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Case No: CA-2023-000920

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY**  
**COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)**  
**John Kimbell KC sitting as a Deputy High Court Judge**  
**[2023] EWHC 927 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20 November 2023

**Before :**

**LORD JUSTICE MOYLAN**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE ARNOLD**

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**Between :**

<b>(1) THJ SYSTEMS LIMITED</b>	<b><u>Claimants</u></b>
<b>(2) OPTIONNET LLP</b>	
<b>- and -</b>	
<b>(1) DANIEL SHERIDAN</b>	<b><u>Defendants</u></b>
<b>(2) SHERIDAN OPTIONS MENTORING CORPORATION</b>	

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**Ted Loveday** (instructed by **Maddox Legal**) for the **Defendants**  
**Richard Davis KC** (instructed by **Freeths LLP**) for the **Claimants**

Hearing date : 7 November 2023

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**Approved Judgment**

## **Lord Justice Arnold:**

### Introduction

1. There are two appeals before the Court against parts of an order made on 12 May 2023 by John Kimbell KC sitting as a Deputy High Court Judge for the reasons given in his judgment 26 April 2023 [2023] EWHC 927 (Ch). The Defendants appeal against the judge’s declaration that “[t]he graphic user interface, the graphic displays produced by the Software when in use, and the ONE logo ... are artistic works: a. in which copyright subsists; b. of which Andrew Mitchell is the author; and c. of which THJ is the owner”. The Software referred to in this declaration is a program called OptionNET Explorer. The Claimants cross-appeal against the judge’s dismissal of their claim for copyright infringement. I granted permission for both appeals, but on both occasions I recommended mediation to the parties. It is unfortunate that the parties have been unable to resolve their differences, because it seems likely that the costs of the appeals will have greatly exceeded what is at stake.

### Background

2. As the judge noted, the main issue in the proceedings was whether Andrew Mitchell had validly expelled the First Defendant, Daniel Sheridan, from his membership of the Second Claimant (“the LLP”).
3. Mr Mitchell is a computer software developer who lives and works in the UK. Mr Sheridan is an American citizen resident in Chicago who provides training and mentoring to members of the public who are interested in options trading.
4. In 2009 Mr Mitchell created the Software to help himself with options trading. The Software displays financial information about the performance of options in the market. It takes live (or historic) market data and presents it in the form of a table of “call” and “put” positions. These are displayed side by side with a graph showing the “risk profile”.
5. The two men went into business together in 2010/2011, setting up the LLP and entering into a suite of licence and partnership agreements. At a high level, the business model was that Mr Mitchell and his company, the Second Claimant (“THJ”), would provide the Software for Mr Sheridan and his company, the Second Defendant (“SOM”), to use in his mentoring business. In exchange, Mr Sheridan would advertise and promote the Software to his students and mentees.
6. The parties fell out in 2014/2015. Mr Mitchell sought to expel Mr Sheridan from the LLP, raising a wide range of complaints about alleged serious and persistent breaches of the parties’ agreements. The Claimants also terminated the Defendants’ licence to use the Software, and brought claims in passing-off and copyright infringement concerning alleged use of the Software by the Defendants after termination.
7. The bulk of the judge’s judgment was devoted to the LLP expulsion dispute. The judge went through all the alleged breaches in turn. He found that many of them were not made out, or were not sufficiently serious to justify Mr Sheridan’s expulsion from the LLP. On the other hand, the judge found that there were a number of breaches by Mr Sheridan which had been proven and which justified the expulsion. Accordingly,

the judge held that Mr Mitchell had validly expelled Mr Sheridan. The judge also held that the Claimants had validly terminated the Defendants' licence to use the Software by no later than 25 January 2016.

8. The judge dismissed the claim in passing-off. The judge held that copyright subsisted in the works identified in the declaration he made, but dismissed the claims for copyright infringement on grounds that no infringement had been proved. Although the claims before the judge concerned both copyright in the Software as a literary work and copyright in graphical displays produced by the Software as artistic works, the appeals are only concerned with the latter.

#### The Claimants' pleaded case

9. So far as relevant to the appeals, the Claimants' pleaded case in their Re-Re-Re-Amended Particulars of Claim was as follows:

“38. ... The Claimants' position regarding copyright in the Software is as follows ...:

...

38.2. Further, the Software produces when used images including, but not restricted to, risk and price charts. Each of the images generated by the use of the Software are the intellectual creation of Mr Mitchell as author of the Software and comprised and comprises an artistic work pursuant to section 4 of the 1988 Act of which Mr Mitchell is the author under section 9(3) of the 1988 Act, THJ is the Owner, and the LLP is the exclusive licensee;

...

(together, the 'Works').

39. The copyright in the Works is subsisting. Mr Mitchell is a British Citizen, and is domiciled and resident in the United Kingdom.
40. By letter dated 28 January 2016, [the Claimants' then solicitors] identified at least seven occasions on which SOM continued to use images generated by the Software after termination of the SOM Software Sub-Licence Agreement on 25 January 2016 without the licence of the Claimants or either of them. ... By way of example only, ... images generated by the Software were used in:
  - 40.1. A presentation published on YouTube on 27 January 2016;
  - 40.2. An Earnings class hosted on Mr Sheridan's website on 27 January 2016. ...

The Claimants reserve the right to plead further instances of infringement following the provision of disclosure by the Defendants.

...

42. In the premises, the Defendants have infringed THJ's copyright in the Works ... as follows, doing so, in each case, without the licence of the Claimants or either of them:

42.1. The Defendants have communicated the images generated by the Software to the public in the UK, contrary to section 20 of the 1988 Act".

### The Defendants' pleaded case

10. The Defendants' pleaded case in their Re-Re-Amended Defence (with the re-re-amendments made on 9 May 2022 underlined) was as follows:

"49. As to sub-paragraph 38.2, it is admitted that the Software, when used, generates images including risk and price charts. The Defendants do not plead to any other images, as the Re-Re-Amended Particulars of Claim do not contain any allegations of copyright infringement in respect of any other types of images .... It is denied that the risk and price charts generated by the Software are the intellectual creation of Mr Mitchel as alleged or at all. The risk and price charts comprise simple graphs which plot third party data, selected by the user, against time: the data plotted originates from outside the Software. Furthermore, to the extent that there is any intellectual creation in the images generated by the Software, which is denied, that is provided by the user selecting which option to depict and the time period over which to display it: that user is the 'person by whom the arrangement necessary for the creation of the [artistic] work are undertaken' in accordance with section 9(3) of the Copyright, Designs and Patents Act 1988 and accordingly the author of the images generated by the Software, to the extent that they are copyright works at all. Accordingly, it is denied that the types of image pleaded by the Claimants amount to artistic works authored by Mr Mitchell and owned by THJ in which copyright is capable of subsisting as alleged or at all. In the premises, if copyright exists in the images pleaded to, the Defendants are the copyright owners or co-owners of the copyright in displayed images and image outputs generated by their use of the Software.

