assessment of damages by reference to loss of a chance.
112. The passage quoted above from the Claimant's letter dated 18th October 2016 Professor McKendrick indicates that the Claimant may suggest that the First Defendant's publication of his (the Claimant's) research paper caused him (the Claimant) not to have been able to publish the paper himself, with the result that he could not supply sufficient evidence of research experience to enable him to get the job that he applied for. However, there is absolutely no evidence or suggestion that the Claimant ever attempted to publish his research paper, so in my judgment this suggestion has no reality. It might be different if the Claimant had attempted to publish his research paper and publication had been refused because a similar paper had been published by the First Defendant in 1998 or 1999, but there is no suggestion that anything like that has occurred. Further, any such occurrence before 2016 would be inconsistent with the Claimant not having discovered the allegedly infringing publication until 2016. Any such occurrence in or after 2016 would not have resulted in 17 or 18 years past loss of employment.
113. Economic loss caused by the infringing activity is not a necessary ingredient for the award of substantial damages under s.97(2) CDPA 1988 or under regulation 3 of the Intellectual Property (Enforcement etc) Regulations 2006/1028. There is an allegation of knowledge in paragraph 21 of the Proposed Particulars. If, as the Claimant alleges, the First Defendant knew that he was publishing the Claimant's research paper, then prima facie the breach there would be strong arguments that the breach would be flagrant within s.97(2) CDPA 1988 and would also trigger potential liability under regulation 3. Given

the amount of time that has passed since the alleged infringement it may be that the amount of damages awarded under these heads would be limited, but there is insufficient material before me to enable me to assess how limited the recovery would be or to conclude that the Claimant does not have a real prospect of making some substantial recovery under either or both of these heads.

114. The Proposed Particulars allege that the First Defendant was an employee of the Second Defendant. The Proposed Particulars only contain an indirect allegation that the alleged publication by the First Defendant was sufficiently closely connected with his employment to cause the Second Defendant to be vicariously liable for the publication. In paragraph 20 of the Proposed Particulars there is a reference to section 5(1) of a University Statute XVI which provides that the University claims ownership of all intellectual property specified in section 6 of the statute which is devised, made, or created by persons employed by the University in the course of their employment. Section 6 of the University Statute is not set out in the Proposed Particulars; but the implication from the reference to section 5 is that the Claimant alleges that the First Defendant caused the allegedly infringing publications to be made in the course of his employment. The evidence before me does not go directly to that issue. In the absence of such evidence, in my judgment, whether the article was or was not within the scope of section 6 of University Statute XVI, there must be a real prospect that an article written by an academic such as the First Defendant on his academic subject, written at a time when he was employed by the Second Defendant, was sufficiently closely connected with his employment, as to make his employer, the Second Defendant, vicariously liable for the publication. Accordingly if the publication was an infringement of copyright there is a real prospect of the Second Defendant being vicariously liable for that infringement.
115. A claim for infringement of copyright is a claim in tort. The cause of action accrues when the act complained of occurs. In this case that would have been the alleged publication of the Claimant's research paper by the First Defendant in 1998 and, possibly, as per the existing particulars of claim, in 1999. By s.2 Limitation Act 1980 the ordinary time limit for an action founded on tort is 6 years. Such an action may not be brought after the expiration of 6 years from the date on which the cause of action accrued. Thus, subject to the possible extension of that time limit the time for bringing the claim expired in 2004 or 2005.
116. In the sets of circumstances specified in s.32 Limitation Act 1980 the date on which the period of limitation begins to run is extended. The sets of circumstances which might be applicable in the present case and which are relied upon by the Claimant are those specified in s.32(1)(b) and the deeming provision of s.32(2) Limitation Act 1980.
117. S.32(1)(b) Limitation Act 1980 provides that, subject to certain exceptions which are not relevant to the present matter, where any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant, the period of limitation shall not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it.
118. Leaving aside for the moment the deeming provision of s.32(2) Limitation Act 1980, the first condition which needs to be satisfied is that the Defendants or one of them deliberately concealed from the Claimant a fact relevant to the alleged infringement. In this context "deliberate concealment" must be (i) deliberate concealment by the defendant of facts knowing that they were relevant to an actual or potential breach of duty or (ii) any

deliberate concealment by the Defendant of facts relevant to the breach of duty, whether or not the Defendant knew that the fact concealed had any relevance to the wrongdoing which constituted the cause of action. The legal issue of whether point (ii) amounted to deliberate concealment within the meaning of s.32(1) was left undecided by Mance LJ in his judgment in *Williams v Fanshaw, Porter & Hazlehurst* [2004] EWCA 157 at paragraph 37, though the majority (Park J and Brooke LJ) held that point (ii) was the law. On the facts of the case before him Mance LJ held he did not have to determine whether point (ii) was correct. Similarly in respect of the present applications, even if I was not bound by the views expressed by Park J and Brooke LJ, I do not have to decide whether point (ii) represents the law. That is because if there was an infringement of copyright and there was also a deliberate concealment of facts relevant to the claim for infringement of copyright, there must be at least a real prospect of the Claimant establishing that the First Defendant knew that the concealed facts were relevant to a claim for infringement of copyright, for the simple reason that otherwise, at least prima facie, there would be no reason to conceal them.

119. In order for a fact to be relevant to the claimant's right of action within the meaning of s.32(1)(b) it must be a fact without which his cause of action would be incomplete. Facts which merely improve prospects of success are not facts relevant to the claimant's right of action. Facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action. (see *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, per Sir Terence Etherton C at paragraph 49).

120. In *Williams v Fanshaw, Porter & Hazlehurst* [2004] EWCA (Civ) 157 at paragraph 14, Park J explained the operation of s.32(1)(b) as follows:

“I begin with the specific terms of section 32(1)(b): “any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant.” Those words describe the condition which must exist before the operative part of section 32(1) takes effect. There are four points on the wording of the paragraph which should be noted. (i) The paragraph does not say that the right of action must have been concealed from the claimant: it says only that a fact relevant to the right of action should have been concealed from the claimant. (ii) Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where section 32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant, but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action. (iii) The paragraph requires only that *any* fact relevant to the right of action is concealed. It does not require that *all* facts relevant to the right of action are concealed. (iv) The requirement is that the fact must be “deliberately concealed”. It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course

of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it.”

