



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

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2019] EWHC 1207 (IPEC)

Date: 14 May 2019

Before:

HER HONOUR JUDGE MELISSA CLARKE
Sitting as a Judge of the High Court

BETWEEN:

Claim No: IP-2017-000235

(1) ATB SALES LIMITED

Claimant

- and -

(1) RICH ENERGY LIMITED
(2) WILLIAM JOHN STOREY
(3) STAXOWEB LIMITED

Defendants

Mr Roger Wyand QC and Mr Ben Longstaff (instructed by **Hall Ellis**) for the **Claimant**
Mr Thomas St Quintin (instructed by **Brandsmiths**) for the **Defendants**

Trial dates: 12 and 13 March 2019
Judgment provided in Draft: 9 May 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is judgment in a copyright infringement claim. What is sought, amongst other things, is an injunction which would require the removal of the logo of the First Defendant, Rich Energy Limited, from the Formula 1 race car and website of the Rich Energy Haas Formula 1 motor racing team.
2. The Claimant has traded under the name ‘Whytes Bikes’ since 1994 as a bicycle designer and manufacturer. It has used a logo in the course of its business (“C’s Logo”) of which a stag’s head device is a substantial part (“C’s Device”). The Claimant says that C’s Device is an original artistic work designed in December 2008 by its employees Mr Guy Farrant and Mr Mark Morgan in the course of their employment. Accordingly, copyright subsists in it, and the Claimant is the owner of that copyright. At trial the Defendants abandoned their pleaded challenge of these points and now accept them.
3. The First Defendant markets an energy drink under the brand ‘Rich Energy’. The Second Defendant, Mr William Storey, is the director and sole shareholder of the First Defendant. The Third Defendant, Staxoweb Limited, is a digital marketing company founded by Mr Sean Kelly, who is a childhood friend of Mr Storey. The Defendants say Mr Storey commissioned the Third Defendant in May 2015 to design a brand identity for the First Defendant and that Mr Kelly, working with the Mr Storey, designed a logo (“D1’s Logo”) of which a stag’s head device is a substantial part (“D1’s Device”). It is not disputed that the First Defendant has used D1’s Device in the course of its business since it was incorporated in September 2015.



C's Device

D1's Device

4. The Claimant claims that:
- i) D1's Device is a copy of the whole or alternatively a substantial part of C's Device;
 - ii) it did not consent to the First Defendant using it; and
 - iii) the First Defendant's use of D1's Device:
 - a) on products it has marketed and made available for purchase;
 - b) on the First Defendant's website;
 - c) on promotional, advertising and marketing materials including in its sponsorship of sporting events such as the Rich Energy Haas Formula 1 Motor Racing team;

is copyright infringement by reason of breach of sections 17, 18 and 20 of the Copyright Designs and Patents Act 1988 ("CDPA 88").

5. The Claimant claims that the Second Defendant and the Third Defendant are liable for such infringements as joint tortfeasors.
6. The Defendants deny copyright infringement. They say D1's Device was not copied, but independently designed without reference to, or any knowledge of, C's Device, and that the First Defendant owns the copyright in D1's Device. They do not deny that the First Defendant has used D1's Device as pleaded by the Claimant.
7. The issues which survive from His Honour Judge Hacon's list of issues compiled at the Case Management Conference on 1 May 2018 are:
 - i) Whether D1's Device was the result of copying C's Device or independently designed;
 - ii) If copied, whether D1's Device reproduces the whole or a substantial part of C's Device;
 - iii) Whether, if the court finds infringement, the Second and Third Defendants are jointly liable for the infringing acts.
8. Finally, the First Defendant filed a UK registered trade mark application for a mark including D1's Device in classes 5, 25 and 32 on 9 September 2015, which was registered on 4 December 2015 under UK trade mark registration no. 3126288 ("D1's Mark"). The Claimant says the use of D1's Mark is liable to be prevented in the United Kingdom by virtue of the law of copyright, being a ground of refusal of registration in section 5(4) Trade Marks Act 1994 ("TMA"). The Claimant seeks a declaration of invalidity pursuant to section 47(2) TMA.

9. The Defendants at trial accept that this issue stands or falls with the copyright infringement case. If the court finds that D1's Device infringes copyright in C's Device, then they accept that the Claimant's claim for a declaration of invalidity of D1's Mark will succeed.

THE LAW

Copyright

10. It is now conceded by the Defendants that the Claimant's Device is an original graphic work, being an artistic work, in which copyright subsists and is owned by the Claimant.
11. Section 16(1) CDPA 88 provides that the owner of the copyright in a work has the exclusive right to do certain acts restricted by the copyright which include, *inter alia*, copying it, issuing copies of the work to the public, and communicating the work to the public. Section 20(2)(b) CDPA 88 makes clear that communication of a work to the public includes making it available on the internet, or as the wording of the statute provides: "*the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them*".
12. By section 16(2) CDPA 88, a person infringes copyright in a work if he does, or authorises another to do, any of the acts restricted by the copyright without a licence. By section 16(3) CDPA 88, the restricted acts include doing that act:
(a) in relation to the work as a whole or any substantial part of it; and (b) directly or indirectly.

13. There are a number of provisions of the CDPA 1988 which are to be construed so far as possible in conformity with articles 2 and 3(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”). That includes provisions with which we are concerned. This was explained by Arnold J in *England & Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 65:

“65. ...the starting point must be that ss. 16, 17 and 20 of the 1988 Act are to be construed so far as possible in conformity with arts 2 and 3(2) of the Information Society Directive. Article 2 gives authors and others the right to authorise or prohibit reproduction of works and other subject matter “in whole or in part”. It is clear from *Infopaq I* [Case-5/08 *Infopaq International A/S v Danske Dagblades Forening* (EU:C:2009:465, [2009] ECR I-6569)] and subsequent authorities that, in the case of literary and artistic works within art. 2 of Berne, this does not mean that reproduction of any part is a restricted act. Rather, the CJEU has held that art.2(a) of the Information Society Directive is to be interpreted by reference to the rationale for granting protection, which in the case of literary and artistic works is the intellectual creativity they express. Thus, as the Court put it in *Infopaq I* at [39]:

“...the various parts of works thus enjoy protection under Article 2(a)... provided that they contain elements which are the expression of the intellectual creation of the author.””

14. Accordingly, when considering whether a “substantial part” of a copyright work has been taken for the purposes of section 16(3) CDPA 88, what matters is the extent to which that part contains elements which express the intellectual creation of the author. If it contains elements which express the intellectual creation of the author, then it is a substantial part. If it does not, it is not.

15. It is common ground that an essential part of proving copying is an unbroken causal connection between the original work and the infringing copy. That causal connection can be either direct or indirect, pursuant to section 16(3)(b) CDPA 88. A prima facie case of copying may arise if there is substantial similarity and proof of access to the original work by the alleged infringers. In the leading authority *Designers Guild v Russell Williams Textiles* [2000] 1 WLR 2416, at 2425, Lord Millet expressed the court's task as follows:

“The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying.”

Allegations of fraud/inauthenticity of documents

16. Practice Direction to CPR Part 16 at paragraph 8.2 provides that a claimant must particularise various allegations in his particulars of claim where he wishes to rely on them in support of his claim. These include any allegation of fraud, and notice or knowledge of a fact.

17. The Chancery Guide at paragraph 10.1 expands upon this:

“In addition to the matters which PD 16 requires to be set out specifically in the particulars of claim, a party must set out in any statement of case:

- full particulars of any allegation of fraud, dishonesty, malice or illegality; and
- where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.”

18. The Defendants rely on the case of *Property Alliance Group v Royal Bank of Scotland* [2015] EWHC 3732 (Ch) in which Birss J discusses the relevant Rules and previous authorities, including but not limited to the leading authority of *Three Rivers v Bank of England* [2001] EKHL 16 (per Lord Hope at para 55 and Lord Millett at paras 184-186), and concludes at para 40 that:

“These cases and guidelines are all based on the same rationale. Assertions of fraud and dishonesty are easy to make but difficult to prove and can cause a major increase in the cost, complexity and temperature of an action. The court’s approach is not intended to stop soundly based allegations of fraud or dishonesty from being made. It is intended to make sure that improper and unfounded assertions are not permitted and to make sure that the party against whom the allegation is made knows what case they have to meet”.

19. The Claimant in this case has not pleaded either fraud or dishonesty, despite being on notice of the Defendants’ case, pleaded in the Defence: (i) that they

had no awareness of the Claimant or the Claimant's Logo including the Claimant's Device, and (ii) of independent creation.

20. Further, the Defendants rely on CPR 32.19(1) which provides that the parties are deemed to admit the authenticity of all documents disclosed under CPR Part 31 where no challenge to the authenticity of any document disclosed has been made by the later of the time for exchange of witness statements and 7 days of their disclosure. It is common ground that the Claimant has made no such challenge.
21. Mr St Quintin submits on behalf of the Defendants that since no such allegations of fraud and dishonesty have been pleaded, and since the Claimant has not challenged the authenticity of any document disclosed, the Claimant must therefore accept, and be treated by the court as having accepted, that:
- i) The Defendants honestly believe that they knew nothing of the Claimant or C's Device until the letter before action in these proceedings
 - ii) The Defendants honestly believe that D1's Device was independently created; and
 - iii) All the documents disclosed by the Defendants in support of their claim of independent design are authentic.
22. In addition, if the court accepts the first two of those contentions, then Mr St Quintin submits in his skeleton argument that the Claimant's case must be limited to one of "unconscious" or "subconscious" copying. However, in his closing submissions, he said that the whole proposition of unconscious copying "*falls away*", because the Defendants' witnesses evidence at trial was that it was not a single person carrying out the design process but two

individuals (Mr Storey and Mr Kelly) having input at different stages. He described the proposition that they both unconsciously led to the design of D1's Device as "*just too remote to be realistic*". For that reason I will not set out the law and authorities contained in Mr St Quintin's skeleton relating to subconscious copying.