...

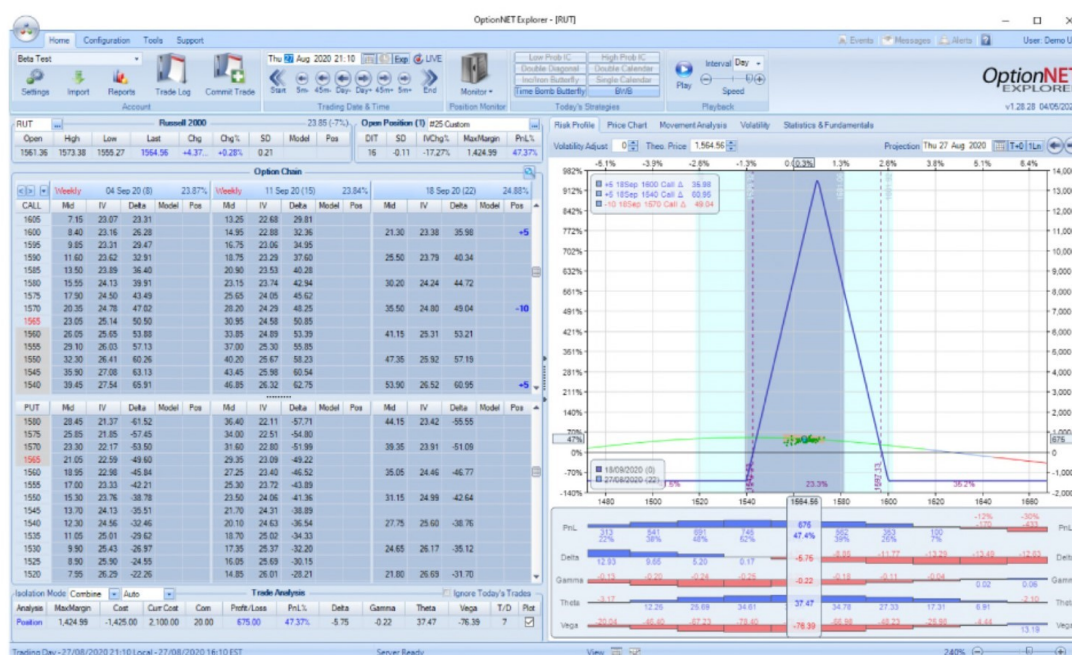
51. For the reasons set out above, paragraph 39 is denied, insofar as it relates to the pleaded images generated by the Software. Save as aforementioned, paragraph 39 is admitted.

- 51A. Paragraphs 40 and 41 and the sub-paragraphs to paragraph 40 are admitted, insofar as they refer to use of images generated by the Software. ~~It~~The notice served on Mr Sheridan purported to expel him from the LLP as of 7 January 2016 and the SOM Software Sub-Licence Agreement was not terminated until 25 January 2016. ... It is admitted that Mr Sheridan made some nominal use of the Software in the period between 25 January 2016 and 27 January 2016: ... it ... is not accepted that THJ had the authority to expel Mr Sheridan from the LLP or to terminate the SOM Software Sub-Licence Agreement to use the Software .... Mr Sheridan has made no use of the Software since his access to it was terminated on 27 January 2016. Save as aforementioned, it is denied, if it is alleged, that Mr Sheridan used the Software to generate any of those images after being expelled from the LPP: and the SOM Software Sub-Licence Agreement being terminated: it is admitted, however, that the images that appear in these two examples at the sub-paragraphs to paragraph 40 were generated in the short period after ... his expulsion from the LLP [and] the SOM Software Sub-Licence Agreement was terminated but before access was removed .... The reservations of rights are noted. The Defendants position is that the question of whether or not copyright subsists in the works is a matter for the trial of liability and can be determined on the basis of the pleaded examples. The question of the extent of use is a matter for the trial of quantum and, if liability is found, the Defendants will provide disclosure in respect of all such use.
- 51B. ... For the avoidance of doubt, it is denied, if it is alleged (which is unclear) that the Defendants or either of them have run the Software following the expulsion of Mr Sheridan from the LLP, save for the limited use by Mr Sheridan in the period between 7 January 2016 and 27 January 2016 ... prior to the date when access to the Software was removed. The use of images about which complaint is made does not require (and does not result from) use of the Software by the Defendants or either of them. In the circumstances where it is denied that the pleaded images generated by the Software are capable of copyright protection, it is denied that the Defendants or either of them have infringed any copyright.”

### The Defendants’ appeal

11. The Claimants do not resist the appeal so far as it relates to the ONE logo. It is therefore unnecessary to say any more about that.
12. As counsel for the Claimants acknowledged, in any copyright case one must first identify the work relied upon. As he accepted, the only works explicitly pleaded by the Claimants in paragraph 38.2 of the Particulars of Claim, the only works mentioned in the list of issues adopted at trial (as to which, see below) and the only works as to which there was any evidence at trial were the “risk and price charts” produced by the

Software (“the R & P Charts”). An example of the R & P Charts is reproduced below (this example post-dates the relevant period, but there is no dispute that it is representative of the R & P Charts produced during the relevant period).



13. The Claimants claim copyright in the R & P Charts as artistic works, or more specifically graphic works, within section 4(1)(a) of the Copyright, Designs and Patents Act 1988. In order for copyright to subsist in an artistic work it must be “original”: section 1(1)(a) of the 1988 Act. The Defendants dispute that the R & P Charts are original. There is now no dispute that, if the R & P Charts are original, then: (i) Mr Mitchell was the author of them; (ii) copyright subsists in them; and (iii) those copyrights are owned by THJ.