121. The fact which the Claimant alleges was deliberately concealed from him was the publication by the First Defendant of the Claimant’s research paper in 1998 or 1999. It is so difficult to understand how publication can be consistent with deliberate concealment, that in my judgment the Claimant has no real prospect of showing that the act of publication itself amounted to concealment, let alone deliberate concealment. That is far from the end of the s.32 point.
122. Following the often criticised decision of the majority in *Sheldon v Outhwaite* [1996] AC 102, it is possible for an act of deliberate concealment within the meaning of s.32(1)(b) Limitation Act 1980 to take place after the act which gave rise to the cause of action has taken place and for the ordinary 6 year limitation period to start or re-start only after the fact which was concealed is later discovered by the Claimant or could with reasonable diligence be discovered by him. Insofar as concerns acts of concealment which may be alleged to occur after the ordinary 6 year limitation period has expired, the logic of the decision in *Sheldon v Outhwaite* is that even in such a case the limitation period might be re-started. In that regard I agree with the comments of Professor McGee in the 8th edition of his work “Limitation Periods” at 20.039 where he says:
- “This formulation of the rule, which is the one chosen by the majority of the House of Lords, makes little sense; between the date when the cause of action accrues and the date of the concealment, time must run. Thus, the decision of the House of Lords really means that a subsequent concealment resets the clock to zero. It is not at all clear what the position would be if the concealment happened when the action was already barred. A strict application of the logic of the decision in *Sheldon v Outhwaite* would suggest that the clock was still reset, although it may be doubted whether a court would be prepared to go quite this far.”
123. On analysis of the allegations of deliberate concealment relied upon by the Claimant as breaches of duty, it is unnecessary for me to decide whether I am bound to accept or should otherwise apply that logic.
124. The first allegation of deliberate concealment relied upon by the Claimant is the allegation that when the Claimant proposed to return to the Faculty in 1998 the First Defendant asked him to consider embarking on a 2 year taught M.Phil and that this was done so as to conceal the First Defendant’s then existing or anticipated infringements of the Claimant’s copyright. The first part of this allegation is denied by the First Defendant. In paragraph 5(a) of his Defence it is stated that “the First Defendant had no further involvement with the Claimant after 1995”. This statement is supported by a statement of truth by the First Defendant’s solicitor. It is directly endorsed by the First Defendant in paragraph 4 of his witness statement dated 9th October 2018. I am not in a position on the evidence before me to determine this dispute of fact either one way or the other to the standard of “no real prospect”.
125. The Claimant’s argument is that if he was studying for the M.Phil rather than his original D.Phil he would be less likely to discover the fact that the allegedly infringing publications had been made. In my judgment on the evidence before me there is a real prospect of the Claimant successfully establishing that his change of course made it less likely that he would discover the allegedly infringing publication. The Claimant’s D.Phil

was in medieval Arabic Philosophy, but focussed on the work of Ibn al-‘Arabi. The M.Phil was a more general course in medieval Arabic Philosophy. It is easy to understand that when working on his D.Phil the Claimant would be likely to study contemporary writings on Ibn-al-‘Arabi including those of his supervisor or former supervisor, the First Defendant; thus including the allegedly infringing article. In contrast, on the more general M.Phil course there would of necessity be less focus on Ibn al-‘Arabi, and hence a lesser likelihood of so many contemporary writings about him being read by the Claimant. The fact that, on the Claimant’s evidence, he did not discover the existence of the allegedly infringing work until 2016 is some corroboration of this.

126. S.32(1)(b) only requires the relevant fact to have been deliberately concealed from the Claimant. The fact that the relevant fact might be apparent to others, and, indeed, the fact that, presumably, the object of publication by the First Defendant was to make public his work and to advance his (the First Defendant’s) standing in the academic world, would not necessarily mean that the First Defendant could not, as a matter of fact and law, take steps deliberately to conceal the fact of publication from the Claimant. To take a hypothetical example: if the First Defendant had a copy of his allegedly infringing publication on display in a waiting room outside his study and decided to remove it on each occasion when the Claimant was due to visit him, in my view that would amount to concealment of a relevant fact from the Claimant.

127. In my view in order for a fact to be concealed within the meaning of s.32(1)(b), the “concealment” does not have to be 100% effective; otherwise the claimant could never discover the concealed fact; the latter part of s.32(1) would never apply; and the limitation period would never begin to run. However, if the concealment is always likely to be ineffective, that may well be evidence against the defendant having had an intention to conceal, rather than some other intention.

128. In order for the Claimant to succeed in establishing that the First Defendant’s persuasion of him to change course amounted to deliberate concealment within the meaning of s.32(1)(b), the Claimant would need to establish not only that the change of course made it less likely that the Claimant would discover the allegedly infringing publication, but also that the change of course was imposed or was sought to be imposed on him deliberately so as to have that effect.

129. The fact that the Claimant clearly had a great interest in the work of Ibn al-‘Arabi means that even if he was on the more general M.Phil course there must have been at least a real possibility that he would find and read the allegedly infringing article, and that makes it more likely that the First Defendant’s intention in persuading the Claimant to change course was the innocent intention of advising the Claimant as he (the First Defendant) considered would be in the Claimant’s best interests and in my judgment that consideration outweighs the counter-consideration that if, as alleged by the Claimant, the First Defendant had published the whole or substantial parts of the Claimant’s research paper, knowing it to be the Claimant’s paper, that makes an intention to conceal more likely. The more difficult question for me is whether that is so much more likely as to make the alternative unrealistic, or is it a question of fact and degree which, on the evidence before me, I am unable to assess to the standard of “no real prospect”?

130. Balancing the sort of considerations mentioned in the immediately foregoing paragraph in the absence of other factors would be something which it would be wrong to

do summarily. However, in my judgment there is another factor which leads me to conclude that the allegation that the change of course was imposed by the First Defendant with the intention of preventing the Claimant from discovering the allegedly infringing publication is unrealistic.

131. That factor is that the Claimant's own case is inconsistent with the First Defendant having had such an intention. Specifically, in paragraph 18 of the Proposed Particulars the Claimant says:

“The First Defendant's explanation [was] that the switch from the D.Phil to a 2 years taught Master's course would enable the Claimant to acquire additional experience of medieval Arabic texts and would not jeopardise the Claimant's D.Phil work on Ibn al-‘Arabi, all of which as the First Defendant maintained the Claimant could complete afterwards.”

132. In my judgment that is clear evidence that if the First Defendant sought to impose the change of course on the Claimant at all (and the First Defendant denies any involvement with the Claimant after 1995) (i) it was contemplated by the Claimant and the First Defendant that the Claimant's work on Ibn al-‘Arabi would continue and, at most, would only be postponed for 2 years. Once his D.Phil work re-started the Claimant would be as likely to discover the allegedly infringing publication as he would have been before he changed courses. In my judgment this factor takes the conclusion that the First Defendant did not persuade the Claimant to change courses with the intention of concealing his (for present purposes assumed) infringement of copyright out of the area of real possibilities into the area of unreality.

133. It is of course possible that if the claim continued something might turn up on disclosure or at trial which supported the Claimant's case in this regard, either directly or indirectly; but in my judgment there is nothing before me to show that that could reasonably be expected. Accordingly I hold that there is no real possibility of the Claimant establishing that the First Defendant persuaded him to change courses with the intention of concealing the alleged infringing publication; or, if the Claimant were to revert to his original case, the allegedly infringing publications.

134. In their submissions the Defendants' counsel laid considerable stress on the gloss put by Park J in *Williams v Fanshaw, Porter & Hazlehurst* on the meaning of “deliberate concealment” in his point (iv), as set out above, to the effect that in order for there to be deliberate concealment by a defendant he would have had to have been under a duty to disclose the fact which was concealed, or at least that the fact would have been something which the defendant would ordinarily have disclosed in the normal course of his relationship with the claimant, but that he consciously decided to depart from the course which he would normally have followed and to keep quiet about it.

135. The Defendants' counsel also referred me to the decision of Morgan J in *IT Human Resources PLC v Land* [2014] EWHC 3812 (Ch). In that case the relevant issue was whether there had been deliberate concealment of a copyright infringement by the defendant. At paragraph 134 Morgan J set out Park J's point (iv) and held that there had been a failure in breach of duty to effect the relevant disclosure.