23. I respectfully disagree with Mr St Quintin in relation to the first two contentions set out above. Those amount to a submission that unless a party pleads dishonesty in relation to witness evidence, both the party and the court must be taken to accept the witness has given that evidence honestly. That is not correct, for the following reasons.

24. Both solicitors and counsel have particular professional responsibilities when considering whether to plead or allege fraud or dishonesty. Their responsibilities under the SRA Code of Conduct and the Bar Code of Conduct respectively are not identical, but broadly speaking, both provide that it is an act of professional misconduct to make such allegations without specific instructions and without having material which on the face of it justifies those allegations. There are many cases where dishonesty is suspected but there is insufficient material for a party to plead it. The Claimant submits that this is one of them.

25. The Claimant submits that although there may be copyright infringement cases where a claimant is able to provide direct evidence of copying by a defendant, this case is not one of them. As the editors of Copinger & Skone James on Copyright, 17th Edition, 2016 note at para 7-23, it is rare that a claimant stands over the shoulder of a defendant while copying is underway. In this case, the

only materials relating to independent design that the Claimant had before trial upon which a pleaded case of dishonesty could have been founded are: the Defendants' pleadings themselves (which stand as evidence pursuant to the procedural rules of IPEC); the Defendants' witness evidence; and a limited number of documents disclosed by the Defendants. On their face, unsurprisingly, each of those supports the Defendants' case. Whether they do in fact support it or not depends on the credibility and reliability of the evidence.

26. It is trite law that the assessment of the credibility and reliability of evidence is peculiarly a matter for the court. Of course I accept Mr Wyand's submission that the Claimant is entitled to test the Defendants' evidence by cross-examination at trial. Until it is so tested, and considered in the light of other evidence before the court and the inherent probabilities, the court cannot know whether on the balance of probabilities it is true, mistaken, dishonest or concocted.
27. As long as the facts upon which an inference of dishonesty may be based are pleaded, if evidence emerges at trial which the Claimant considers sufficient that the court might properly find dishonesty, even though it was not able to plead it before trial, it must be put to the relevant witness so that he may answer it. It is only then that a court may properly be invited to, and may make, an evidential finding that such a witness was indeed dishonest. This is part of the court's ordinary adjudicative function. In this case, the facts from which dishonesty may be inferred are clearly set out in the pleadings and arise from the cause of action. The Claimant pleads that the Defendants have copied C's

Device, and the Defendants deny any familiarity with the Claimant or C's Device and deny copying it. It is for the court to sift and evaluate the evidence to determine the case. The court's hands will not be tied in the manner that the Defendants seek, by the fact that dishonesty has not been pleaded.

28. For those reasons I am satisfied that the question of the honesty of the Defendants' beliefs remains a question to be determined by the court. As I think Mr St Quintin also now accepts, the claim to be determined continues to encompass conscious copying.

29. Turning to the third contention relating to the authenticity of documents, it is difficult to know what the Defendants mean by 'authentic', in light of the very limited information they have given about the limited disclosure they have made, and in light of what emerged at trial from the Defendants' own witness Mr Kelly. I will deal with this later in this judgment to the extent it still remains in issue.

WITNESSES

30. I heard from four witnesses at trial. For the Claimant, I heard from Mr Guy Farrant (the Claimant's managing director) and Mr Mark Morgan (a graphic designer employed by the Claimant). Mr Farrant signed the pleadings for the Claimant. For the Defendants, I heard from Mr William Storey (the CEO of the First Defendant) and Mr Sean Kelly (the CEO of the Third Defendant). Both Mr Storey and Mr Kelly signed the Amended Defence. Mr Storey filed one witness statement and the other witnesses each filed two.

31. I found Mr Farrant and Mr Morgan to be straightforward, credible and reliable witnesses who came to court to assist it to the best of their abilities. Mr St Quintin did not submit otherwise. As the Defendants have conceded the issues relating to the subsistence of copyright in, and ownership of, C's Device, their evidence was of relatively limited relevance to the issues which remain.
32. Conversely, I found both Mr Storey and Mr Kelly to be poor witnesses.
33. Mr Storey provided different and inconsistent accounts of the development of D1's Device, which also conflicted to a large extent with the evidence of Mr Kelly. He often did not answer questions directly, preferring to make speeches about his vision for his business or alternatively seeking to evade questions by speaking in generalities or in the third person plural. He only answered several questions when I intervened. He had a tendency to make impressive statements, which on further investigation or consideration were not quite what they seemed. For example, when Mr Wyand in cross-examination tried to understand his evidence about the sales figures of Rich Energy drinks, and put to him that he had been quoted in the press in February 2019 as saying that the First Defendant had produced 90 million cans, Mr Storey explained that it had produced 90 million cans, but had not yet filled and sold them. He said he would have to check the figures, but in 2018 he thought the First Defendant had filled and sold "*circa 3 million cans*" of Rich Energy drink. In another example, he stated in an impassioned fashion that he was "*not in the business of trying to create a world-class business by taking any inspiration from anybody else whatsoever*", but his own written evidence was that his starting point when thinking about developing a logo was to carry out logo research on

what other drinks companies were doing, and to carrying out internet searches on stag head logos used by other companies. For reasons which I set out below, I am satisfied that some of Mr Storey's evidence was incorrect or misleading and that he was involved in the manufacture of documents during the course of litigation to provide additional support for the Defendants' case.

34. Mr Wyand described Mr Kelly's evidence as a mixture of fact and fantasy. Mr St Quintin submits that, on the contrary, Mr Kelly was careful and patently honest. I am not with Mr St Quintin. I set out below some significant findings of dishonesty that Mr Kelly manufactured documentation to provide additional support for the Defendants' case. In addition his oral evidence was inconsistent with his witness evidence and answers given in the Defendants' RFI Response, which he had signed. His witness evidence was inconsistent with the Defence that he had also signed. He was evasive in some aspects of his evidence, as I will go on to highlight when I deal with the evidence. I accept he made a number of significant admissions against the Defendants' case, but some of those were unwillingly made in the face of incontrovertible evidence put before him by Mr Wyand. He would not make other, obvious admissions, for example that C's Device and D1's Device are closely similar.

35. For those reasons, I do not accept either Mr Storey or Mr Kelly as credible or reliable witnesses and I treat all of their evidence with a high degree of caution. Wherever possible, I look for corroboration from other credible and reliable evidence or the inherent probabilities.

EVIDENCE

36. The Defendants' evidence on independent design is at best, in my judgment, confused and contradictory and purports to be supported by documents which are not what they seem. It is necessary to look first at the Defendants' written evidence in the form of the Defence and initial witness statements, before then going on to consider the different and contradictory picture which emerged from the disclosure process and at trial.

Amended Defence

37. Pursuant to the procedural rules which apply to IPEC, pleadings stand as evidence. In the Amended Defence, which was signed by both Mr Kelly and Mr Storey, the Defendants contend in para 22(b)(ii) that the first word of the First Defendant's name:

“...was selected before the incorporation of the First Defendant to simultaneously refer to a number of things and concepts. One of the purposes of its selection was as an abbreviation of “Richmond”, in order to give the brand a sense of geographical origin and to assist in the creation of a brand narrative.”.

38. The Defendants further contend in the Amended Defence that the Third Defendant was commissioned by Mr Storey to design a logo and that:

“The design of D1's [Device] was carried out by Sean Kelly of Staxoweb with the assistance of others at Staxoweb Limited under Mr Kelly's instruction. In addition to the inspiration from the deer of Richmond Park, one objective of the design was to create a modern image that distinguished it from stag imagery often used by Scotch whisky brands (such as, for example, Glenfiddich, Dalmore, Arran...). A number of iterations of the design were proposed until D1's [Device] was selected”.

39. No further information about the design process is pleaded or evidenced in the Amended Defence.

Mr Storey's Witness Statement

40. In fact, as Mr Storey acknowledged in his witness statement and accepted in cross-examination, the name "Rich Energy" was selected by the Croatian creator of the energy drink formula, Drazen Majstrovic in 2013, when Mr Majstrovic founded a Croatian company, Rich Energy C.O.O, to market his new drink. Mr Storey had no formal involvement with the brand until 2015. Accordingly the name of the drink was not selected by him to reflect his associations with Richmond, Surrey, as pleaded. By the time of his witness statement, Mr Storey's evidence was that he was from Richmond, Surrey and the connection between the word 'Rich' and 'Richmond' was why he kept the name Rich Energy, albeit not why it was originally chosen.
41. In Mr Storey's witness statement he describes that in 2015 he was sharing an office with Mr Kelly, his childhood friend, who had set up the Third Defendant as a digital marketing agency. Accordingly when he was in negotiations with Mr Majstrovic to market and sell his Rich Energy drink in May 2015, he formally instructed the Third Defendant to assist with the development of the Rich Energy brand and create and maintain a website. The Third Defendant raised an invoice for £50,000 on 31 May 2015 "*prior to commencing work*". This was addressed to Mr Storey as the First Defendant had not yet been incorporated. Mr Storey's written evidence is that: the work was carried out by way of an exchange of ideas between him and Mr Kelly; it was carried out

orally as they were in the same office; no notes were taken; but various design documents were kept.