#### The law

14. I recently set out the legal framework in some detail in *Wright v BTC Core* [2023] EWCA Civ 868, [2023] FSR 21 at [20]-[39] and [53]-[55]. It is therefore only necessary briefly to recap the points which are particularly pertinent to the present appeal.
15. Section 1(1)(a) of the 1988 Act must, so far as possible, be interpreted in accordance with Article 2(a) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”) as interpreted prior to 31 December 2020 by the Court of Justice of the European Union. In Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 the Court of Justice held at [37] that “copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation”.
16. The Court of Justice has elaborated upon the requirement that the work be its author’s own intellectual creation in a number of subsequent judgments. What is required is

that the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch: see in particular Case C-145/10 *Painer v Standard Verlags GmbH* [2011] ECR I-12533 at [89]-[94]; Case C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd* [EU:C:2012:115] at [38]; Case C-469/17 *Funke Medien NRW v Germany* [EU:C:2019:623] at [19], [23]-[25]; Case C-683/17 *Cofemel—Sociedade de Vestuário SA v G-Star Raw CV* [EU:C:2019:721] at [30]; and Case C-833/18 *SI v Chedech/Get2Get (“Brompton Bicycle”)* [EU:C:2020:461] at [23], [26]. This criterion is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom: see in particular Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury (“BSA”)* [2010] ECR I-13971 at [48]-[49]; Case C-403/98 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083 at [98]; *Football Dataco* at [39]; *Funke Medien* at [24]; *Cofemel* at [31]; and *Brompton Bicycle* at [24], [27].

### *The evidence*

17. Mr Mitchell’s evidence in his trial witness statement was as follows:

“116. I believe copyright subsists in the ONE Software and the images that it generates. The ONE Software can be likened perhaps to a video game. The software for a game performs thousands of calculations, which result in generating a series of images that we interpret as a form of video.

117. Similarly, the ONE Software performs thousands of calculations, to determine theoretical asset prices at various intervals, projected profit and loss, adjustments, margins, volatility etc.

118. All of these calculations result in generating an image or series of images as market data changes, which we can interpret as a form of video. Similar to the game, the user does not enter the raw data (some of which is market data) or perform the calculations themselves. The images, including line types, colours, transparencies, layouts, font types etc, were all designed by me as the developer.”

18. In cross-examination, Mr Mitchell explained that he had used a ribbon and other components from a third party library licensed by THJ, but maintained that “the look and feel of it is my brainchild”. The key passage of cross-examination ran as follows:

“Q. Yes, you used a template from Dev Express?”

A. I used the ribbon from Dev Express or Dev Components, whichever one it was to build the rest, everything else is my design. So how you put things together ----

Q. Show me and show the court which bits of this are your design that have not been copied off someone else or using a template

or putting Lego bricks together created by someone else. Show me on here what is entirely original from you and nobody else?

- A. Everything is original, because I designed how the ribbon looks, what goes into each component of the ribbon, what name you call it, what buttons, how you make the buttons work, how they work when you hover over it. Everything on there is my design. I use components, like a painter would use paint and a brush, I extract(?) into various locations and give them functionality.”

*The judge’s assessment*

19. The judge noted at [201](ii) the case pleaded by the Claimants in paragraph 38.2 of the Particulars of Claim. He went on in [208] to record that the Defendants had submitted that the Claimants had failed to distinguish between three different types of protected work, of which the second and third were:

“ii) The graphic user interface. This is the interface which enables communication between a computer program and a user. It comprises many individual ‘frames’ stored in the user’s computer memory.

iii) Screenshots. This means all and any screenshot taken by users using their devices of their screens whilst the software is in use (i.e. when a user creates an image file which shows what is shown on the user’s screen while they are using the software, including, graphs that are displayed to the user).”

20. On the appeal it is not in dispute that there is no material difference between these categories so far as the R & P Charts are concerned, because both are produced by the Software and the layout is the same. The so-called “screenshots” are the images produced by the graphical user interface when in use and populated by data.

21. The judge proceeded to reason as follows:

“212. In relation to (ii) the Defendants did not dispute that individual frames of graphic user interfaces are capable *in principle* of constituting artistic works. However, they submitted that graphic user interfaces do not qualify for protection as artistic works automatically: they only qualify if they would otherwise meet the requirements for copyright protection as an artistic work.

213. In Nova Productions Ltd v Mazooma Games Ltd [2006] EWHC 24 (Ch) the author had designed the individual graphical components from scratch ‘*using various computer tools such as notional brushes and pencils and the screen colour palette*’, which had ‘*created a visual effect which is very similar to that of a painting of drawing*’ (see paras 98 – 106 of the judgment of Kitchin J).



214. In this case, the evidence as to the creation of the graphic interface was rather limited. At trial, Mr Mitchell's evidence was that he had obtained the components that are displayed on the End User's screen when the Software is in use from a third party library, but that he was responsible for the '*overall look and feel*' of the display. I am satisfied that the work of creating the look and functionality of interface including the arrangements of the tables and graphs did involve the exercise of sufficient skill and labour for the result to amount to an artistic work. The analogy with the GUI screens in issue in Navitaire Inc v Easy Jet [2006] RPC 3 Ch at [98] is in my judgment apposite.
215. As to (iii) whilst the Defendants are right to point out that any particular screenshot of an image produced by the software in use is the combined product of the user and the programme, the image in each case is predominantly the result of the computer algorithms written by Mr Mitchell. The ONE logo for example is automatically generated by the software when in use regardless of what trading data the user wants to analyse. The same is true of the overall look, framing and lay out of the graphics and tables regardless of the shape of the graph or the numbers displayed.
216. I therefore accept the graphic interface, the graphic displays produced when the software is in use and the ONE logo were all artistic works in which copyright subsisted, that Mr Mitchell was the author and THJ the owner."

### *The appeal*

22. The Defendants contend that the judge erred because he did not apply the correct legal test; and that, if the correct test is applied, the evidence did not establish that the R & P Charts are original.
23. In my judgment the Defendants are right that the judge did not apply the correct test, which I have set out in paragraph 16 above. This is not because of his reference to "functionality" in [214], which appears to be a slip of the pen having regard to what he went on to say in the last sentence of [215]. It is because the test he applied was that of "skill and labour", which was the test applied by the English courts prior to *Infopaq*, including in *Navitaire Inc v easyJet Airline Co Ltd* [2004] EWHC 1725 (Ch), [2006] RPC 3 and *Nova Productions Ltd v Mazooma Games Ltd* [2006] EWHC 24 (Ch), [2006] RPC 14, and not the test of "author's own intellectual creation" laid down by the Court of Justice. As can be seen from cases such as *Football Dataco* and *Funke Medien*, these two tests are not the same, and the European test is more demanding; although *Painer* establishes that even a simple portrait photograph may satisfy it in an appropriate case. In fairness to the judge, I should make it clear that he was not referred to any of the relevant case law on this question (although the Defendants cited *BSA*, they did so in relation to a different issue).