136. I consider that the gloss on the meaning of deliberate concealment set out in Park J's point (iv) does not apply to cases where active or positive steps are taken to conceal a relevant fact. Park J's statement must be read in context. In *Williams v Fanshaw, Porter*

& *Hazlehurst* the Court of Appeal (in which Park J was sitting) was dealing with a negligence claim against a firm of solicitors who had previously acted for the claimant. The deliberate concealment alleged in that case was a failure, during the currency of the defendant firm's retainer, to inform the claimant about a consent order dismissing one of her claims in earlier proceedings.

137. In my view the law is accurately summarised by Rix LJ in *AIC Ltd v ITS Testing Services (UK Ltd ("The Kiri Palm"))* [2006] EWCA Civ 1601 at paragraph 321, where he said:

“321. It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment.”

138. The Claimant's allegation as to the First Defendant's persuasion of him to change course is an allegation of active concealment and in my view of the law, if established as a matter of fact, would not require the Claimant also to show that the First Defendant was under a duty to disclose or that he would in the usual course of disclosed the fact of the publication. However, although I am against the Defendants on this point of law, that does not detract from my conclusion on the facts and specifically on the Claimant's own case, that there is no real possibility of the Claimant establishing that the First Defendant persuaded him to change courses with the intention of concealing the alleged infringing publication.

139. The second allegation of deliberate concealment relied upon by the Claimant is the allegation that there was deliberate concealment of the fact of the infringing publication by reason of the Second Defendant causing him to take and fail the 1999 tests and to prohibit his continuing with his M.Phil without taking a further test. In my judgment this suggestion is unrealistic.

140. The evidence does not suggest any causative linkage between the actions taken at and around the end of the academic year 1999 and the First Defendant's alleged infringement of copyright or any attempt to conceal it. There is absolutely no evidence that the 1999 tests and the acts and litigation which occurred in respect of and in relation to them had anything to do with the allegedly infringing publication or its concealment.

141. On both the Claimant's and the First Defendant's case, by 1999 the First Defendant had ceased to be the Claimant's supervisor. From about October 1998 to at least June 1999 the Claimant's supervisor was Dr Zimmerman. The Claimant has complained about Dr Zimmerman's absence, but does not allege that he was replaced by the First Defendant during his period or periods of absence. The controversy as to events at around the end of the academic year in 1999 centred around the Arabic language tests or examinations which the Claimant was required to take. These are the tests which the Claimant refers to in the Proposed Particulars and elsewhere as the “unlawful assessments”. There is absolutely no evidence that the tests were imposed as part of a cover up of the First Defendant's alleged infringing publication. There is no evidence of any involvement of the First Defendant with the decisions in relation to the tests. It was suggested by the Claimant in his oral submissions to me that Dr Zimmerman and the First Defendant and, possibly, other persons involved with the tests were “best friends” and that therefore they acted as they did in relation to the tests and so as to cause the Claimant to cease to be a

student at the Second Defendant with the intention of concealing the act of the alleged infringing publication. There is absolutely no evidence to support such a scenario. There is no evidence that anyone at or involved with the Second Defendant other than the First Defendant ever knew of the alleged infringing publication, let alone that they conspired to oust the Claimant from the University so as to reduce the possibility of his discovering the infringement.

142. The third allegation of deliberate concealment relied upon by the Claimant is the allegation that when Professor Dummett sought to obtain information from the Second Defendant as to the status of the “informal tests” which the Claimant underwent at the end of the academic year 1999 and as to the subsequent prohibition which the Second Defendant imposed on the Claimant against his continuing with his M.Phil course unless he re-took and passed a further test, the answers received by Professor Dummett from the Faculty and the University were “evasive, incoherent, contrary to natural justice and that it was engaged in a deliberate commission of a breach of duty” (paragraph 34 of the Proposed Particulars). This allegation is subject to same fundamental flaw as the second allegation. There is no evidence of any causative linkage between the actions taken at and around the end of the academic year 1999 and the First Defendant’s alleged infringement of copyright or any attempt to conceal it.
143. The fourth allegation of deliberate concealment relied upon by the Claimant is an allegation in paragraphs 44-46 of the Proposed Particulars that by reason of the First Defendant making an affidavit that was relied upon by the Second Defendant in the County Court proceedings the Defendants or one of them concealed the infringement “by giving in effect the Claimant a bad report” (paragraph 45 of the Proposed Particulars). I was not shown a copy of the affidavit. Nor was I told what its contents were, except for the Claimant’s allegations that it constituted undue influence, was a bad report and a negative affidavit. The Proposed Particulars do not explain in a coherent manner how the provision of an affidavit in the County Court proceedings in 2001 and 2002 could amount to deliberate concealment of the allegedly infringing publication. My understanding is that the allegation is to the effect that the provision of the affidavit was a method by which the First Defendant (and possibly also the Second Defendant) sought to prevent the Claimant from continuing on the M.Phil course or from studying for his D.Phil at the University with the intention of thereby reducing the likelihood of his discovering the allegedly infringing publication. This allegation is not ruled out by the Claimant’s evidence to the effect that at the time that he says he was persuaded to change courses he and the First Defendant contemplated that on completion of the M.Phil the Claimant would continue with his D.Phil because by the time of the County Court proceedings it must have been apparent that the Claimant would not or might not complete his M.Phil or progress to his D.Phil. Indeed, the thrust of the allegation under consideration is that the affidavit was provided so as to prevent that from happening.
144. In my judgment this fourth allegation of deliberate concealment is so far-fetched as to be unrealistic. The County Court proceedings were commenced by the Claimant. They were concerned with alleged acts of discrimination by Dr Zimmerman in 1999. By June 2001 when the County Court proceedings were started the Claimant had already ceased his M.Phil course. His attempt at reinstatement without taking a further test had been rejected by Gage J on 7th November 2000 in the judicial review proceedings and he had chosen not to take the further test. Thus, any evidence which the Second Defendant might have given in the County Court proceedings would not have been capable of having an impact on whether or not the Claimant continued on the M.Phil course or

continued to study for his D.Phil and cannot have operated so as to cause that result. It follows that whatever intention the First Defendant may or may not have had in making his affidavit in the County Court proceedings, it cannot have been causative of the Claimant ceasing his M.Phil course or of his ceasing to study for his D.Phil course. It might be suggested by or on behalf of the Claimant that the Second Defendant's negative evidence as to his ability or competence reduced his prospects of studying elsewhere or on another course; but that is not suggested in the evidence; was not suggested at the hearing and appears to me to be so speculative as to causation that in my judgment there is nothing before me to show that any further evidence in support of such speculation could reasonably be expected at or before trial if these proceedings continued.

Accordingly I hold that, assuming that there was an infringing publication, there is no real possibility of the Claimant establishing that by providing the affidavit which he did for the purpose of the County Court proceedings the First Defendant concealed the alleged infringing publication, whether deliberately or otherwise.