42. At para 22 of Mr Storey's witness statement he said:

“Before Sean began formally designing, I conducted research into drinks that were in a similar market, as well as those brands that were using a stag logo. I exhibit at page 6 of WS1 this research. That research did not identify the Claimant's logo. As I explain below, I had never seen it before this litigation commenced”.

43. Page 6 is a collection of logos dropped into a 4 X 4 grid of boxes. It is found at 357 of the bundle and headed “Logo Research”. The text beneath says, inter alia, *“The final row are logos which could be a starting point for Rich Energy's identity”*. I will come back to that Logo Research page.

44. Mr Storey continued at para 22 of his witness statement, going into para 23:

“The stag features in a lot of logos, they are often quite simple, however the majority favour the classic design. I explained to Sean that a classic design may not necessarily be my vision for Rich Energy... Sean therefore put together a collage of images of stags which he could use as inspiration when designing the logo. This is exhibited at page 28 of WS1.”

45. This is a single page collage of photographs of stags in bucolic countryside scenes, which may or may not be Richmond Park. It is at 378 of the bundle and is headed “Design Research”. I will also come back to that Design Research page.

46. Mr Storey's witness statement continues at paragraphs 25 and 26:

“25. In early June 2015, Sean then put pen to paper and produced some exploratory sketches by hand. These sketches which I have exhibited at page 29-30 of WS1 showed a stag face on. These were classic yet modern designs... But in my opinion, were more akin to the traditional stags employed by Scotch Whisky producers... I wanted something more modern and innovative.

26. It was for this reason that Sean suggested geometric shapes, this [which] would make the stag look more angular. Sean produced the angular logo ideas which are exhibited at pages 37 – 39 of WS1. The sketch... which is exhibited at page 40 of WS1 was getting close to what I wanted. I liked the use of geometric shapes, they represented the modern characteristics I wanted for the brand and departed from any possible association with whisky brands.”

47. The sketches at page 29-30 of WS1 are in the bundle at 380-381 under the heading “Logo Sketches”. The sketches described as ‘more angular’ can be seen at 388-391 of the bundle under the heading “Logo Concepts”.
48. Mr Storey describes at paragraph 27 of his witness statement that Mr Kelly put together further geometric sketches. These can be seen at page 392 of the bundle under the heading “Logo Creation”. It is a collection of six very reduced, simple geometric sketches dropped into a 3 X 2 grid of boxes, one of which has a large tick beside it. Mr Storey explains that he was “*instantly drawn to [that] cleaner sharper sketch... however, it was incomplete. I tasked Sean with further developing [it] as I felt it was the perfect foundation*”.
49. Mr Storey then sets out sketches dropped into two 2 x 3 grids of boxes, which he describes as “*further iterations*” of the sketch he had selected. These can be seen at page 392 of the bundle. Of the first set of six sketches he said he liked the one in the top left of the grid: “*However I felt that it was missing*”.

some minutia that would elevate the logo to the next level". He said that "*Sean therefore created*" the second set of six sketches. In fact two of those appear to be duplicates. All five appear to be from a later-disclosed single page of sketches headed "Finals Rich Logo" and dated in manuscript 25/06/2015 (page 393 of the bundle).

50. Finally, Mr Storey says that he asked Sean to put together some final options using computer software and he sets out in his witness statement a 2 x 3 grid of boxes headed "Rich Energy Logo Options" in which graphic black CAD renderings can be seen, all of which are geometric angular stag head devices. One of these (seemingly identical to D's Device) is in the bottom right and marked with a large tick.
51. Mr Storey gives his opinion at para 42 that both C's Device and D's Device are very simple, and the use of geometric stag designs is "*commonplace*". He provides two examples – one from Moor Hall (a hotel in Ormskirk, Lancs) and one from The Wild Beer Company ("D's Example Geometric Stag Designs"). Both are very different to C's Device.

Mr Kelly's Witness Statement

52. Mr Kelly states in his witness statement "*I believe it likely that some documents relevant to the design process may not have been retained, however key ones such as original sketches have been*".
53. He agrees with Mr Storey as to the scope of work that the Third Defendant was commissioned to carry out, and that he "*raised an invoice for £50,000*" for that work.

54. He states that Mr Storey wanted a modern innovative brand, and to play on the fact that he was from Richmond but says, accurately this time: *“fortuitously the drink was already called the ‘Rich Energy Drink’”*. After some discussion, he says, Mr Storey told him he wanted a stag to be incorporated in the design.
55. Mr Kelly says that after some initial discussions around the office: *“I put pen to paper and began to start producing exploratory sketches of stags”*. He exhibits a number of pages entitled “Logo Sketches” at pages 2-6 to the exhibit to his first witness statement. Page two shows 16 different drawings of stag heads dropped into a box. The subtitle above the box is “Exploration sketches” and the rubric states *“Exploring different routes to visualise the Stag logo idea. Using the features of the Stag as a starting point”*. Mr Kelly says Mr Storey considered these, but indicated that he didn’t want a traditional stag design. I will come back to this page, which is at 415 of the bundle.
56. Mr Kelly agrees with Mr Storey that it was his own idea, and not Mr Storey’s, to use geometric shapes to create a more angular modern stag shape, and that he began to sketch *“intricate and more simple options”*. His written evidence was that Mr Storey selected one basic angular sketch, which he thought, *“was a good starting point, but I recall him saying that he wanted it to be more identifiable as a stag... I suggested we add more definition to the antlers”*.
57. He says that towards the end of June 2015 he created 12 geometric and angular options, and that on 25 June 2015 he created a single page of sketches headed “Finals Rich Logo” so Mr Storey could make a final decision on the logo he liked best, saying: *“This document contained a number of sketches that we had considered during the creative process”*.

58. Mr Kelly's written evidence is that Mr Storey asked him to construct renderings using CAD, and so: *"I put together a number of designs using vectors in order to keep the logo sharp and less twiggy. This was to evoke a sense of strength. I put the sketches exhibited at page 20 of SK1 using Adobe Illustrator which fit this brief. I printed these off and provided these to Will for consideration"*. The renderings he attaches to his witness statement are the same six as those contained in Mr Storey's witness statement.
59. He says that Mr Storey picked one, and: *"I therefore finalised the logo using Adobe Illustrator as it allowed me to create a vector graphic. It allows logos to be enlarged without compromising quality"*. The final logo is D1's Device. Mr Kelly said *"I am personally proud of the design of the logo especially now it is becoming internationally recognised"*.

Disclosure issues

60. The Defendants provided disclosure, as required by the case management directions of His Honour Judge Hacon, in the form of a scanned copy of the Third Defendant's £50,000 invoice to Mr Storey dated 31 May 2015, and a number of single-page electronic pdf files contained in folders labelled *"2. Sketches of Rich Energy Logo; 3. Rich Energy Can Designs; 4. Stag Logo Research Documents; 5. Brand Research Documents; and 6. Other documents"*. The pdf files were numbered, but there were gaps in the sequence. They included the various pages and sketches which I have described above and which were appended to Mr Storey's and Mr Kelly's witness statements. Apart from the Invoice and the single scanned page of

sketches dated 25/06/2015, none was dated nor was any further description provided of what they were.

61. The Claimant's solicitors wrote to the Defendants' solicitors on 21 August 2018 noting that page markings on pdfs 6-25 indicated that they appeared to come from a single document, albeit with some pages missing, and asking:

- i) "Please explain the provenance of those pdfs and supply us with a whole copy of the document or documents from which those pdfs have been extracted"; and
- ii) "There is no correspondence passing between the Defendants setting out the scope of the design project, Rich Energy's/Mr Storey's own ideas/preferences for design style, presentation of Staxoweb's design process/ideas or feedback from Mr Storey/Rich Energy on the design ideas that had been supplied to them by Staxoweb. There are also no documents illustrating the iterative process that was followed before the final form of the Logo was selected. Please disclose copies of all such correspondence and/or notes of meetings... falling within the types of documents set out above".

62. The Defendants' solicitors, Brandsmiths, responded on 4 September 2018 stating: (i) that they did not believe that the requests made were appropriate or required any explanation; and (ii) in respect of the second request:

"...this is quite frankly an imbecilic request by you. You are asking our client to provide more documents that could only ever support its case of independent creation".

63. I do not believe I should let that pass without comment. I do not consider that there are any circumstances in which one solicitor in the course of his professional duties should accuse another in writing of making imbecilic

requests. That language is far removed from the professional courtesy which solicitors are expected to show each other and those they deal with. If a trainee solicitor sent the letter, as the reference suggests, the fact that it was sent in this form suggests a failure by the supervising solicitor properly to supervise.