24. It follows that this Court must re-assess the originality of the R & P Charts applying the correct test. Before turning to consider the evidence, it is important to make five points. First, the test is an objective one. Secondly, the test is not one of artistic merit: section 4(1)(a) of the 1988 Act expressly provides that graphic works qualify as artistic works “irrespective of artistic quality”, and nothing in the case law of the CJEU suggests otherwise. Thirdly, the burden of proof lies on the Claimants. Fourthly, particularly given that we are concerned with graphic works, a key item of evidence is the works themselves. Fifthly, as counsel for the Defendants rightly emphasised, the functionality of the Software is irrelevant to this question. The enquiry concerns the visual appearance of the R & P Charts. Given the informative purpose of the R & P Charts, the visual appearance is primarily a matter of the layout of the R & P Charts.
25. It can be seen from the example of the R & P Charts reproduced above, particularly when enlarged, that the various component parts of the image have been laid out with some care. Mr Mitchell has designed the display so as to cram quite a large amount of information into a single screen. Moreover, he has made choices as to what to put where, including such matters as which commands to put into the ribbon and in what order. He also selected what fonts and colours to use.
26. When one turns to Mr Mitchell’s evidence, his statement that “the look and feel of it is my brainchild” was not challenged. Nor were his statements that “[e]verything is original” and “everything on there is my design” because, although he had sourced components from a library, he had put them “into various locations”. The cross-examiner used the analogy of building something from Lego bricks, and in my view the analogy is a good one. As the Court of Justice held in *BSA* at [48], “the national court must take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface”. Mr Mitchell did not enlarge upon the choices he had made, but he was not asked about this. Nor was it put to Mr Mitchell that the visual appearance of the R & P Charts was dictated by technical considerations, rules or other constraints which left no room for creative freedom. Nor did the Defendants adduce any evidence to contradict Mr Mitchell’s evidence, such as similar graphical user interfaces produced by third parties. As the judge observed, the evidence was limited, but nevertheless it was all one way.
27. It is plain that the degree of visual creativity which went into the R & P Charts was low. But that does not mean that there was no creativity at all. The consequence of the low degree of creativity is that the scope of protection conferred by copyright in the R & P Charts is correspondingly narrow, so that only a close copy would infringe: see *Infopaq* at [45]-[48]. (It is sometimes suggested that *Painer* at [95]-[98] is authority to the contrary, but all that passage establishes is that the protection conferred by copyright on portrait photographs *as a category* is not inferior to that enjoyed by other *categories* of works, including other kinds of photographs.) It does not mean that the R & P Charts are not protected by copyright at all, which would have the consequence that even an identical copy would not infringe.
28. I therefore conclude that, even though the judge applied the wrong test, he was correct to find that the R & P Charts were original. I would therefore dismiss the Defendants’ appeal, save that I would restrict the declaration made by the judge to the R & P Charts.

The Claimants' cross-appeal

29. The Claimants appeal on the ground that the judge was wrong to dismiss the claim for infringement because the Defendants had admitted that, if (contrary to their case) the R & P Charts were original and Mr Mitchell was their author, the Defendants had infringed the copyright in them. The Defendants dispute this. Determining who is right requires a regrettably lengthy exegesis of the procedural history of this litigation.
30. The starting point is the parties' pleaded cases, which I have set out above. It can be seen from the Particulars of Claim that the Claimants alleged that (i) the R & P Charts were original artistic works, (ii) Mr Mitchell was the author of those works, (iii) THJ was the owner of the copyrights and (iv) the Defendants had infringed the copyrights by communicating them to the public in the UK during the course of the presentation and class on 27 January 2016. The Claimants had reserved the right to plead further instances of infringement following disclosure, but had not done so. The Claimants say that this was because an admission by the Defendants made it unnecessary.
31. Turning to the Defence, it can be seen that the Defendants advanced positive cases that (i) the R & P Charts were not original and therefore no copyright subsisted in them, and (ii) if copyright did subsist, the author was the user of the Software, and hence the Defendants were the owners of the copyrights. Although the Defendants had also alleged in previous versions of the Defence that the acts complained of were licensed, the effect of the re-re-amendments to paragraph 51A and 51B on 9 May 2022 was to admit some unlicensed acts between 25 and 27 January 2016, and specifically to admit the two instances pleaded in paragraphs 40.1 and 40.2 of the Particulars of Claim, but to maintain a denial that the Defendants had used the Software after 27 January 2016. Furthermore, the last two sentences of paragraph 51A averred that the question of subsistence of copyright (and, implicitly, authorship/ownership) could be determined on the basis of the pleaded examples, that the question of the extent of use was a matter for the trial of quantum and that, if liability was established, the Defendants would give disclosure of all uses. Importantly, the last sentence of paragraph 51B made it clear that the Defendants' denial of infringement was predicated solely upon their denial that copyright subsisted in the R & P Charts (and, implicitly, on their alternative case as to authorship/ownership of copyright).
32. As counsel for the Defendants accepted during the course of argument, no case was pleaded in the Defence that the acts relied upon by the Claimants did not infringe any copyright which subsisted and was owned by THJ because those acts did not constitute communication to the public in the UK. Any such case would have had to be pleaded in the Defence: see CPR rule 16.5(2).
33. The Claimants' Re-Amended Reply served on 24 March 2022 (i.e. before the re-re-amendments to the Defence) pleaded in paragraph 18B that the Claimants "make no admissions to paragraphs 51A and 51B which they find impossible to understand". This does not detract from the points I have made in the two preceding paragraphs.
34. On 5 October 2020 there was a Costs and Case Management Conference ("CCMC") at which Deputy Master Nurse made an order (to this extent by consent) that there be a split trial to determine liability in advance of quantum. This was unnecessary so far as the claims for passing off and copyright infringement were concerned (because the

Claimants sought, as is conventional, an inquiry as to damages or an account of profits), but was relevant to the Claimants' claim for damages for breach of the LLP agreement. He also directed that there be a further CCMC to consider disclosure and costs management on 19 January 2021.