145. The Claimant also relies on s.32(2) Limitation Act 1980. S.32(2) provides that for the purposes of s.32(1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty. A breach of duty within s.32(2) may be a breach of a duty which itself constitutes the cause of action relied upon. Further, a breach of duty within s.32(2) may include a breach of some different legal duty owed to the Claimant. However, where the duty breached is a different legal duty from that which gives rise to the right of action which is being sued upon (in the present case the duty not to infringe copyright), then, if the different breach of duty is established, the next steps are to identify the facts involved in that breach of duty; then go back to s.32(1)(b) and identify whether any of those facts are facts which are relevant to the claimant's right of action which is being sued upon. This is in accordance with the provisional view expressed by Arden LJ in *Giles v Rhind (No.2)* [2008] EWCA Civ 118, per Arden LJ at paragraph 42.

146. In order for a breach to be a deliberate breach within s.32(2) the defendant must know or be reckless as to whether he is acting in breach of duty.

147. The primary breach of duty relied on by the Claimant is the making of the allegedly infringing publication. If the First Defendant did copy the whole or a substantial part of the Claimant's research paper in making the alleged publication, there must be at least a real possibility that he knew that he was doing so, though it is also possible that he was only guilty of subconscious copying. On the same hypothesis, the Claimant would also have a real prospect of establishing that the First Defendant knew or was reckless as to whether that copying and publication was an infringement of copyright. In this context I take judicial notice of the fact that as an academic employed by Oxford University, the First Defendant is at least likely to know that plagiarism or copying of another person's work might involve an infringement of copyright. Accordingly, in my judgment, on the hypothesis that the alleged infringing publication occurred, the Claimant has a real prospect of establishing that the publication was a deliberate breach of duty within the meaning of s.32(2) Limitation Act 1980.

148. The second limb of the s.32(2) condition, that is that the breach is unlikely to be discovered for some time, is more difficult for the Claimant. In this context "discovered" must mean "discovered by the claimant". The statutory phrase "for some time" is vague and has had little judicial attention. If I was deciding this issue on the balance of

probabilities I would have no hesitation in holding that this second limb of the condition was not satisfied. The essence of a publication is making the document concerned public. At or around the time of publication in 1998 the Claimant was still intending or considering continuing with his D.Phil and it must have been highly likely that he would read the allegedly infringing publication within a reasonable period of time, and almost certainly within the period of his study for his D.Phil. Even if the publication came after the Claimant had decided to change courses to his M.Phil: (i) he might well have come across the publication in the course of his M.Phil, and (ii) even if he did not, he was still planning on completing his D.Phil after he had finished his M.Phil, which was a 2 year course, at which time it would become a near certainty that he would read the allegedly infringing publication. In my judgment those probabilities are so high that, given the objective nature of the test, I can and do hold (a) that there is no real prospect of the Claimant establishing otherwise than that in the circumstances as they existed at the time of publication, the publication was likely to be discovered by him within a matter of months, and at latest within some 2 to 3 years and (b) that in the circumstances that does not amount to “some time” within the meaning of s.32(2) Limitation Act 1980.

149. Other deliberate breaches of duty relied upon by the Claimant are:

149.1. The Second Defendant’s answers to Professor Dummett’s enquiries referred to above. It is unclear what legal duty the Second Defendant was under to answer Professor Dummett’s enquiries, but assuming in the Claimant’s favour that there was such a legal duty and that the Second Defendant’s answers to the questions or failures to answer them amounted to deliberate breaches of duty within the meaning of s.32(2) Limitation Act 1980; those breaches of duty were not “unlikely to be discovered for some time” within the meaning of s.32(2). They were discovered or discoverable immediately. That is what the Claimant complains of in relation to them. He complains that the answers were “evasive, incoherent, contrary to natural justice”. That must have been apparent immediately. Even if that was not the case, the facts involved in any such breach of duty did not relate in any way to the alleged infringing publication or its alleged concealment. The facts which Professor Dummett was concerned about were the facts relating to the 1999 tests and the subsequent prohibition of the Claimant from continuing with his M.Phil course. As explained above those facts did not relate in any way to the alleged infringing publication or its alleged concealment.

149.2. Exertion by the First Defendant on the Claimant of “duress” or “undue influence” so as to cause the Claimant to change courses in order to prevent the Claimant from discovering the alleged infringement (paragraphs 25 – 27 of the Proposed Particulars). The alleged “duress” is an alleged threat by the First Defendant that he could not continue to supervise the Claimant until or unless he first embarked on a 2 year M.Phil course (paragraph 25 of the Proposed Particulars). The exertion of duress or undue influence is probably capable of being a deliberate breach of duty within the meaning of s.32(2) Limitation Act 1980 (see *Giles v Rhind (No.2)* [2008] EWCA Civ 118, per Arden LJ at paragraphs 39 to 55). The “facts involved” in such a breach of duty would include the fact of the alleged infringing publication. However, even if the Claimant could establish a deliberate breach of duty comprising the exertion of “duress” or “undue influence” so as to cause the Claimant to change courses in order to prevent the Claimant from discovering the alleged infringement; his case in respect of s.32(2) Limitation Act 1980 based on that deliberate breach would suffer from the same defect so far as s.32(2) Limitation Act 1980 is concerned

and for essentially the same reasons as discussed above in respect of a possible deliberate breach of copyright. That is that there is no real prospect of the Claimant establishing otherwise than that in the circumstances as they existed at the time of the duress or undue influence, the publication and hence the breach of duty consisting of the duress or undue influence for the purpose of concealing the publication from the Claimant was likely to be discovered by the Claimant within a matter of months, and at latest within some 2 to 3 years; so that in the circumstances that does not amount to “some time” within the meaning of s.32(2) Limitation Act 1980.

- 149.3. Breach by the First Defendant of an alleged fiduciary duty owed by him to the Claimant. The breach would have consisted of a failure to inform the Claimant of the allegedly infringing publication or of publishing and making use of the Claimant’s work. The relationship of tutor or supervisor and student is not within the generally recognised categories of relationship which give rise to fiduciary duties; though the features of the relationship and in particular the existence of a relationship of trust and confidence as to the giving of advice might give rise to relevant fiduciary duties, including a duty not to profit from the student’s work after the relationship was over. The existence and extent of the duties would be highly fact dependent. In the absence of a properly pleaded case, it is not possible for me to do more than speculate that there might well have been such a relationship and that relevant duties might have been breached. Without more I am not in a position to form a view as to this. However, even if either of the suggested breaches occurred they would suffer from the same defect so far as s.32(2) Limitation Act 1980 is concerned and for essentially the same reasons as discussed above in respect of a possible deliberate breach of copyright. That is that there is no real prospect of the Claimant establishing otherwise than that in the circumstances as they existed at the time of the breach, whether that be the time of publication or the termination of the fiduciary relationship which on any footing must have occurred at latest in 1998, that, the publication or breach was likely to be discovered by the Claimant within a matter of months, and at the latest within some 2 to 3 years.
150. Without at this stage going behind the Claimant’s statement that he did not actually discover the allegedly infringing publication until 2016, the final step in the s.32 analysis is to determine whether if, contrary to the above, there was a relevant deliberate concealment or deemed concealment, the Claimant has a real prospect of establishing that he could not with reasonable diligence have discovered the deliberate concealment from him of the allegedly infringing publication more than 6 years before he started the present proceedings, that is to say before 6th July 2012. My short answer to that question is “no”.
151. The relevant part of s.32(1) Limitation Act 1980 reads: “the period of limitation shall not begin to run until the [claimant] has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.” As a matter of grammar the last “it” refers to the concealment, not to the fact that was concealed. In the present case this subtlety is of little relevance because if the fact of the allegedly infringing publication could be discovered, then the alleged concealment would also be discovered.
152. It is inherent in s.32(1) Limitation Act 1980 that there must be an assumption that the claimant desires to discover whether or not there has been a fraud, deliberate concealment or mistake. Not making any such assumption would rob the effect of the word "could" of

much of its significance. Further, the concept of "reasonable diligence" carries with it the notion of a desire to know, and, indeed, to investigate (see per Neuberger LJ in *Law Society v Sephton & Co* [2004] EWCA Civ 1627 at paragraph 117). The claimant is not required to do everything possible but only to do what an ordinary prudent person would do having regard to all the circumstances.