64. It is also particularly regrettable in the circumstances of this case because of what happened next. The Claimant made a Part 18 Request for Further Information. I note that nowhere in that document does the Claimant mention the words ‘fraud’ or ‘dishonesty’ or even hint at them. It simply made the requests foreshadowed in their solicitor’s letter of 21 August 2018. The Defendants’ solicitors, after a great deal of harrumphing in a cover letter:

“The RFI, quite simply, is an attempt to challenge the authenticity of our clients’ disclosure. It is clear to use [sic] that it is an unsubtle and thinly veiled vehicle to commence the advancement of an extremely serious allegation that our client has fraudulently created documents for the purposes of this litigation in support of its defence. This is not the case and our clients deny any allegation of wrongdoing vehemently. In any event, at no point has an allegation of fraud been alleged or pleaded. The reasonable inference here being that following disclosure your client’s position is becoming increasingly untenable and this is no more than a final ‘roll of the dice’ ... your scattergun approach of throwing as much mud at our clients in a hope that something sticks is completely inappropriate and heavily criticised by the Courts”

provided what they described as without prejudice and voluntary disclosure, enclosing with the RFI Response:

- i) An electronic copy of a document described as “*Rich Energy Brand Guidelines*” and which is entitled “Brand Research – How we created Rich Energy” (“Brand Document”);

- ii) Electronic copies of the renderings underlying pages 19 and 20 of the Brand Document, which include those in Mr Storey's witness statement and appended to Mr Kelly's first witness statement, but also include others; and
 - iii) Screen shots of the properties of each of these electronic documents.
65. Mr Kelly and Mr Storey signed the RFI Response. It referred to the Brand Document as "*a copy of the document from which the pages referred to were taken*" and described that the contents were compiled:
- i) by Mr Kelly from other documents that had been created by or were in the possession of the Third Defendant before that compilation;
 - ii) in or around July 2018 and finalised on 3 August 2018.
66. The RFI Response further stated that:
- i) the pencil drawings on pages 6-18 of the Brand Research document were created by Mr Kelly in May and/or June 2015; and
 - ii) Mr Kelly created the computer-generated renderings on pages 19-22 of the Brand Research document in May and/or June 2015. The properties/metadata of two electronic files containing the renderings on page 19 and 20 (but not 21 and 22) were disclosed, which show that those two files were in fact created on 2 July 2015.
67. Accordingly, it appeared from the Defendants' RFI Response that the Brand Document was a 2018-created document compiling together previously existing documents, created by or in the possession of the Third Defendant before the time the Brand Document was put together.
68. In fact, Mr Kelly's oral evidence at trial was that the Brand Document was no such thing. In cross-examination, he said that apart from the pencil drawings

on pages 6-18 which dated from June 2015, and all of the renderings on pages 19-22 which dated from on or around 2 July 2015, the rest of the Brand Document was:

“produced... to try and aid the court to see, to put together the pieces, because the only originals we had were the original sketches and the black geometric designs, and obviously the can design, but those are the only originals. So just to aid, you know, our recollection of those events, we decided to put together a comparison document, which kind of pieces it together, so that we could talk about it more easily”.

69. Mr Wyand asked if it was for an aide-memoire, and Mr Kelly said “*No, mainly for the court, to make matters easier on the day.*”
70. Mr Kelly confirmed in cross-examination that save for those pencil sketches and renderings, none of the rest of the contents of the Brand Document was in his or the Third Defendant’s possession before he created the Brand Document. He said that:
- i) he believed, but was not certain, that the various third party stag head logos used as exemplars or potential “starting points” for the design, including the Example Geometric Stag Designs, came from internet searches carried out by Mr Storey at the time of creation of the Brand Document in 2018, not creation of D1’s Device in 2015;
 - ii) the photographs, including those contained in the moodboard collage, were found and put together in 2018, not 2015;
 - iii) the narrative explanatory text and headings were also only created during the course of creation of the Brand Document in 2018; and

- iv) the ticks, seemingly showing Mr Storey's preferred options at various stages, were superimposed on the various images during the creation of the Brand Document in 2018;
 - v) nonetheless, the Brand Document attempted to "recreate" the "design journey" that he and Mr Storey had undertaken when they independently created D1's Device.
71. Mr Wyand asked Mr Kelly why, if the Logo Research page was manufactured for the purposes of this litigation in 2018 using logos selected from internet searches also carried out in 2018, the rubric on that page says "*The final row are logos which could be a starting point for Rich Energy's identity*" (my emphasis). Mr Kelly replied: "*To effectively portray how we went about coming to the Rich logo, the original concepting and ideas. Again, there was a lot of documentation that we did not keep. There is some that we did, which we submitted to the court, some of it was paper, some of it was electronic. So, most of this document, bar the sketches and the black geometric shapes, we effectively recreated just to tell the story and put it all together*".
72. My Wyand put to him that someone reading the Brand Document would think that these were the logos from which the development of D1's Device started. Mr Kelly answered "*It was effectively meant to say, this is what we could have done, this is what we did do, here is the whole story, here is how we put it together, and that is making the best use of what originals we had*".
73. Mr Kelly agreed in cross-examination that the statement in the RFI Response, which he had signed, that "*the documents have been created by, or were in the possession of, the third defendant prior to that compilation*" was not correct.

Contradictions between Mr Kelly's and Mr Storey's oral evidence

74. This was not Mr Storey's oral evidence, which I had heard before Mr Kelly was called to the witness box. Mr Storey was asked about the Brand Document in cross-examination.
75. Mr Wyand first asked Mr Storey how D's Example Geometric Stag Designs and the other stag logos on the "Logo Research" page came to be found and selected. Although Mr Storey's witness statement stated clearly that he had conducted research and attached the Logo Research page to evidence that research, in cross-examination he gave confused and contradictory evidence. He originally said that "we" i.e. he and Mr Kelly, had carried out "*an awful lot of research... We looked at dozens and dozens of the stag-inspired logos*". He said, "*we were doing a lot of research and brainstorming*" "*we looked at lots and lots of designs*". He later increased this estimate to "*hundreds and hundreds*" of logos.
76. When asked if he personally carried out internet searches (and I had to intervene before he would answer Mr Wyand's question), Mr Storey answered "*You will have to ask the designer that question. I personally did not*". He said Mr Kelly showed him "*hundreds of things which I would pass an opinion on to give him some steer on how we should be moving towards our design*".
77. Mr Wyand asked Mr Storey why he had said in his witness statement that he carried out the internet research, if it was Mr Kelly. Mr Storey then said: "*We both conducted the research. Mr Kelly did an awful lot of perhaps the donkey work in actually exploring different things that were out there, and together we worked on the design. So, Mr Kelly did do an awful lot of the leg work, but*

we obviously did a lot of research and looking around to give us, you know, as comprehensive an understanding of the market as possible.” I note that Mr Kelly’s oral evidence was that he did not carry out this research, and that it was Mr Storey who did it.

78. When asked in cross-examination how the logos which were included in the Brand Document had been picked out of all of the hundreds and hundreds of logos he said he had looked at, Mr Storey originally said: *“it would have been the designer”*. He then amended his position again, saying: *“No, we were both, if I can say that, researching, both together and independently, and this is some of the research that I did, and we then worked on it together... And obviously, this is a, you know, quite frankly, this was months and months of work, so a lot of this is a snapshot of the research that we were doing”*. Mr Wyand specifically asked him when the Logo Research page was put in its current form and Mr Storey replied *“Well, all of these pictures and images were found during our research in 2015 and that was subsequently summarised to answer the points that were brought to us two and a half years later by people querying our research”*. Mr Wyand sought clarification, asking: *“So, this document was produced in 2018 and was a selection of some of the research results that you had from 2015?”* and Mr Storey answered: *“Correct. In order to answer the questions raised, we put together a summary in 2018 of the work that we had done, which was based on the sketches and the work that we had done in 2015. We could have created a 300-page document, but chose to raise the most pertinent points which is, you know, the work that we did.”*

79. This contradicts the admissions made by Mr Kelly in his oral evidence, that he had not carried out internet searches in 2015, had not saved any internet searches that Mr Storey carried out in 2015, and the pictures and images were obtained in July 2018. It is also difficult to understand how Mr Storey could say that “*we could have created a 300-page document*” when:

- i) his evidence was that Mr Kelly kept all the documents from 2015 (or at least that only Mr Kelly knew where any saved documents were kept); and
- ii) Mr Kelly’s evidence was that he only had the pencil sketches and some computer-aided renderings from 2015. No further documentation has been disclosed.

80. Again, when asked who had picked the Example Geometric Stag Designs for inclusion in his witness statement, Mr Storey said “*Myself in conjunction with my legal team*”. He said: “*I would have picked them from the original work that we had*”. When asked if he had selected them from a document that he still had in his possession, relating to searches carried out in 2015, he said that they were picked from “*assorted paperwork that we would have held... I believe you have seen a lot of the information that we hold and that these were picked out as examples...* ”.

81. Again, this contradicts Mr Kelly’s oral evidence that he didn’t believe he had found those Example Geometric Stag Designs, but thought they were picked by Mr Storey. He originally said “*I’m not sure whether these came from the original research [in 2015] or recently as examples [in 2018]*”, but on further questioning confirmed that he did not save any documentary evidence of searches carried out in 2015. Certainly, none have been disclosed.

82. Mr Storey's oral evidence was that the "Design Research" moodboard collage of photographs was created in 2015. Mr Kelly said it was in 2018, from images which he obtained in 2018. Mr Wyand showed Mr Kelly that Mr Storey had appended that Design Research page to his witness statement with the description: "*Sean put together a collage of images of stags which he could use as inspiration when designing the logo.... Exhibited at page 28 of WS1*". Mr Kelly said he "*didn't believe that Mr Storey meant that is the original. I believe he is saying that is effectively the example*". Of course, that is not Mr Storey's evidence.