35. Following the service of the Amended Defence (and Counterclaim) in December 2020, the parties attempted to reach agreement as to the directions to be given at the second CCMC, but a substantial dispute emerged as to disclosure. The Defendants said that disclosure of videos of presentations and classes in which the Software had been used could only manageably be conducted by a sampling process, but the Claimants resisted this.
36. At the second CCMC on 19 January 2021, Deputy Master Nurse invited the parties to try to agree an order dealing with the disclosure of what later came to be referred to as the "pre-termination videos" (meaning up to 31 January 2016). The parties were unable to reach agreement in correspondence, and so a videoconference was arranged on 23 March 2021 which was attended by both sides' solicitors and counsel then acting for the Defendants.
37. The Claimants rely upon an admission which they contend was made first orally by the Defendants' counsel during the meeting on 23 March 2021, and secondly in a witness statement made on 4 June 2021 by Alice Daniels, a partner in the Defendants' then solicitors who had conduct of the matter on their behalf and who expressly stated that she had been authorised to make the statement on their behalf, in advance of a Disclosure Guidance Hearing listed before Deputy Master Nurse on 7 June 2021. In her statement Ms Daniels said:
  - "14. There is a dispute between the parties over whether the videos post-2016 are relevant to this claim. This affects whether 19,500 videos between 2010 and 2020 are relevant or whether in fact 13,885 files relating to 2010 to 2016 are relevant. In either case, a complete review would be highly disproportionate in both time and costs.
  15. In the meeting of 23 March 2021 (which I attended virtually), the Defendants' counsel confirmed that the Defendants accept they have made limited use of images of risk and price charts generated by the Software (as defined in the Re-amended Particulars of Claim) in presentations that were either produced after their licence was revoked or were produced prior to its revocation but were made available to their customers after that date. The Defendants do not accept that the images are copyright works but if they are found to be copyright works, their primary position is that the author of those works is the user of the Software, not Mr Mitchell. This is set out in the Amended Defence at paragraph 49 ...
  16. If the Defendants are wrong and the Claimants demonstrate at trial that Mr Mitchell is in fact the author of the copyright works, the Defendants will accept that this applies to risk and price charts produced by any version of the Software.

Accordingly, any video that was produced after January 2016 that contained a risk and price chart originating from the OptionNet Software will amount to an infringement, as will any video produced prior to that date that was still viewable after January 2016.

17. On this basis, the Defendants do not see any need to disclose the 5,615 videos post 2016 as these will not assist the court on the question of liability and will greatly increase the time and costs of disclosure. If the Claimants win on liability, their disclosure (or some sample of them) will become relevant on the question of quantum.”
38. Consistently with Ms Daniels’ evidence, counsel for the Defendants submitted in paragraph 32 of his skeleton argument for the hearing:

“On the pleaded case, the Defendants do not accept that the charts are artistic works (or, if they are, that the Claimants or either of them are the ‘author’ of those works). If the Defendants are wrong, they admit they have used the charts and accept that the extent of use will be relevant to a quantum hearing. In the circumstances, no disclosure is necessary in respect of the charts.”
39. In my view paragraphs 15 and 16 of Ms Daniels’ statement, particularly when read together with paragraph 32 of counsel’s skeleton argument, are a clear admission that, if (contrary to the Defendants’ case) the works in question were copyright works of which Mr Mitchell was the author, then the Defendants had infringed those copyrights, with the extent of such infringement being a question for the quantum phase of the proceedings. It was on this basis that she argued that there was no need for disclosure of post-termination videos at that stage. (Although there might have been some doubt at that time as to whether this meant that the Defendants had abandoned their pleaded defence of licence, any such doubt should have been put to rest by the subsequent re-re-amendments to the Defence. I will return to this point below.)
40. It is also clear that this is how the Claimants understood the position at the time. In a supplemental skeleton argument served on the morning of the hearing counsel then acting for the Claimants stated:

““The Cs note that by para 32 of the Ds’ skeleton argument it has now been conceded that the Ds have used the Cs’ charts. Para 16 of Daniels 2 accepts that if the Cs prove authorship of the risk and price charts, any use of images from any version of the software after January 2016 will amount to an infringement.”
41. As a result, the order for disclosure made by Deputy Master Nurse on 7 June 2021 was limited to pre-termination videos. Regrettably, that was by no means the end of disputes between the parties as to disclosure.

42. In his witness statement for trial made on 6 October 2021 Mr Mitchell gave some evidence directed to the question of whether the Defendants had made unlicensed use of the Software following termination. That is understandable given that that question formally remained in issue on the pleadings at that date. Mr Mitchell did not, however, give any evidence directed to the question of whether the Defendants had thereby communicated the R & P Charts to the public in the UK.
43. At that time the trial was scheduled to take place in late November 2021. On 18 November 2021 there was a pre-trial review (“PTR”) before the judge. He vacated the trial date and directed the Claimants to re-amend their Particulars of Claim. There were further PTRs and hearings before the judge on 8 December 2021, 13 April 2022, 20 September 2022 and 21 October 2022.
44. One of the reasons for all these hearings was that there were ongoing disputes between the parties as to disclosure, and in particular disclosure of videos by the Defendants and a technology-assisted review (“TAR”) of the videos proposed by the Defendants. Notwithstanding what had been ordered on 7 June 2021, on 13 April 2022 the judge ordered the Defendants to give disclosure of post-termination videos up to 10 September 2020, but the Defendants did not provide these videos to the Claimants in a legible format until 20 October 2022. On 20 September 2022 the judge ordered the Defendants to deposit a copy of videos produced in the period 11 September 2020 to 11 September 2022 (referred to as “quantum videos”) with a supervising solicitor. The purpose of this order was to ensure that evidence was preserved for the quantum stage of the proceedings if required.
45. On 28 September 2022 the Claimants served a notice to admit seeking admissions that the Defendants had used the Software, including communicating images generated by the Software to the public in the UK, on one or more occasions between 1 February 2016 and 10 September 2020. The notice was attached to an email from the Claimants’ then solicitors to the Defendants’ solicitors which it is necessary to quote almost in full:

“Your clients’ position in relation to the post-termination videos is quite confusing.