153. The Claimant's complaint is about the publication of his research paper or parts of it by the First Defendant in 1998. Without more (and the Claimant does not suggest more) "publication" involves making public the thing which is published. There is nothing before me to indicate that the publication or (if the 1999 publication is still complained of) the publications complained of were anything other than public documents or documents which were available to the public. The Claimant's own case implies that the allegedly infringing publications were available to the public. Thus, in paragraph 19 of the Proposed Particulars the Claimant alleges that the First Defendant had "in a book and for commercial purposes an article in his own name in 1998". In paragraph 24 of the Proposed Particulars the Claimant alleges that the unauthorised publication of his research paper by the First Defendant was "made for commercial purposes and sold to the public".
154. The Proposed Particulars do not contain any relevant allegations as to when the Claimant could or could not with reasonable diligence have discovered the allegedly infringing publication.
155. Paragraph 36 of the Proposed Particulars alleges that "even the reasonable diligence of Sir Michael Dummett could not have prevented the deliberate concealment by the First Defendant and Second Defendant of the infringement." There are two difficulties with this insofar as the possible application of s.32(1) Limitation Act 1980 is concerned: firstly the test under s.32(1) is objective; so without knowing what it was that Sir Michael Dummett did with a view to ascertaining whether there had been an infringing publication, his inability to find a deliberate concealment does not throw any light on whether reasonable diligence was exercised. Secondly, Sir Michael Dummett was not searching for concealment of the fact of publication of the allegedly infringing publication. As alleged in paragraph 31 of the Proposed Particulars, he was trying to obtain further clarification from the Second Defendant on the status of the tests. I have explained above why in my judgment the facts of and relating to the tests are irrelevant and disconnected from the alleged infringing publication and its concealment. Similarly with the Claimant's allegation in paragraph 32 of the Proposed Particulars that the Second Defendant had given insufficient reason for the Claimant being prohibited from further study for his M.Phil and that an alleged failure of the Second Defendant to assign a new supervisor was an act of continuing unfavourable treatment of the Claimant. The Claimant was prohibited because he did not take the further test offered by the Second Defendant. The alleged failure by the Second Defendant to appoint a new supervisor was an alleged failure to replace Dr Zimmermann; so again it was disconnected from any alleged wrongdoing by the First Defendant. There is absolutely no evidence linking the acts which took place in and about the setting of the tests in 1999 with the First Defendant's alleged wrongdoing in publishing the allegedly infringing publication or with any attempt to conceal it. Any suggestion to that effect is wholly speculative and has no real prospect of success.
156. The Professor Dummett and "tests" allegations are the only suggestions by the Claimant of any diligence being exercised by the Claimant to discover the alleged

infringing publication and its alleged concealment. There are no suggestions in the evidence from any of the parties as to what steps might or might not have been taken with reasonable diligence to discover the alleged publication or its concealment. For example would the publication have been found or would it not have been found by Google searches for any or any combination of Ibn al-‘Arabi, Ibn al-‘Arabi’s concept of mercy, the Chapter on Zakariyya, and Nettle? There is no direct evidence before me on which I can assess how easy or difficult it would have been to discover the allegedly infringing publication except for the fact that the allegedly infringing publication or publications were available to the public.

157. The test under s.32(1) Limitation Act 1980 as to when the claimant “could with reasonable diligence have discovered” the concealment of the publication is an objective test. The onus of proof on the s.32 Limitation Act 1980 issues is on the Claimant. Can I deduce from the facts that the alleged publication or publications were available to the public and that the Claimant has not put in any relevant evidence on the point and has put in some irrelevant evidence (his allegations as to the tests and Professor Dummett) that the Claimant has no real prospect of success on this point? In my judgment I can and I do.
158. The Claimant is on his third attempt at setting out his case and has still not put in any relevant evidence as to reasonable diligence. There is no evidence at all about what he was doing between 2000 and 2016 except for the litigation referred to above. He has made his own application for summary judgment and has not put in any relevant evidence on this point. The Defendants have also failed to put in evidence which goes to this point, and that is some indication that they are aware of evidence which goes against them on the point; but that is speculation; the onus of proof is on the Claimant; the Defendants have raised the Limitation Act 1980 points in their applications, and are not obliged to put in evidence. In my judgment the Claimant has had ample opportunity to put in evidence which goes to this point and has failed to do so. I deduce from this that there is no evidence and no reasonable likelihood of evidence being produced to support an allegation that the Claimant could not with reasonable diligence have discovered the allegedly infringing publication and hence its concealment before 4th July 2012, which is the latest date when the effect of s.32 Limitation Act 1980 could have been to cause the ordinary 6 year limitation period to begin to run, and the present proceedings not to be time-barred.
159. It follows that in my judgment the Claimant has no real prospect of establishing that his claim for infringement of copyright is not barred by the operation of the Limitation Act 1980 for three reasons:
- 159.1. (1) He has no real prospect of establishing an actual deliberate concealment within s.32(1)(b) Limitation Act 1980.
- 159.2. (2) He has a real prospect of establishing a deliberate breach of duty within s.32(2) Limitation Act 1980, but no real prospect of establishing that that breach of duty was effected in circumstances where it was unlikely to be discovered for some time.
- 159.3. (3) He has no real prospect of establishing that he could not with reasonable diligence have discovered the alleged infringing publication and hence any actual or deemed deliberate concealment before the relevant date, which is 4th July 2012.