83. In my judgment, only one of them can be telling the truth about how, when and from what materials the Brand Document was created. I find it highly improbable that Mr Kelly would dishonestly tell the court that he had manufactured large parts of the contents of the Brand Document in 2018 for the purposes of supporting the Defendants' case in this litigation, if those contents had in fact been legitimately produced during the design process of D1's Device in 2015. I do not believe that Mr Storey can be mistaken about where the contents came from, given that it was put together as recently as July/August 2018 for the purposes of this litigation. For those reasons, in relation to this evidence, I prefer Mr Kelly's account and I am driven to the conclusion that Mr Storey's evidence was untruthfully given.

84. Accordingly I am able to make the following findings, on the balance of probabilities:

- i) Mr Kelly was involved in the design of D1's Device for just over a month in June 2015 until around 2 July 2015;

- ii) I accept Mr Storey's evidence that he did research into drinks brands and brands using a stag logo, before Mr Kelly began designing;
- iii) I prefer Mr Kelly's evidence that Mr Storey carried out initial internet searching and research into logos and brands, and most internet searching thereafter per his witness statement, rather than Mr Storey's later oral evidence that Mr Kelly did all such searches, or alternatively most of the donkey work of internet searches;
- iv) Both Mr Kelly and Mr Storey saw hundreds and hundreds of logos of stag's heads, arising from Mr Storey carrying out such searches and sharing results with Mr Kelly;
- v) The only documents which can have been contemporaneously produced in 2015 (about which I will go on to make further findings), and so may be relevant to the issue of independent design, are the pencil sketches and the black CAD renderings.
- vi) The creation of the Brand Document was a joint endeavour between Mr Kelly and Mr Storey, being manufactured by Mr Kelly *ex post facto* in 2018 for the purposes of this litigation from content which included that only obtained in 2018, in order to strengthen the Defendants' case of independent design.
- vii) The Brand Document has significantly undermined my view of the credibility of both Mr Story and Mr Kelly:
 - a) in the manner in which they created it, using photographs and logos obtained from searches carried out in 2018 and presenting them as providing 'inspiration' and maybe 'a starting point' for the development of D1's Device;
 - b) in the incorrect and misleading description of the document in the RFI Response which they both signed with a statement of truth;

- c) In Mr Storey's misleading and untruthful oral and written evidence about its creation.

Issues with Pencil Sketches

85. The first indication that there was an issue with Mr Kelly's witness evidence about the disclosed pencil sketches came in a letter from the Defendants' solicitors of 6 March 2019 a few days before trial, in which it was said that he wished to clarify his evidence about page 2 of his "Logo Sketches" exhibit (page 415 of the bundle). The letter set out that Mr Kelly had described these as "*exploratory sketches of stags*" made after he initially put pen to paper in the design process, and goes on to say:

"Mr Kelly did not mean, and it is not his evidence, that every example sketch of a stag on page 2 was produced at the time when he first began to start to produce exploratory sketches. Page 2 contains a collection of sketches collaged from the pencil sketches he produced throughout the design process, only some of which were produced at the time when he first began to start to produce exploratory sketches".

86. Mr Wyand explored this in cross-examination of Mr Kelly. Mr Kelly produced a rather confused response when being asked which of the 16 sketches were initial exploratory sketches and which were from later in the design process, and could not provide an answer.

87. When Mr Wyand asked why there some sketches within the sixteen that were repeats of others in the same group, Mr Kelly did not appear to understand what he was talking about until he was shown. He said that he was not aware that he had done that, saying "*I must have added a duplicate by mistake*". In fact it appears that there is more than one duplicate.

88. Mr Wyand asked why some of the sketches appeared to be getting close to the final design, if they were meant to be early sketches. Mr Kelly said “*I suppose, to summarise, that page 415 is not necessarily in chronological order, that is just a selection of the various sketches that we did... we did not retain, you know, numbered pages... we retrieved all of these hand-drawn images and again that is why we felt the need to put together this document, to try and explain, you know, what we did two and a half years ago*”. I note, as Mr St Quintin pointed out in his closing submissions, that the Claimant’s witness Mr Morgan also placed a number of sketches on a single page and accepted in cross-examination that they were not necessarily in chronological order of creation. It seems that it might be a common practice in the world of graphic design.

89. Mr Wyand asked Mr Kelly again when these sketches were scanned in and made digital. Mr Kelly said, “*Some were scanned in [in 2015], some were not. Some were kept on paper, the recent [ones] that we scanned in in 2018 [sic]*”.

90. Finally, Mr Wyand produced some enlarged images of two of the sketches which Mr Kelly had exhibited as early sketches of stags (page 419 and 420 of the bundle). There was the following exchange:

“Q. ...page 419, this is sketch VI. This one appears to be mirrored?

A. In what sense, sorry?

Q. That the right-hand side is a mirror image of the left-hand side?

A. It is symmetrical, which it probably should be. Sorry, can you expand further?

Q. Let us have a look at the next page, page 420. Do you see, on the right-hand outer antler, there is a bit of a line going down. The sketch is not terribly polished and you see exactly the same thing on the left-hand side.

A. It is just how I draw things. I mean, that is – you know.

Q. Well, here is an enlarged version of sketch VI... You can see what I was talking about. The top of the right-hand antler has a little imperfection. It is repeated on the top of the left-hand one. The lines on the antler, on both sides, there is the double line, exactly the same on both sides.

A. (Pause) Possibly. That could have been a tactic that I did on these. Yes, you may be right. Yes.

Q. So, when would you have done the mirroring?

A. So, sometimes when I do it in this method, I would draw it originally, to get roughly what I want, and then re-draw it, effectively fold the page over or use tracing paper, just to get the sketch as symmetrical as possible.”

Issues with Renderings

91. Mr Wyand then turned to the disclosed CAD rendered designs, which were twelve in total, and included six other designs apart from those six which had been included in Mr Storey’s witness statement, and also appended to Mr Kelly’s first witness statement. Some of the previously unseen six designs were not geometric and angular at all, but curved and rounded representations of stag heads which are, in my judgment, quite different from the pencil sketches that Mr Kelly and Mr Storey say Mr Storey preferred.
92. Mr Kelly’s written evidence had been that after considering the 25 June 2015 “Rich Finals Logo” sketches, Mr Storey “*advised he was a fan of the angular sharper logos as they looked less like an antelope and more like a stag*”.

Accordingly, Mr Wyand asked why Mr Kelly had created those curved renderings at the very end of the design process, which looked nothing like the sketches on the “Rich Finals Logo” page. Mr Kelly said that he thought that was his *“artistic flair coming out”*, and he had got *“carried away”*. I did not find that convincing. The only other place that similarly curved designs appear is in the initial sketches, including on the page of 16 designs at page 415 of the bundle. Although Mr Kelly now says that some of those sketches on page 415 are not initial sketches but from later in the design process, when Mr Wyand was trying to understand which he said were early and which were later ones, he said *“You know, I drew so many different designs and if you continue on to... page 422, again that started getting towards the angular... They were becoming more and more angular, like the final logo that we created”*.

93. In my judgment it is difficult to reconcile what both Mr Storey and Mr Kelly have said about a design journey involving a process of continual refinement and consistent preference towards angularity culminating with D1’s Device, with these curved, shaped vector designs which the metadata show were created as late as 2 July 2015.
94. Finally, I turn to page 21 in the Brand Document, which is entitled “Final Logo”. This contains a rendering of D1’s Device in black in a box, above which is the legend “Logo created in Adobe Illustrator”. After reading Mr Morgan’s witness statements which addressed the similarities between C’s Device and D1’s Device, Mr Kelly filed and served a second witness statement, to which was attached at page 2 of SK2 the same image, but apparently with the vector lines produced by Adobe Illustrator made visible.

Mr Kelly confirmed as much initially in cross-examination, before becoming equivocal and eventually changing his evidence:

Q. In the electronic copies, you can see the vector lines, is that correct?

A. Yes.

Q. And what did you do, did you drop that into this box on this page?

A. So this page is a snippet of one of the final drawings that we put in here just to show the final, final, which is based off originally a file in Adobe that we used to create it.

Q. So, those straight lines are the Adobe lines? (Pause). Is that correct?

A. I believe so, yes.

Q. What else could they be?

A. (Pause) I am sorry, I did not quite understand the question.

Q. The straight lines shown on there are the Adobe Illustrator lines, are they?

A. I cannot remember if they are or not.

Q. What else could they be?

A. These may have been superimposed afterwards as part of this document. I am not quite sure, I cannot remember. But certainly the black elements look like to me the final, it looks like the final shape we went with.

Q. Why would the lines be superimposed afterwards?

A. I cannot actually remember. Possibly to further illustrate the geometric and the angular, you know, route we took, that they are all effective mirrored, hence why we decided to use Adobe Illustrator.”

95. Mr Kelly agreed with Mr Wyand that the purpose of an Adobe vector is to define the lines of an image so that it can be enlarged without distorting. Mr Wyand showed him that if he looked at the enlarged image, the lines did not in fact perfectly define the image, and Mr Kelly agreed, saying that the lines were not created in Adobe, they were created by him “*in Premiere Pro*”. Mr Wyand’s questions continued:

“Q. You were speculating as to whether these lines were or were not Adobe Illustrator vector lines, when you knew all the while they were not, because you say you added these lines on afterwards?”

A. I did not say that. I said I do not remember doing that. I could not remember whether I inserted the whole thing or if the lines were done afterwards. It is clear that the lines were done afterwards, because if they were done in Adobe, they would be pixel perfect, as we say.

...