1. In her statement of 4 June 2021, Ms Daniels at paragraph 16 conceded that if the Claimants demonstrate at Trial that Mr Mitchell is the author of the copyright works, the Defendants will accept that this applies to the risk and price charts produced by the ONE Software.
2. Ms Daniels went on to concede that any video that was produced after January 2016, that contained a risk and price chart originating from the ONE Software will amount to an infringement, as will any video produced prior to that date that was still viewable after January 2016.
3. On the same day, your client’s Counsel stated in his skeleton for the Hearing on 7 June 2021 at paragraph 32.

‘On the pleaded case, the Defendants do not accept that the charts are artistic works (...). If the Defendants are wrong, they admit they have used the charts and accept that the extent of use will be relevant to a quantum hearing.’

4. I have previously referred you to these two documents. It is clear that for whatever reason, notwithstanding both common sense and those unequivocal concessions, that your clients do not formally disavow their Defence to the copyright ... claims.
5. The latest version of that Defence was served in early May 2022, and contains new statements of truth signed by Mr Sheridan (both on his own behalf and as the chief executive officer of SOM). That version still contains a denial in paragraph 51B that there has been any infringement.
6. Your client’s Trial statement appears to have been drafted with the pleading in mind and disregarding the concessions made by Ms Daniels and your clients’ Counsel. For instance, at paragraph 94, Mr Sheridan states

‘Students were left out in the rain because we could no longer use SOM’s license for ONE Software with the back testing to dissect bad trades. I could not even let students use their own ONE Software in our sessions for fear of further reprisals and claims. It was devastating because I could not really precisely help the student who needed me to review and correct mistakes on a bad trade.’
7. I have only observed small parts of a small number of the videos on the 11 May 2022 list (ie those produced 31 January 2016 – 10 September 2020). A number of those that I have observed, clearly have on the screen risk and price chart images generated by the ONE Software and it is clear from the video recordings, that the Software is being used as the images change as you watch the video.
8. The fact that the ONE Software was being used, is supportive of the proposition that Ms Daniels and your client’s Counsel were correct to make the concessions; and flies completely in the face of the pleaded defence at 5[1]B and Mr Sheridan’s Trial witness statement at paragraph 94.
9. Until 11 May 2022 ... sight of, and access to, those videos was, of course, denied to my clients.
10. As you know, considerable work is still to be undertaken to analyse the post termination videos and will only commence

with the benefit of the TAR after your clients supply the .arf format videos by 30 September 2022.

11. There is still a ‘window of opportunity’ for the parties to reach some degree of understanding in relation to this aspect.
12. To assist that process, I attach a (Second) Notice to Admit Facts within the next 21 days [*sic*].

...”

46. Four points should be noted about this email, to which there was no response from the Defendants’ solicitors. First, it made it plain that the Claimants were relying upon the admission contained in Ms Daniels’ statement. Secondly, it can be seen that the Claimants were alleging that the Defendants had continued to use the Software to generate images after 27 January 2016, contrary to the Defendants’ denial. Thirdly, it confirms that the purpose of the notice to admit was to try to force the Defendants to admit continued use of the Software after 1 February 2016 i.e. after their licence to use the Software had been terminated. Fourthly, although the Claimants may have overlooked the significance of the Defendants’ admission in the Re-Re-Amended Defence of unlicensed use of the Software to generate images during the period 25 to 27 January 2016, which meant that continued use of the Software after 1 February 2016 was only relevant to quantum, the order obtained by the Claimants on 20 September 2022 demonstrates that the Claimants were looking forward to the quantum phase of the proceedings at that juncture.
47. The trial commenced on Thursday 10 November 2022. Shortly before this, on Friday 4 November 2022, the Defendants applied to adjourn the trial. That application was unsuccessful, but it evidently distracted both parties to some extent from their trial preparation.
48. During the run-up to the trial the parties agreed a list of issues which was subsequently, with a minor modification, approved the judge on Monday 14 November 2022. This included the following issues:
  - “24. Are the risk and price charts generated by the Software capable of protection as artistic works under section 3 [*sic*] of the Copyright, Designs and Patents Act 1988 (the ‘1988 Act’)?
  25. If so, who is the author of those works under section 9(3) of the 1988 Act?
  26. If Mr Mitchell is the author of such works, have they been infringed by Mr Sheridan and/or SOM by the use of images generated by the Software in:
    - a. a presentation published on YouTube on 27 January 2016; or
    - b. an earnings class hosted on the website operated by Mr Sheridan on 27 January 2016?”



49. Issue 26 is ambiguous in that it is unclear whether it is consequential on the resolution of issues 24 and 25 or whether it is an independent issue. Even if it is interpreted as an independent issue, there is no mention of communication to the public in the UK being an issue. That is unsurprising: as noted above, no such issue had been raised by the Defendants.
50. In his skeleton argument counsel then appearing for the Claimants addressed the issues of subsistence and authorship/ownership of copyright. He said nothing about infringement. This is consistent with his understanding that it was not in issue if the Claimants succeeded on subsistence and authorship/ownership.
51. The Defendants did not file a skeleton argument, in breach both of paragraph 2 of Appendix Y of the Chancery Guide and of paragraph 10 of the order made by the judge on 21 October 2022. The Defendants did file a very short “opening note” which “[did] not repeat Ds’ existing case as set out in their pleadings” and stated that the Defendants were content with the list of issues with two qualifications, the first of which was that “[i]t should (of course) not be taken as superseding the pleaded cases”.
52. After the evidence had been concluded on 18 November 2022, there was insufficient time for the parties to prepare and deliver oral closing submissions. Accordingly, closing submissions were made sequentially in writing.
53. The Claimants’ closing submissions dated 27 November 2022 again addressed the issues of subsistence and authorship/ownership of copyright. Again nothing was said about infringement. This is again consistent with the Claimants understanding that it was not in issue if the Claimants succeeded on subsistence and authorship/ownership.
54. The Defendants’ closing submissions dated 3 December 2022 not only addressed the issues of subsistence and authorship/ownership, but also said this at paragraph 171:

“Even if artistic copyright subsists in the graphic user interface or the Screenshots (which is denied), it is denied that there was any communication by Ds to the public in the UK in relation to the communications listed at Issues 26(a) and (b) such as would engage UK copyright law. The relevant principles on targeting were summarised in *Warner v TuneIn* [2021] EWCA Civ 441; [2022] 2 All E.R. 35 at para 61. Cs rely on no specific factors to suggest the UK public was targeted, whilst the available indications (such as pricing in US dollars) do not point objectively towards a UK audience being targeted. The Court should not find that these materials were targeted at the UK public.”
55. The Claimants’ submissions in reply dated 9 December 2022 addressed what the Defendants had said about subsistence and authorship/ownership. Nothing was said in reply to paragraph 171. That again is consistent with the Claimants understanding that infringement was not in issue if they succeeded on subsistence and authorship/ownership. The Claimants did not, however, object that the case being advanced by the Defendants in paragraph 171 was both unpleaded and contrary to Ms Daniels’ admission, and therefore not open to the Defendants; that the Claimants had therefore not had the opportunity to adduce evidence directed to that issue; or that the

Defendants' conduct in raising the issue for the first time in written closing submissions was an ambush. This is despite the fact that Ms Daniels' statement had been included in the agreed trial bundles (and therefore was admissible as evidence of its contents: see Practice Direction 32 paragraph 27.2).