160. That is a good reason for my not permitting the Claimant to amend his particulars of claim in the form of the Proposed Particulars and I refuse him permission to amend his particulars of claim in that way.
161. It also follows that in my judgment the claim form as sought to be particularised by the Claimant discloses no reasonable grounds for bringing the claim. He is unable to particularise his claim in such a way as to avoid his claim for infringement of copyright being barred by the operation of the Limitation Act 1980. I have already indicated that I will strike out the existing particulars of claim. Accordingly CPR 3.4(2)(a) applies. By that rule I “may” strike out a statement of case (which includes a claim form) if it discloses no reasonable grounds for bringing the claim. In exercising my discretion under that rule I must apply the overriding objective of dealing with the case justly and at proportionate cost.
162. In my judgment my conclusion that the Claimant has no real prospect of establishing that his claim for infringement of copyright is not barred by the operation of the Limitation Act 1980 by itself means that to deal with the claim justly and at proportionate cost, I should strike it out and I do so on that ground. It would be pointless and would be unjust and costly to the Defendants to allow the claim to continue. If, as I have held, the claim has no real prospect of success, there is no injustice to the Claimant in striking it out now. By allowing the claim to continue further costs would be incurred and that would be disproportionate to any benefit that was realistically possible and burdensome on the Defendants.
163. I next consider whether, if I am wrong in my conclusion that the Claimant has no real prospect of establishing that his claim for infringement of copyright is not barred by the operation of the Limitation Act 1980, I should permit the Claimant to amend his Particulars of Claim or whether I should not do so, and should strike out the claim.
164. The Proposed Particulars are unsatisfactory. They have the omissions identified above. Further, and without intending to produce a comprehensive list, it not being my job to re-plead the Claimant’s case for him:
- 164.1. Paragraphs 1 – 7 and 51 of the Proposed Particulars comprise evidence and argument as to why the Claimant should be given permission to amend his Particulars of Claim. These should not be included in the particulars of claim, but that is no great problem because if I decided to allow amended particulars of claim I could allow the Proposed Particulars with those paragraphs deleted.
- 164.2. Paragraph 8 of the Particulars of Claim alleges a contract between the Claimant and the Second Defendant. Paragraphs 25 to 27 of the Proposed Particulars allege that the First Defendant’s consent to his change of course was procured through duress. Paragraph 28 reads as follows:
- “This act is a breach of the Claimant’s rights under the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations and Unfair Contract Terms Bill”.
- 164.3. The “act” referred to in paragraph 28 of the Proposed Particulars appears to be a reference to the obtaining of the Claimant’s agreement to the change of course. However, the allegation in respect of breaches of the Unfair Contract Terms Act etc is misguided because the provisions referred to do not form part of a contract, but affect

the terms of a contract, and it is terms of a contract which may be breached so as to give rise to a cause of action. If I decided to allow amended particulars of claim I could allow the Proposed Particulars with paragraph 28 deleted. As regards the possibility that there was a contract with a relevant term that was breached by the First Defendant persuading the Claimant to change course in 1998: it is unclear what, if any contract the Claimant had or alleges that he had with the First or the Second Defendant in 1998. There is no evidence or allegation which would support any suggestion that the Claimant had a contract with the First Defendant at any time. A contract with the Second Defendant would appear to a possibility, but it is unclear what its express terms were and whether any express or implied terms related to the behaviour of its employees such as the First Defendant. Unless those particulars are given the allegation as to breach of contract is deficient in failing to state the facts relied upon within CPR 16.4 and, if included in any amended Particulars of Claim without further particularisation would be an abuse of process or likely to obstruct the just disposal of the court's process within CPR 3.4(2)(b) because it would not set out the case on the facts which the Defendants have to meet.

164.4. In paragraph 41 of the Proposed Particulars the Claimant alleges that the First Defendant's denial of knowledge of the Claimant's research paper is "a direct breach of the contract between the Claimant and the Second Defendant as the employer". There is no allegation as to whether the alleged breach is an alleged breach of an express term or an implied term. Any contract between the Claimant and the Second Defendant must have come to an end at or around the time that the Claimant left the University in 1999. The reference in paragraph 41 of the Proposed Particulars to a denial of knowledge appears to be a reference to paragraph 5 of the First Defendant's Defence in the present proceedings where he states that he has "no recollection of the said paper". The Defence is dated 15th August 2018. It is difficult to understand and it is not explained how a statement made by the First Defendant in August 2018 could be a breach of a contract which came to an end in or around 1999. If I decided to allow amended particulars of claim I could allow the Proposed Particulars with paragraph 41 deleted.

164.5. Paragraph 12 of the Proposed Particulars alleges that the Claimant enjoys exclusive copyright of the research paper and is the sole author of it. It does not allege that it was his original work, but such an allegation can be inferred.

164.6. At paragraph 17 of the Proposed Particulars the Claimant alleges that "on returning to the Faculty" he was unexpectedly asked by the First Defendant to consider embarking on the M.Phil course. He does not allege when he returned to the Faculty or, more relevantly, when the request was made. This, coupled with the failure to specify when in 1998 the allegedly infringing publication took place is a serious omission in the context of any reliance on s.32 Limitation Act 1980 because it does not enable it to be determined whether the request to change courses preceded or succeeded the allegedly infringing publication. The lack of clarity in this regard is confirmed by paragraph 25 of the Proposed Particulars where it is alleged that "the First Defendant had approached the Claimant to change course knowing that he was engaged in an act of infringement". If the request preceded the publication it would at least be strongly arguable that the request could not amount to concealment because at that stage there would have been nothing to conceal. These failures mean that there would be a failure to state the facts relied upon within CPR 16.4 and, possibly, depending on what the allegation is, a failure in respect of the allegation to

disclose a reasonable ground for bringing the claim within CPR 3.4(2)(a) and if included in any amended Particulars of Claim without further particularisation there would be an abuse of process or the allegation would be likely to obstruct the just disposal of the proceedings within CPR 3.4(2)(b) because it would not set out the case on the facts which the Defendants have to meet.

164.7. Paragraph 19 of the Proposed Particulars alleges that the First Defendant had published in a book and for commercial purposes “an article in his own name in 1998 and without permission or authorisation from the Claimant his advanced research work on (Ibn al-‘Arabi’s concept of Mercy: the Chapter on Zakariyya.” There is no mention of the 1999 publication by Brill which is referred to in the existing particulars of claim. Paragraph 19 refers to publication of the Claimant’s “advanced research work”. It is unclear as to whether this is intended to be a reference to the Claimant’s research paper in which he claims copyright, or part only of it and, if so, which part. This lack of clarity is a failure to state the facts relied upon within CPR 16.4 and, if included in any amended Particulars of Claim without further particularisation would be an abuse of process or likely to obstruct the just disposal of the proceedings within CPR 3.4(2)(b) because it would not set out the case on the facts which the Defendants have to meet.

164.8. Paragraph 20 of the Proposed Particulars recites section 5(1) of the Second Defendant’s Statute XVI under which the Second Defendant claims ownership of all intellectual property specified in section 6 of the statute. In paragraph 21 it is alleged that the Second Defendant claims copyright in the allegedly infringing work. In paragraph 22 it is alleged that the Second Defendant’s claim to ownership of the copyright is a breach of the Claimant’s property right in the research paper. The Claimant does not allege that the allegedly infringing publication is a publication of a kind which is within section 6 or why or how that is or why or how the Second Defendant otherwise claims ownership of the copyright in the allegedly infringing publication. These are serious omissions because without them the allegation in paragraph 22 is unfounded and any allegation that the allegedly infringing work is sufficiently closely connected with the First Defendant’s employment as to make the Second Defendant vicariously liable for it on the ground that the Second Defendant claims copyright in it is incomplete and in that respect does not disclose a ground for bringing a claim against the Second Defendant within the meaning of CPR 3.4(2)(a).

164.9. In paragraphs 29 and 30 of the Proposed Particulars it is alleged that the 1999 tests were declared by the Second Defendant to be “intellectually and procedurally flawed”. The document or person within the Second Defendant’s organisation in which or by whom this declaration is alleged to have been made are not specified. This is a relatively minor failure which could easily be cured by further particulars.