Q. I would put it to you that you have put them there to make it look like they are vector lines, defining the logo, but they are something that you have just added in, in order to generate this image, to make it look more as though you have designed it?

A. I would not agree. It is purely meant to highlight, you know, some of the angles, some of them are, you know, mirrored, it does look roughly symmetrical. I admit I did this far too quickly. It is an oversight on my behalf.

Q. You did this for the court, for the benefit of the court, for the benefit, apparently, of us, because this is the document that was going to be disclosed to us. That seems to be the only reason this document was produced and this document has got these misleading vector lines on it... I am going to suggest to Her Honour that this is an attempt by you to try

and create a vision of how this was independently created by you, when in fact it was based on the Claimant's design?

A. I would totally disagree. This document, I have tried my best to put together what we did, tried to explain the journey, you know, it is not perfect... I did not intend to go to the nth degree; if I did, I probably would have spent several more hours on it."

Findings in relation to pencil sketches and renderings

96. In relation to the pencil sketches:

- i) There are no metadata to show that any of these sketches were scanned/digitised in 2015. Mr Kelly gave conflicting evidence on this point, initially in cross-examination that the sketches were scanned only in 2018, and later stating that some were scanned in 2015 and others in 2018. In my judgment, if metadata were available showing that any or all of the sketches were scanned in 2015, it is highly probable that the Defendants would have disclosed it (as they disclosed the metadata relating to the renderings). For that reason, I find on the balance of probabilities that the pencil sketches were not scanned until 2018.
- ii) No original pencil sketches have been disclosed, even though they must have been in Mr Kelly's/the Third Defendant's possession in 2018 in order to scan them and Mr Kelly in his oral evidence said that he had all the "hand drawn sketches" in 2018.
- iii) I am satisfied on the balance of probabilities that the mirroring of two of the sketches (bundle pages 419 and 420) was carried out digitally as one side is an exact, facsimile replica of another. I am satisfied that this cannot be explained by Mr Kelly free-hand tracing one side, as he suggested in his oral evidence. Therefore this work can only have been carried out after the sketches were digitised in 2018.
- iv) I am satisfied that this digital mirroring (and other minor digital 'cleaning up' of the sketches which I have not described in this judgment

but which were explored in Mr Kelly's oral evidence) was more likely than not carried out in order to use those manipulated images in the Brand Document, to strengthen the Defendants' case of independent design. Although Mr St Quintin submits they are 'peripheral', those sketches must have been digitally manipulated for a reason, and there is no evidence before me as to what other purpose such manipulation might serve.

- v) The impression Mr Kelly gave during his evidence on this point was that he didn't know such mirroring had been done. I am satisfied on the balance of probabilities that he did know that work had been done, but he gave that impression in an attempt to hide his work, much as he attempted to hide the fact that he had superimposed false 'vector lines' in Premier Pro. I make this finding because Mr Kelly did not attempt to blame Mr Storey for that work and neither Mr Storey nor Mr Kelly say that any other person was involved in the production of the Brand Document or its contents. It was not put to Mr Storey that he was involved in this digital manipulation.
- vi) Following Mr Kelly's evidence, I cannot rely on the fact that various sketches are found on the same 'page' as providing any reliable evidence of the chronology of their creation, since those sketches appear to have been grouped together in 2018 and not in 2015, and some are duplicates. This also appears to be true even of the "Finals Rich Logo" document, which is dated in manuscript 25 June 2015, as Mr Kelly's own written evidence is that: "*This document contained a number of sketches that we had considered during the creative process*". However I do accept on the balance of probabilities in that case that those sketches were grouped together in that form on 25 June 2015.

97. In relation to the renderings I make the following findings:

- i) The renderings were created on 2 July 2015 as per the metadata.

- ii) The curved, shaped vector stag head renderings disclosed in the RFI Response undermine the evidence of Mr Storey and Mr Kelly that D1's Device arose from an independent design journey involving a process of continual refinement and consistent preference towards geometry and angularity.
- iii) It is more likely than not that Mr Kelly and Mr Storey did not include these curved vectors in their witness statements or the Brand Document, but only included the more angular and geometric ones, because they undermined their evidence about the independent design journey they say they had undertaken.
- iv) Mr Kelly added the vector lines to the final rendering of the D1's Logo in an effort to mislead the Claimant and the court. In my judgment he inadvertently admitted as much in his evidence when he said that he did it "*far too quickly*" and could have spent "*a couple more hours on it*".

98. Finally, I return to the Defendants' submission that the Claimant is to be treated as having accepted that the documents that the Defendants rely on to support its case of independent creation are authentic. Again, what is meant by authentic? The Defendants say the Brand Document was created in July 2018 and finalised in August 2018. That was not challenged and is deemed to be authentic in as much as that is the deemed date of creation. The CAD renderings were stated to be created in July 2015. Those are unchallenged and deemed to be authentic. The "Finals Rich Logo" page dated 25 June 2015 is not challenged and is deemed to be authentic, although I have found it is made up of sketches which predate it and whose dates of creation are not known. The various separately-disclosed pages of the Brand Document are dated the same as the Brand Document and to that extent they are authentic, inasmuch as those pages were created on that date, albeit they are not what they were

presented as being when disclosed or in the RFI Response. The hand-drawn sketches from 2015 have never been disclosed, only scanned images which, on Mr Kelly's evidence, were digitised in 2018 and have in some cases, he accepts, been manipulated since then by mirroring and cleaning up. To the extent those were unchallenged and deemed to be authentic (i.e. to date from 2015), that must fall away in the face of Mr Kelly's own evidence that they were created and manipulated in 2018.

SUBMISSIONS

Issue (i) - Proof of copying

Similarity sufficient to give a prima facie inference of copying?

99. The Claimant submits that the level of similarity between C's Device and D1's Device is overwhelming, being virtually identical with only minor differences. In particular:

- i) When the two designs are overlaid upon each other it can be seen how closely the two designs are aligned in their geometries;
- ii) All of the principal features of C's Device are found in D1's Device;
- iii) The differences relied upon are minimal and only serve to highlight the similarities, being of the order of: a 2 degree difference in angles; 6.8% taller antlers; two extra small tines to the outer antlers, and a thickening of the inner antlers.

100. Mr Wyand reminds me that copying imperfectly or with minor alterations or changes is still copying. He submits there is an astonishing similarity in terms of stylisation and aesthetics which is surprising given:

- i) Mr Kelly's own evidence he had total design freedom
- ii) The Defendants' own images returned by a Google image search for "stags head logo" and "antler logo" show nothing even remotely as alike to C's Device as D1's logo is and even the most similar are, he submits, hopelessly unlike the Device.

101. Mr St Quintin for the Defendants submits:

- i) While there are some similarities between D1's Device and C's Device, they are the result of both logos being simple, stylised representations of stags heads.
- ii) The choice of a stag head is not surprising, given the evidence of both Mr Kelly and Mr Storey that he wished to emphasise an association with Richmond.
- iii) The similarities amount to a triangular head, splayed antlers and simple lines which are the result of simplifying a representation of a stag head into something stylised and angular.
- iv) The triangular head is not surprising as stag generally have triangular heads, as can be seen from annotated photographs contained in the Brand Document and other companies' logos, including the Dalmore logo
- v) The stylised splayed antlers are also not surprising and are ubiquitous in the logos retrieved from Google searches carried out by both the Claimant and the Defendants.
- vi) Splayed antlers with vertical or near vertical inner tines symmetrically about the head are features that real stags have, and appear in almost every logo found.
- vii) There are also many differences of detail that point away from copying. In particular, Mr Morgan's analysis of the two devices is wrong to the extent that it asserts that C's Device has a straight line from the outside of the head to the inside of the inner tines, like D1's Device. It does not.

viii) Such similarities as there are arise from coincidence, because both C's Device and D1's Device are simple stylised representations of a stag's head with antlers.

102. I have compared the two devices side by side. Although they are not identical, they are strikingly similar. D1's Device looks like C's Device. It is only on a closer inspection that certain differences reveal themselves, in particular the additional smaller two tines, and the thickening of the inner tines. I remind myself that *Designers Guild* posits as a first step a visual comparison of the two designs. The small differences in height of the antlers and specific angles are not noticeable on a strictly visual, side-by-side comparison, only on a measured analysis. The similarities are not merely that both have a triangular head, splayed antlers and inner tines which I agree are commonplace in representation of stag's head logos. It is the unusual proportions of the pointed, triangular face; the elegant pointed antlers; the placement of the inner, angled antlers; and the specific manner in which this stag's head is highly reduced and simplified; which can be seen in both C's Device and D1's Device. In my judgment, these similarities are sufficiently close, numerous and extensive to be more likely to be the result of copying than coincidence. I am also satisfied that there is sufficient evidence of the possibility of access by the Defendants to C's Device, because C's Device was available on the Claimant's website from as early as 2010; and the evidence of both Mr Storey and Mr Kelly is that in 2015 they looked at "hundreds" of stag head logos for inspiration. Together, I am satisfied that there is a strong prima facie presumption of copying which shifts the burden to the Defendants to satisfy the court that, despite the similarities, they did not result from copying, because of lack of actual access or because D1's Device was independently created.

Access and Independent Creation?