56. In his judgment the judge noted at [220] that counsel for the Claimants' submissions "did not engage with the requirements of s.20". He went on to observe in [221] that it was "impossible to begin to apply" the legal test "in a complete evidential vacuum". In [223] he repeated that he had "no evidence one way or the other" on the issue. Having cited *Warner Music UK Ltd v TuneIn Inc* [2021] EWCA Civ 441, [2021] Bus LR 1119, he concluded:

"229. Both events appear to have physically to have taken place in the US and therefore any communication originated there. The Claimants did not identify any factors which might support a targeting case and offered no evidence that the communications complained of had reached the UK.

230. For the reasons set out above, I am persuaded that the Claimants failed to prove a claim for infringement of copyright. I will make declarations as to the copyright in the Works but the claim for damages and the claim for an inquiry as to damages are dismissed."

57. The Claimants made no protest about the judge dealing with the matter in this way when the judgment was circulated in draft on 19 April 2023.
58. After the judgment had been handed down on 26 April 2023, the Claimants sent the Defendants on 27 April 2023 a draft order which contained declarations as to subsistence, authorship, ownership and non-infringement of copyright and proposed that the Claimants be granted permission to appeal on the infringement issue. On 4 May 2023 the Defendants commented on the Claimants' draft.
59. On 5 May 2023 the Claimants sent the judge and the Defendants a revised draft order which (i) included a recital of the admission made by Ms Daniels in paragraph 16 of her witness statement, (ii) modified the declaration to say that "no infringement of copyright actionable in the United Kingdom has *yet* been proved [emphasis added]" and (iii) ordered an inquiry as to the damages sustained by the Claimants by reason of, or at the Claimants' election, an account of profits made by the Defendants as a result of, the Defendants' infringements of copyright in the Software.
60. This draft was sent by counsel for the Claimants to the judge attached to an email in which he said:

"It is now apparent that there was a misunderstanding as between the Cs and the Ds as to what matters were, and were not, before the Court on the liability part of the trial. The Cs' draft contains on the first page a recital that the Ds in June 2021 admitted that if the Cs demonstrated that Mr Mitchell (as opposed to the Ds or some other User of the Software) was the author of the risk and price charts they had infringed copyright.

The statement of Alice Daniels stated: [quoting paragraphs 15 and 16].

That admission was never withdrawn, and this position was reflected in paragraph 51A of the Amended Defence: [quoting the last two sentences].

The Claimant[s] succeeded at trial in establishing that the works were ones in which copyright subsisted and that Mr Mitchell, rather than some other user, was the author. The Claimants say that it should follow that the Order should contain the declaration sought at G, and the directions sought at 1(c) and (d). I apologise for not making this clear beforehand in my written submissions in response to those of the Ds.”

61. The Defendants responded later the same day:

“... the Claimants appear to be trying to rely on witness evidence that they did not rely on at trial, and an argument about an alleged admission which has never been raised before (certainly not at trial, which would have been the proper time for doing so.

Our clients’ position on the draft order is simple: it must faithfully reflect the Judgment. It is not a vehicle for re-litigating the liability trial, or pursuing points which were not upheld in the Judgment and/or not pursued at trial. The trial on liability is the claimant’s sole opportunity to establish breaches of duty. Otherwise, a claimant could have endless bites of the cherry.”

62. On 9 May 2023 counsel for the Claimants filed written submissions on the draft order in which he enlarged upon what he had said in his email of 5 May 2023. Having set out the parties’ pleaded cases, Ms Daniels’ statement, the relevant passages from the skeleton arguments for the hearing on 7 June 2021 and the order made by Deputy Master Nurse on that occasion, he said:

“29. The claims proceeded from 7 June 2021 onwards on the basis that if the Cs proved that: a. the images were copyright works; and b. Mr Mitchell, rather than the Ds as users of the Software, was the author of the works; then each use post-termination of the images amounted to an infringement, and would be relevant to a later hearing on quantum. Disclosure of the post-termination videos, relevant to the period in which any infringement of copyright would have occurred, was not pursued at that stage.

30. Given that infringement was – on the basis set out above – admitted, the Cs were not, therefore, inviting the court to decide the question of infringement in an ‘evidential vacuum’ (see para 221 of the Judgment), but to find that: a. the Works

were ones capable being copyright works; and b. Mr Mitchell rather than the ‘user’ was the author; in circumstances where the Ds admitted that their use post-termination amounted to an infringement of copyright, the extent of which would be the subject of further disclosure and evaluation in the trial on quantum.”

63. Having reviewed some of the later history of the proceedings, he went on:

“45. The Ds did not plead any point on jurisdiction or territory. In the light of the D’s long-standing admission that if the Works were artistic work in which copyright subsisted, and of which Mr Mitchell was the author, the Ds had infringed copyright in the Works, there was no need for the Cs to analyse the Post-termination videos (and nor would they have had time to do so prior to the trial hearing given their very late provision), or request additional information and disclosure from the Ds, in order to deal with any issues as to infringement or targeting at trial.

46. Had the Ds not made their admission as to infringement in June 2021, and these points had remained in issue, the Cs would have dealt with disclosure of the Post-termination videos and Quantum Videos very differently, at a much earlier stage in the proceedings. Disclosure would not have been left as it stood at the time of the 7 June 2021 hearing before Deputy Master Nurse, and the Cs are likely to have undertaken further investigations and provided further witness statements.