164.10. Paragraphs 30 – 38 of the Proposed Particulars deal with the alleged involvement of Professor Dummett. I have explained above why this appears to me to be irrelevant to the claim for infringement of copyright or any allegation as to deliberate concealment. If I decided to allow amended particulars of claim I could allow the Proposed Particulars with these paragraphs deleted.

164.11. In paragraphs 39 - 40 of the Proposed Particulars the Claimant says:

“39. In 1999 proceedings were brought in the County Court by the Claimant against the Second Defendant for breaches which prohibited him from

continuing with his research. The case was dismissed but was later successful on appeal.

“40. The Appellate Court ruled that the Second Defendant had misled the Court on the legal status of the Assessors who found in the Claimant’s favour. The Court concluded that the Second Defendant could not oppose the agreed opinion of the Assessors.

164.12. I have explained above why in my judgment there is absolutely no evidence that the 1999 tests and the acts and litigation which occurred in respect of and in relation to them had anything to do with the allegedly infringing publication or its concealment. On that basis if I decided to allow amended particulars of claim I could allow the Proposed Particulars with these allegations deleted.

164.13. The Claimant’s statement that his case was successful on appeal even looked at most benignly from the Claimant’s perspective was untrue. The Claimant’s appeal was dismissed. The Court of Appeal held that the County Court Judge had failed properly to record in his judgment the views expressed by the assessors in the decision making process and his reaction to those views because he had, in accordance with what he understood was the agreed position of the parties, wrongly failed to take account of the views of the assessors in the preparation of his judgment. But as a matter of substance the Claimant failed because his appeal was dismissed and the County Court Judge’s decision that there had been no racial discrimination was upheld. Ms Tschobotco has exhibited a copy of the Westlaw report of the Court of Appeal’s decision. The Judgment of the Court of Appeal was given by Waller LJ. At paragraph 67 Waller LJ states clearly that the appeal was dismissed. The Court of Appeal did find that the County Court Judge had erred in failing to record in his judgment the views expressed by the assessors in the decision making process and his reaction to those views because he had understood it to be common ground that the assessors had no role in that process. However, the Court of Appeal also held that there was every reason to believe that the County Court Judge had in fact used the assessors during the trial in precisely the way they should have been used; it could not be said that no reasonable tribunal could have reached the conclusion which the judge had reached; and that, accordingly, no miscarriage of justice had taken place. At paragraph 6 of the judgment of the Court of Appeal Waller LJ explains that the County Court Judge was “led astray” by submissions made by the current Second Defendant’s leading counsel as to the manner in which assessors should be used; but Waller LJ goes on to say that those submissions were endorsed by the present Claimant’s junior counsel and represented, as the Court of Appeal understood it, the then received wisdom as to the use of assessors in race discrimination cases. Thus, it appears that any “misleading” of the County Court Judge in that regard was an innocent error, and nothing nefarious.

164.14. The statement in paragraph 40 of the Proposed Particulars to the effect that the Assessors had found in the Claimant’s favour is wholly unsupported by the evidence. There is no indication in the Court of Appeal’s judgment of what the assessors’ views were. It is incorrect to say, as the Claimant does in paragraph 40 of the Proposed Particulars, that the Court of Appeal concluded that the Second Defendant could not oppose the agreed opinion of the Assessors. The Court of Appeal was clear that although the Judge ought to have taken account of the views of the assessors (whatever they were), he was not bound by them and ultimately the

decision on the facts was for the Judge. If the Judge was not bound by the views of the assessors, then neither could the Second Defendant have been.

164.15. For the reasons given above, in my judgment the whole saga about Dr Zimmermann, the 1999 tests, the cessation in or after 1999 of the Claimant's M.Phil or D.Phil studies, the County Court proceedings and the appeal is irrelevant to the allegedly infringing publication or its concealment. A considerable amount of time, effort and cost has already gone into considering them in these proceedings. The continuation of allegations in respect of them in these proceedings would in my judgment be an abuse of the court's process and contrary to the overriding objective. If I decided to allow amended particulars of claim I would only permit them with these allegations deleted.

164.16. Paragraph 43 of the Proposed Particulars reads:

“If the Second Defendant is [in] denial in relation to the Claimant's qualifications or suitability to complete a D.Phil in medieval Arabic then it has a duty to provide the Court with its reasons for unlawfully prohibiting the Claimant”

164.17. The issue as to the unlawfulness or otherwise of the prohibition imposed on the Claimant in 1999 and, possibly, 2000 from continuing with his M.Phil has been thoroughly examined by Gage J in the judicial review proceedings; by the County Court and by the Court of Appeal. The complaint in paragraph 43 is about the D.Phil, not the M.Phil; but in my judgment if such a complaint was going to be advanced it probably should have been advanced, if at all, in the earlier proceedings and it would be an abuse of the court's process to raise it now. Be that as it may, it is unclear why the Second Defendant should be under any duty to provide reasons at this stage. If the prohibition was relevant, a failure to provide reasons might be relevant to the resolution of a factual issue. However, again for the reasons given above, in my judgment the whole saga about Dr Zimmermann, the 1999 tests, the cessation in or after 1999 of the Claimant's M.Phil or D.Phil studies, the County Court proceedings and the appeal is irrelevant to the allegedly infringing publication or its concealment; so again this is an irrelevant allegation the inclusion of which would in my judgment be an abuse of the court's process and contrary to the overriding objective.

164.18. Paragraphs 49 and 50 of the Proposed Particulars summarise a claim for unjust enrichment against the First Defendant and, possibly, the Second Defendant arising out of their alleged enrichment at the expense of the Claimant from the allegedly infringing publication. The inclusion of such a claim as an independent cause of action would be inconsistent with the Claimant only wishing to advance a claim for infringement of copyright in these proceedings. I was not addressed on the point, but it is difficult to understand how such a claim could exist separately from a claim for infringement of copyright. Such a claim would also prima facie be time-barred. Reliance on s.32 Limitation Act 1980 would suffer from the same difficulties in that regard as the claim for infringement of copyright. It may be that the Claimant is here concerned with the alternative remedy for breach of copyright of an account of profits; but if that is the position it should be made clear.

165. Having regard to the above, and whether or not stripped of the parts which (as per my judgment above) I would order to be deleted if I permitted amendment by reference to the Proposed Particulars, the Proposed Particulars are or would be incoherent. They contain

or would contain irrelevant allegations; raise or would raise many insufficiently or inaccurately particularised issues and fail or would fail adequately to address critical issues, in particular those going to the possible application of s.32 Limitation Act 1980. Those defects mean that the Proposed Particulars (whether or not stripped as aforesaid) (i) fail or would fail to comply with CPR 16.4 in that they do not or would not consist of a concise statement of the facts relied upon; (ii) are or would be an abuse of the process of the court or likely to obstruct the just disposal of the proceedings and (iii) cause or would cause large amounts of costs to be spent dealing with points of no relevance or in trying to obtain proper particulars. For those reasons and applying the overriding objective, even if I was not of the view that the Claimant had no real prospect of establishing that his claim for infringement of copyright was not barred by the operation of the Limitation Act 1980, I would not permit amendment in the form of the Proposed Particulars (whether or not stripped as aforesaid). This reason for my refusing such amendment is independent of my reason based on the Claimant having no real prospect of success; though some of the analysis spans both reasons; in particular my views as to the irrelevance of the saga about Dr Zimmermann, the 1999 tests, the cessation in or after 1999 of the Claimant's M.Phil or D.Phil studies, the County Court proceedings and the appeal.