103. It is common ground that unless there is actual access/familiarity with C's Device, there cannot be copying. Both Mr Kelly and Mr Storey give clear evidence in the pleadings, their witness statements and in oral evidence that they had never seen the logo until they received the Claimant's letter before action. If this is true, the Claimant accepts that there cannot be copying.
104. There is no direct evidence that either Mr Storey or Mr Kelly saw C's Device. As Mr St Quintin points out, this is not a case where there was any existing trading relationship between the Claimant and the Defendants, for example, or where there is any evidence that the Defendants had asked for and been sent by the Claimant or a bike dealer any company literature containing C's Device, such as a catalogue.
105. The Claimant relies on the fact that C's Device is, and has been since well before 2015, available on the internet. Mr Farrant in his second witness statement sets out the web address at which their dealers and others with a legitimate interest may access the artwork for the Claimant's branding, including C's Device, in a dropbox folder marked "Marketing". In addition, his evidence is that C's Device can be seen on the Claimant's website in the Claimant's catalogues for at least 2010, 2013 and 2014 which were available on the Claimant's website. I have in the trial bundle some images from the 2014 catalogue. The Defendants do not dispute this evidence.
106. Mr Wyand submits that if the Defendants had not seen C's Device, then the similarities are such that the coincidence is amazing. He draws my attention to para 7-23 of Copinger that "*the more strikingly similar two works are, the*

more likely it is that there has been copying, so that the more cogent will be the evidence required to rebut the case than if the similarities were less striking". Mr Wyand submits that the cogency of the evidence in rebuttal is, following the trial, woefully short of what the court should expect to explain away the remarkable similarities.

107. The Defendants submit that in order for me to be satisfied that Mr Kelly and or Mr Storey accessed C's Device, and that they copied it to produce D1's Device, the court would have to find that both witnesses were lying. They submit that there is insufficient evidence before me to do so.
108. The Defendants submit that only three propositions for how Mr Kelly might have seen C's Device were put to him in cross-examination: (i) he saw it in a bike shop; (ii) he saw it on an advertisement; or (iii) he saw it on the internet. It was not put to either him or Mr Storey that they may have seen it on a bike on the road.
109. In relation to the first proposition, Mr St Quintin reminds me that Mr Farrant's oral evidence is that the bikes are sold through specialist high-end bike retailers, and not through mainstream bike retail outlets like Halfords. He submits that in the absence of any evidence about how many bike shops supply these bikes, from what date, their geographical location and whether the bikes are stocked and available for view, the court cannot assess the likelihood of Mr Storey and Mr Kelly entering or passing one of these shops and seeing the logo there. I accept this submission. In addition, he submits, Mr Storey says that he is not interested in bikes and Mr Kelly says that he does not ride bikes, which Mr St Quintin submits makes it even less likely that either of them

entered a specialist bike retailer in which the Claimant's bikes were stocked. The Claimant relies on a 'selfie' with track and road cyclist and Olympic medallist Mark Cavendish that Mr Storey has posted on social media, and submits that this casts doubt on his evidence that he is not interested in bikes. In my judgment, people take selfies with all sorts of celebrities, whether they are interested in their achievements or not. Mr Farrant in cross-examination confirmed that Mr Cavendish does not ride the Claimant's bikes, is not sponsored by the Claimant and does not ride in events in which the type of bikes that the Claimant makes may be used. As a British Olympic Medallist and past winner of BBC Sports Personality of the Year I accept that Mr Cavendish's celebrity extends beyond the world of road and track cycling. Mr Storey is interested in boxing and so Rich Energy provides some boxing sponsorship. It does not appear to have any presence in the world of cycling. I do not think this takes me any further.

110. In relation to the second proposition, Mr St Quintin submits that the Claimant has submitted no evidence of any advertising that they may have carried out whether magazine, billboard, television, or leaflets (putting to one side advertising in the form of the Claimant's website or internet presence, which I will consider in relation to the third proposition). In addition there is no evidence about what any such advertising would have contained, and in particular no evidence that any advertisements contained C's Device. I accept this submission.
111. To the extent that the Claimant's product catalogue can be considered advertising, the Defendants accept that Mr Morgan's evidence is that the 2010

catalogue was available in bike shops (dealt with above), by download from the Claimant's website (dealt with below), and from the Claimant directly (that is not the Claimant's case). Mr Farrant's evidence is that the 2013 and 2014 catalogues were also available from the Claimant's website.

112. In relation to the proposition that Mr Kelly or Mr Storey may have seen C's Device on the internet, Mr St Quintin submits that in order to find it, they would have to have known that it was there, since both the Claimant and the Defendants' evidence is that if you search for the two most obvious terms that one might use when researching a stag logo, namely stag's head logo or antler logo, C's Device does not appear in the 800+ responses that are returned. He submits that there is no evidence before me that the Defendants did know that it was there and they vehemently deny that they ever saw it during the course of their research.

113. The Defendants rely on the observations of HHJ Birss (as he then was) in the Patents County Court in *Mitchell v British Broadcasting Corporation* [2011] EWPC 42 at p122: "*This illustrates the slippery nature of the allegation of subconscious copying when it is combined with the reality of the internet today. Since everything is available to everyone on the world wide web, no evidence can ever rule... out a subconscious influence.*"

114. I distinguish this case from *Mitchell v BBC*, on the facts. In that case, Birss J found that all of the defendants' witnesses were credible, honest and reliable. That is not the case here. In particular, Birss J was only dealing with subconscious copying, as he accepted the defendants' evidence that they did not recall seeing Mr Mitchell's drawings on the internet, and they thought that

if they had seen them, they would have remembered them. There was, therefore, no remaining case of conscious copying open to Mr Mitchell. That is not the case here, where I consider that conscious copying remains a possibility and I accept Mr St Quintin's submission that it is the only real possibility, as previously discussed. Finally, unlike in *Mitchell v BBC* where there was no suggestion that the various witnesses had searched the internet to find material similar to Mr Mitchell's works, there is ample evidence from both Mr Kelly and Mr Storey that following active searches for stag's head logos on the internet, they had looked at "*hundreds and hundreds*" of examples.

115. Although C's Device does not come up on a search of 'stag's head logo' or 'antlers logo' there are many ways of defining an internet search to produce different results. Mr Storey's evidence is that he spent "*years*" planning the Rich Energy brand and "*months*" researching potential logos. Even allowing for Mr Storey's apparently natural tendency to exaggerate, I must assume that he carried out considerably more extensive internet research than those two obvious searches. The fact that, as I have found, it was Mr Storey who was doing the bulk of the internet searching, and sharing "*hundreds*" of logos with Mr Kelly, I consider is significant, particularly in light of the Brand Document produced several years later which still sought to represent as a 'possible starting point' the logos of other companies. I infer from that that Mr Storey was looking for inspiration from existing logos, rather than relying on Mr Kelly to do his job and create a wholly original logo from scratch. In my judgment, it is more likely than not that Mr Storey and Mr Kelly did access C's Device during the course of this research.

116. In my judgment, there are two possibilities. The first is that Mr Kelly and Mr Storey are lying: they were familiar with C's Device, and deliberately copied it to produce D1's Device, making minor changes either to meet Mr Storey's aesthetic preferences or to ensure the copy was not a facsimile of C's Device. The second is that Mr Kelly and Mr Storey are telling the truth: they do not remember seeing C's Device and have no familiarity with it, and did not copy it either knowingly or subconsciously, but created the misleading Brand Research document, the fake vector lines on the render and gave misleading evidence in order to support an evidentially weak, but otherwise truthful case of independent creation.

117. I have considered this very carefully. However in light of:

- i) my concerns about Mr Kelly and Mr Storey's credibility;
- ii) their own case of extensive searches and consideration of stag head logo designs created by others;
- iii) their own evidence, albeit from 2018, that they used stag head logos of others as a 'starting point' for their own design;
- iv) the, in my view, unreasonable unwillingness of both witnesses to even countenance the possibility that they might have seen, but forgotten, C's Device in the course of those extensive searches;
- v) my findings that they have misled the court in relation to, *inter alia*, the creation and disclosure of the Brand Document and Mr Kelly's dishonest evidence in relation to the mirroring of the sketches and the application of false 'vector' lines to the final logo render, to support their case of independent creation;
- vi) the fact that their story of independent creation through a reiteration of design sketches following Mr Storey's more angular and geometric

preferences is undermined by the final vectors including curved designs which do not fit with this story;

- vii) the high degree of inconsistency and contradiction between the differing accounts of the role each of Mr Storey and Mr Kelly played in the design process, which in my view is inconsistent with a truthful case of independent creation;
- viii) the very limited documents available from 2015, which are fewer than I would expect to see had D1's Device truly been independently created; and
- ix) the very high degree of similarity between C's Device and D1's Device;

I am satisfied on the balance of probabilities that both Mr Kelly and Mr Storey have lied about not being familiar with C's Device. I find it more likely than not that they were familiar with it, and that they directly and knowingly copied C's Device in designing D1's Device.

118. In reaching this conclusion I have considered the Defendants' submissions that:

- i) The Defendants have no motive to copy and a positive motive to avoid copying, as explained in particular by Mr Storey in his oral evidence. He is trying to build a world-class business and exploit the Rich Energy branding commercially;
- ii) The First Defendant has also paid for trade mark searches and filed its own trade mark application, which is also inconsistent with copying C's Device;
- iii) The First Defendant has paid the Third Defendant £50,000 for services including the development of D1's Device, which it would not do had it copied C's Device.