47. I apologise for not dealing with this point expressly in the closing written submissions on behalf of the Cs, and also for the fact that the List of Issues for trial still included references to infringement. I regret that my oversights on these points may have resulted in a misunderstanding as to what points were, and were not, in issue at the liability trial, and caused additional work for the Court in considering this issue. The list of issues was produced by me from one circulated between the parties before Ds’ admissions as to infringement in June 2021, and – as a result of the Cs’ preparation for trial having been hugely disrupted by the Ds’ last-minute application the previous week to adjourn the trial and strike out all references to the TAR – had to be done at a time when I was away from chambers on a residential course.

48. The Ds’ June 2021 admission as to infringement informed the Cs’ approach to their evidence, to the disclosure sought from the D, and to preparation for trial, and has never been withdrawn. Having made findings as to the subsistence of copyright in the Works, and as to Mr Mitchell’s authorship, the Court is respectfully invited to make directions as to the inquiry / account as to quantum as set out in para 1 (c) and (d)

the Cs' draft Order. It is submitted that, despite the confusion referred to above, it would be most unjust to the Cs to dismiss the copyright claim."

64. The Defendants' solicitors responded on 10 May 2023 disputing that the Defendants had made any admission of infringement, pointing out that the Claimants had agreed the list of issues and had not relied upon the alleged admission at trial, and re-iterating that it would be wrong to allow an unsuccessful claimant to raise fresh submissions on infringement after trial and judgment.

65. On 12 May 2023 the judge sent the parties his order consequential upon the judgment, the relevant parts of which I have set out in paragraph 1 above. He explained his reasons for rejecting the Claimants' position with respect to infringement as follows:

"I have checked the opening and closing submissions and there is no reference to Ms Daniel's witness statement. It is not referred to in the judgment and I do not consider it ought to be referred to in the order. Whilst I can see that the words at the end of para 51A of the Re-Re Amended Defence might be said to be somewhat unclear, I note that the Claimants' response in para 18B of the Reply is that 51A and 51B are 'impossible to understand'. It is not said in the Reply or so far as I know anywhere in correspondence that 'it is agreed that all issues of alleged infringement of copyright in videos post 27 January 2016 should be tried later'. Even if it was, no application was made to the court for a case management order to that effect. The 'reservation of rights' in para 40 of the Particulars of Claim is a warning that an application to amend might be made but no such application was forthcoming. There is also no reference in any of the submissions received by me during the trial that it was concerned only with infringement of copyright in the pre-termination videos. ... The judgment deals with the issues as pleaded and as set out in the agreed and approved list of issues. I was therefore asked to rule on only two claims of alleged copyright infringement as identified in issue 26. The order on the judgment reflects my findings on the those infringement claims. I am satisfied that the judgment deals with all the points on copyright on which I received submissions. The approved order should I believe reflect the findings in the judgment."

66. Having set out the history, I draw the following conclusions from it.

67. First, the Defendants never pleaded any case on communication to the public in the UK. It was incumbent on them to do so if they wished to make that an issue.

68. Secondly, on the contrary, the Defendants' pleaded case made it clear that their denial of infringement was predicated solely upon their cases as to subsistence and authorship/ownership.

69. Thirdly, even if the pleaded case was unclear, counsel for the Defendants during the meeting on 23 March 2021 and Ms Daniels in her witness statement expressly admitted on behalf of the Defendants that infringement was admitted if the Claimants succeeded in proving subsistence and authorship/ownership.
70. Fourthly, as a result of the admission, disclosure pursuant to the order dated 7 June 2021 was limited, although further disclosure was sought and obtained by the Claimants subsequently.
71. Fifthly, the Defendants knew that the Claimants were relying on the admission, as shown by counsel for the Claimants' skeleton argument dated 7 June 2021 and the Claimants' solicitors' email dated 28 September 2022. There is no suggestion that the Defendants sought to withdraw the admission at any point prior to trial.
72. Sixthly, it is plain that the Claimants did not consider it necessary to adduce any evidence on issues such as communication to the public in the UK as a result of (i) the fact that no such issue was pleaded and (ii) the Defendants' admission. This was what led to the "evidential vacuum" noted by the judge. I do not accept the submission made by the Defendants' solicitors in a letter to the Court following the hearing that the notice to admit served by the Claimants on 28 September 2022 demonstrates otherwise. As discussed above, that notice concerned the post-termination period, and thus was only relevant to quantum.
73. Seventhly, it follows that the submission advanced by the Defendants in paragraph 171 of their written closing submissions was not open to them. Furthermore, it amounted to ambushing the Claimants with a wholly new case after the evidence had closed, thereby depriving the Claimants of the opportunity of adducing evidence on the point.
74. Eighthly, the Claimants ought to have objected to this in their submissions in reply. Nevertheless I do not accept counsel for the Defendants' submission that the Claimants' silence amounted to a waiver of their procedural rights. The Claimants did raise the matter, albeit after judgment, before the order was made. Even if that was properly to be regarded as an application to re-open the judgment, the ground relied upon was one which justified that course. Nor do I accept counsel for the Defendants' submission that the Defendants have been deprived by the Claimants' conduct of the opportunity of withdrawing their admission pursuant to CPR rule 14.1(5). The Defendants made no application to the judge to withdraw the admission after the Claimants had drawn it to the judge's attention, the Defendants have made no application to this Court to withdraw the admission and the Defendants have not identified any arguable basis for contending that they should be permitted to withdraw the admission having regard to the factors listed in Practice Direction 14 paragraph 7.2.
75. Ninthly, it follows that the judge was wrong to deal with the issue of infringement, and specifically communication to the public in the UK, in his judgment because no such issue was before him. This is not a criticism of the judge: he proceeded on the basis of a reasonable interpretation of issue 26 in the list of issues, not being aware of the admission made by the Defendants in 2021 and in the absence of any objection by the Claimants in their reply submissions.

76. Lastly, it also follows that the judge was wrong to reject the Claimants' submissions on this point on 12 May 2023. It is understandable that he was sceptical of the Claimants' position, but his reasoning did not grapple with the points they had made.
77. I would therefore allow the Claimants' appeal, make a declaration that the two instances of display of the R & P Charts pleaded in paragraphs 40.1 and 40.2 of the Re-Re-Re-Amended Particulars of Claim constituted an infringement of THJ's copyright in the R & P Charts, and direct an inquiry as to damages or an account of profits at the Claimants' election. As always, that will be at the Claimants' risk as to costs.

**Lady Justice Asplin:**

78. I agree.

**Lord Justice Moylan:**

79. I also agree.