166. If I am wrong in my conclusion that the Claimant has no real prospect of establishing that his claim for infringement of copyright is not barred by the operation of the Limitation Act 1980, there would remain the possibility of giving the Claimant permission to amend his particulars of claim by way of a new document. Essentially allowing him to start from scratch with a new form of particulars of claim which is rule compliant and appropriately focussed on the alleged infringement of copyright and the relevant considerations under s.32 Limitation Act 1980. In my judgment it would be contrary to the overriding objective for me to do so and I do not give such permission. In favour of my allowing this are the considerations that (i) refusal would result in the draconian step of striking out the claims in circumstances where, on the hypothesis on which this paragraph is based, the Claimant has a real prospect of success; (ii) given the terms of this judgment the Claimant ought to be able to produce a substantially less defective set of particulars of claim than he has done heretofore in these proceedings; (iii) my concern that the Defendants have not dealt with the substance of the claims as to the allegedly infringing publication except in the general and, as explained above, unsatisfactory terms. However, in my judgment those considerations are significantly outweighed by the following considerations, taken cumulatively into account:

166.1. If I gave the Claimant such permission it would be unclear what amendments might be effected. It is quite possible that a new set of Particulars of Claim would give rise to issues as to whether they were compliant with the rules and with any conditions as to their contents which I might impose by order; thereby leading to further costly and court time consuming disputes of a similar nature to those sought to be disposed of in these proceedings.

166.2. The Claimant has already had three attempts at producing Particulars of Claim in these proceedings.

166.3. Even on the hypothesis on which this paragraph is based; that is that (contrary to my judgment above) the Claimant has a real prospect of success; there are considerable difficulties in his way, in particular as to limitation.

- 166.4. The acts complained of took place in 1998 and, possibly 1999. That is a long time ago. There would be likely to be issues of fact which the passage of time would make more difficult fairly to determine.
- 166.5. The Claimant has sought or obtained help with fees for the issue of these proceedings and has been seeking Legal Aid for their prosecution. There must therefore be at least considerable doubt as to whether the Defendants will be able to recover their costs if successful at the end of the day.
- 166.6. There is a serious risk that the Claimant will continue to make what I have held is the misleading statement that he was successful in his Court Of Appeal challenge in 2002. He has already been judicially corrected once as to this. In paragraph 2 of Employment Judge Gumbiti-Zimuto's decision the Employment Judge said that the present Second Defendant had pointed out "correctly, that the claimant did not successfully win the appeal as he alleged in his claim form".
- 166.7. The Claimant has demonstrated an ability (whether intended or not) to attempt to mislead the other parties. The instances I have in mind are those explained above where the Claimant said in an email to Ms Tschobotko on 9th October 2018 timed at 16:21 that "The Court has only today confirmed and approved the amended statement of case/particulars. Consequently, I will send you a copy shortly." The statement that the court had approved the amended statement of case/particulars was untrue. This untrue statement was repeated in the Claimant's email to Ms Tschobotko dated 23rd October 2018 timed at 16:50 where the Claimant said that he could confirm that the court had granted permission to amend the statement of case. It had not.
- 166.8. The numerous breaches by the Claimant of the CPR and the Civil Procedure Practice Directions which I have identified above. Many of these are not serious or significant, but both individually and cumulatively they have added to the difficulty, cost and court time involved in dealing with the case.
- 166.9. The prejudice to the Claimant in striking his claim out without giving him permission to provide a new set of particulars of claim will be limited because, subject in all probability to having to pay any outstanding costs, he could start a new set of proceedings. He may suffer prejudice in such circumstances in that he would have to pay another issue fee, but if, as it appears from the Claim Form may be the case, he is entitled to help with fees, that prejudice would not be suffered. The Claimant might also suffer prejudice if any relevant limitation period expired between the date of issue of these proceedings and the date of issue of any new proceedings. However, the Claimant has not provided me with any evidence to indicate that this might be the case, and if, contrary to my above judgment, he could bring his claim within s.32 Limitation Act 1980 and if, as he says, he only discovered the allegedly infringing publication in 2016, there would still be some time before the extended limitation period expired; so prejudice by reference to the expiration of limitation periods should be non-existent. In contrast if I allowed the proceedings to continue the Defendants would have to spend time and money dealing with them.
167. It should be apparent from what I have said above that in my judgment the Defendants have at least a realistic prospect of successfully defending the claims. Accordingly option (3) (granting the Claimant summary judgment) is not one which I adopt.

168. To conclude on the substantive questions of what to do in the way of strike out, summary judgment and amendment:
- 168.1. I strike out the existing particulars of claim.
- 168.2. I refuse permission to amend the particulars of claim either in the form of the Proposed Particulars or at all.
- 168.3. I dismiss the Claimant's application for summary judgment.
- 168.4. I strike out the claim form and the claim in its entirety.
169. That disposes of the substance (as opposed to the costs) of all the applications except for the Claimant's application dated 17th September 2018 by which he applied under CPR 3.3(5)(a) to set aside the costs order for £1,200 made against him and in favour of the Second Defendant by Chief Master Marsh on 4th September 2018.
170. The order was made on the application by the Second Defendant dated 15th August 2018 for an order that unless the Claimant filed and served an amended claim form and particulars of claim which complied with the relevant requirements of the CPR and Chancery Guide within 14 days, the claim stand struck out and dismissed and, in the alternative, an extension to the period of time for serving the Second Defendant's Defence.
171. The Claimant's application was made promptly and within 7 days of service of the order on the Claimant.
172. There is no evidence before me one way or the other as to whether the Second Defendant's application notice dated 15 August 2018 was served on the Claimant. Even if he was, the order made was substantially different from that sought by the application notice. Accordingly the Claimant had a right to apply to have the order set aside or varied either directly under CPR 23.10, or indirectly under CPR 23.8(c), CPR 23APD 11.2 and CPR 3.3(5). In my judgment, on the Claimant's application I should consider the matter afresh. That is because the purpose of the various rules is to ensure that justice is done by enabling a party to be heard who was not given the opportunity to be heard. If that opportunity was restricted by requiring the applicant to show a change of circumstances or that relevant factors had not been taken into account or that extraneous factors had been or that no reasonable tribunal could have made the order sought to be set aside or varied; then the opportunity to be heard would be unfairly and unjustly curtailed.
173. The Second Defendant did not obtain the unless order sought by it. It obtained an order requiring it either to serve an amended Defence or an application to strike out the claim. Insofar as the option which the 4th September 2018 order gave the Second Defendant of applying to strike out is concerned: applying to strike out is something which the Second Defendant could have done without making its application dated 15th August 2018. So far as the permission to serve an amended Defence is concerned: that was permission which the Second Defendant required because its original Defence was inadequate and not compliant with the rules. In those circumstances, considering the matter afresh and without deciding that the Chief Master's order was in any way reviewable, I consider that the appropriate order as to the costs of the application dated 15th August 2018 would be "no order as to costs". Accordingly I order that the order of 4th September 2018 be varied so that its paragraph 2 is replaced by "There be no order as to the costs of the application".

W.H. HENDERSON (Deputy Master Henderson)

21st March 2019