119. In relation to motive, I do not accept Mr St Quintin's submissions that the Defendants can have had no motive for copying C's Device and that copying it is inconsistent with the care he gave to clearing it for trade mark purposes. It is clear from Mr Storey's oral evidence in relation to the Rich Energy can design, as acknowledged by Mr St Quintin in closing, that he has very little idea of what copyright is and no idea of the difference between copyright and trade marks, even after going through this litigation process. I have no doubt his state of knowledge was worse, not better, in 2015. In my view, it is therefore no argument for the Defendants to ask why he would be so careful about trade marks and less careful about copyright, when it appears that he did not understand them to be different. It may be that he and Mr Kelly simply thought that C's Device was a great logo, and that it was one from a company sufficiently removed from their own business not to notice or complain about their copying, or that it did not attract copyright protection. Perhaps they thought that trade mark clearance was all that mattered. I cannot know. Certainly once they had obtained legal advice, their initial response to the letter before action, continued through the defence and up to Mr St Quintin's skeleton argument lodged before trial, was that C's Device was too simple and banal to attract copyright protection. They now accept that it is not.
120. Similarly, Mr St Quintin asks why Mr Kelly would make a number of sketches of different designs, and a number of renders of different designs, as I accept he did in June and July 2015, if he had copied C's Device? I accept Mr Wyand's submission that the fact that he produced several other designs for consideration (whether those were variations of C's Device, or different simple geometric designs, or indeed curved renders quite different to earlier

sketches) does not mean that the one Mr Storey chose was not a copy. It may be that they tried to create an original logo, but Mr Storey kept coming back to the inspiration logo he liked best. It may be that some of those other renders are copies of other existing logos. Again, I cannot know. However I am satisfied that the consideration of a variety of designs is not inconsistent with the final design chosen being a copy.

121. I have also considered, but do not accept, Mr St Quintin's submission that the Third Defendant's invoice of £50,000 is inconsistent with copying. First, both Mr Kelly and Mr Storey say that sum encompassed not only brand development but also a wider marketing strategy including developing, launching and maintaining the Rich Energy website. It does not all relate to logo design. Secondly, question marks remain in my mind about that invoice, which contains the Third Defendant's VAT number on the top but does not include VAT. Mr Kelly was asked why this was, and confirmed that his company was registered for VAT at the time, but had no answer to give. Thirdly, Mr Storey's evidence about whether he had paid the invoice was characteristically somewhat evasive. He said: *"It was settled, so, yes, it was settled... Sean and I do a lot of business together in terms of I have had different IT businesses and sports management companies that he does web development for and design so, yes, it was settled... yes, it was settled, yes, it was paid... I cannot recall exactly, but I know that it was paid"*. No supporting documentary evidence of payment, in the form of bank statements, for example, has been disclosed. Given those issues, and in particular the question over VAT and my concerns about Mr Storey's credibility, although I accept

that invoice appears to have been raised at the end of May 2015, I am unable to make a factual finding about whether that invoice was actually paid or not.

122. In reaching this conclusion I have also considered very closely the similarities between the two devices which I describe above and consider further in relation to Issue (ii) below.

Issue (ii) - Whole or substantial part?

123. The Claimant's pleaded case is that C's Device is an original artistic work in its entirety, and D1's Device either is a copy of the whole or, alternatively, a substantial part of C's Device. In the Amended Defence, the Defendants plead that what is original in C's Device is limited to "*the precise presentation of every element that is present in the [C1's] Device*". Mr St Quintin explains that this is because the Defendants agree that what is original in C's Device is the work as a whole. Accordingly, they submit that because D1's Device is not a facsimile copy of C's Device and does not take it in its entirety, that which makes C's Device original has not been taken, and so there is no infringement.

124. Alternatively, the Defendants say, the only things which can properly be said to have been copied are the particular expression of the triangular head, and the general ideas of the outer and inner antlers, which, they submit, are not sufficient to amount to the expression of the author's own intellectual creation as they lack originality.

125. The Claimant submits that the Defendants by their primary pleading are attempting artificially to narrow the scope of protection of C's Device by a

“squeeze” on originality. I agree. The CJEU in *Infopaq* was clear that parts of a work are protected by copyright if they share the originality of the whole work. The case of *Infopaq* related to the storage and printing of an extract of a work comprising only 11 words of the whole. The CJEU held that was copyright infringement provided that the elements reproduced contain the expression of the intellectual creation of their author.

126. For that reason I do not accept that even as pleaded, it is necessary for the court to be satisfied of facsimile copying or the copying of the entirety of C’s Device, for copyright infringement to be made out. As I have set out in my discussion of the law, the key issue is whether there are elements of the expression of the intellectual creation of the author of C’s Device in D’s Device.

127. I am satisfied that there are. These can be seen in the significant similarities between D1’s Device and C’s Device, which go well beyond a triangular head and general ideas of outer and inner antlers, as I have described. I consider the originality of C’s Device to be evidenced by the fact that despite the extensive searching that both the Defendants and the Claimant have carried out in 2018, neither has been able to find another stag’s head logo which has anything close to the level of similarity to C’s Device as D1’s Device displays, although almost all have general ideas of outer and inner antlers and a number display a triangular or triangular-shaped head.

128. In my judgment, the high level of similarity between the two devices means that I find that what has been copied from C’s Device is the author’s own intellectual creation (or, using the English common law test, the author’s skill

and labour), albeit (a) imperfectly copied; and (b) then subjected to small changes which amount to the addition of two small antler points, the slight thickening of the inner antlers, and small changes in the height of the antlers and angle between them, which are difficult to identify without measuring. Those imperfections and changes to form D's Device are insufficient to negate or remove the existence of the author's intellectual creation, in my judgment. For those reasons I accept the Claimant's submission that what has been copied is the whole of C's Device. If I am wrong about that, and the imperfections in copying and small changes introduced by Mr Kerry mean that the whole of C's Device has not been copied, then I have no doubt that what has been copied is at least a substantial part of C's Device.

129. The Defendants do not deny that, if D1's Device is copied, then (i) the First Defendant had no consent from the Claimant to use it; and (ii) the First Defendant has carried out the use complained of. Accordingly, I am satisfied that D1's Device is an infringing copy of C's Device for which the First Defendant is liable pursuant to section 17 CDPA 88 and that the First Defendant's uses of D1's Device complained of are copyright infringements pursuant to sections 18 and 20 CDPA 88.

Issue (iii) - Joint tortfeasorship

130. The law in relation to joint tortfeasance by common design is set out by the Supreme Court in the case of *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229. It was helpfully summarised by HHJ Hacon in *Vertical Leisure v Poleplus Limited* [\[2015\] EWHC 841 \(IPEC\)](#) at para 66:

“I interpret this to mean that in order to fix an alleged joint tortfeasor with liability, it must be shown both that he actively co-operated to bring about the act of the primary tortfeasor and also that he intended that his co-operation would help to bring about that act (the act found to be tortious). Liability will always be subject to the threshold requirement that the alleged joint tortfeasor's contribution to the act was more than *de minimis*.”

131. Whether the alleged joint tortfeasor has met the threshold of joint tortfeasance by his actions is fact-sensitive. Given the findings that I have made I do not believe there is much left in the way of dispute between the parties on this issue.
132. My finding that Mr Storey was fully involved in the design process and knowingly copied C’s Device in jointly creating, with Mr Kelly of the Third Defendant, D1’s Device is sufficient to fix Mr Storey with liability, in my judgment. By knowingly copying C’s Device he was actively co-operating to bring about the act of the First Defendant as primary tortfeasor, i.e. copying without consent, and intended that his co-operation would bring about that act.
133. In addition, Mr Wyand submits for the Claimant that Mr Storey is responsible for all the activities of the First Defendant in relation to the later use of D1’s Device, as to all intents and purposes he is the First Defendant, as he is the controlling mind of it. I do not understand this to be disputed, as Mr St Quintin in his closing submissions accepted for the Defendants that Mr Storey is “*the human agent through which the First Defendant undertakes its activities*”, and so he is jointly liable with the First Defendant for these infringing activities.

134. Mr St Quintin in his closing submissions also accepted that, in relation to the Third Defendant and Mr Kelly, if I find that there was knowing copying by Mr Kelly (as I have done) then the Third Defendant is liable for the First Defendant's s17 CDPA copyright infringement through common design, in the same way that Mr Storey is.
135. In addition, the Defendants admit the Claimant's allegation in para 11A.b of the Amended Particulars of Claim, namely that the Third Defendant knew or could reasonably foresee that the alleged activities in relation to the later use of D1's Device would subsequently be carried out by the First Defendant and/or the Second Defendant. For those reasons I find that the Third Defendant is also jointly liable with the First Defendant as a joint tortfeasor in relation to the copyright infringements pursuant to sections 18 and 20 CDPA 88.

SUMMARY

136. To summarise:
- i) The Claim succeeds. D1's Device is an infringing copy of C's Device pursuant to section 17 CDPA 88, and the First Defendant's use of D1's Device complained of infringes the Claimant's copyright in C's Device pursuant to sections 18 and 20 CDPA 88.
 - ii) The Second and Third Defendants are jointly liable for such copyright infringements as joint tortfeasors.
 - iii) The Claimant is entitled to injunctive relief and for damages or an account of profits at its election.
 - iv) The Claimant is entitled to a declaration of invalidity of D1's Mark on the basis that its use is liable to be prevented by UK copyright law.

137. This judgment is handed down in the parties' absence. I adjourn issues relating to consequential matters and costs, including any application for permission to appeal, to a hearing listed before me in the Rolls Building at 10.30am on 27 June 2019.