



**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**BUSINESS AND PROPERTY COURTS**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

Rolls Building  
New Fetter Lane  
London

Neutral Citation Number: [2023] EWHC 766 (IPEC)  
Date: 3 April 2023

**Before:**

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

**B E T W E E N:**

Claim No: IP-2021-000111

**FAY EVANS**

**Claimant**

**- and -**

**(1) JOHN LEWIS PLC**  
**(2) DBB UK LIMITED**

**Defendants**

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**Ms Kendal Watkinson** (instructed by **Brandsmiths**) for the **Claimant**  
**Mr Michael Hicks** (instructed by **Lewis Silkin LLP**) for the **Defendants**

Trial dates: 30 and 31 January 2023

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**JUDGMENT**

**Her Honour Judge Melissa Clarke:**

**INTRODUCTION**

1. The dragon is a creature of myth, dating back to ancient times and found in cultures across the world. As a mythic animal, its appearance, characteristics and personality are not fixed, but have been reinterpreted through the years to suit the purposes and culture of the person utilising it. In the earliest tellings, the dragon was malevolent, destructive or fear-inspiring, and often all three. In the Old Testament, a dragon is used as a cypher for Satan himself and is described in terms including:

“His sneezes flash forth light, and his eyes are like the eyelids of the morning. Out of his mouth go burning torches; sparks of fire leap forth. Out of his nostrils smoke goes forth, as from a boiling pot and burning rushes. His breath kindles coals, and a flame goes forth from his mouth.”

(Job 41:15, 18-21, King James Bible)

2. The idea of dragons sneezing and breathing fire, and that such fire can be put to useful purposes such as kindling coals, is therefore very old indeed.
3. The Claimant is a children’s book author who has self-published three books. One of these is a book called “*Fred the Fire-sneezing Dragon*” (“**FFD**”), with illustrations produced by Ms Lisa Williams, a freelance illustrator, who has since assigned all her right of copyright in FFD to the Claimant by way of written assignment dated 3 July 2021. This included an assignment of the right to sue for past, present and future infringements.
4. FFD is the story of Fred, a young dragon who is a school pupil in a school otherwise populated by human characters, including children, adult teachers and staff. Fred is drawn in a cartoon-style and the story is set in a contemporary context. Fred accidentally emits fire when he sneezes, with unfortunate and accidental results, such as burning books and pencils, melting ice-cream in the school tuck shop and setting fire to trees while on a cross-country run. This causes him to be teased and makes him sad. However, his sneezes ultimately save the day when the school canteen oven is broken and he is able to cook the school lunch, gaining the approbation of the school cook and his peers. The story is told in rhyming couplets,

and each sneeze is prefaced by a repeated chorus describing what Fred feels, which is intended to be accompanied by actions as illustrated in the front of the book, for children to join in at each chorus.

5. It is the Claimant's case that FFD was first made available to the public at the official book launch on 7 September 2017. Since that date the Claimant has performed live readings of FFD, mainly at primary schools (and those normally in the North-West of England) but also at a few networking events. The Claimant has sold copies of FFD in conjunction with such live readings and events and also on Amazon and her own website, in small numbers. Between its launch in September 2017 and October 2019, she has disclosed sales totalling 914 copies, 709 of which have been via schools, 76 to family and friends, 68 on Amazon and 61 from her website.
6. The First Defendant ("**JLP**") is one of the UK's best known retailers through its department store brand John Lewis and supermarket brand Waitrose. Every year it releases a lavish television advertisement to support its Christmas offerings ("**Christmas Advert**"). These are characterised by their high production values and heart-warming messages. Since 2009 the Christmas Advert has been created by the Second Defendant ("**adam&eveDBB**"), part of the Omnicom group of companies. Up to 2019 the Christmas Advert promoted only the John Lewis brand, but for 2019 JLP decided to use it to promote both John Lewis and Waitrose.
7. adam&eveDBB is a multi-award-winning creative advertising agency. It has earned too many plaudits to list, but these include that it has been named *Campaign's* Advertising Agency of the Year six times, and at the Cannes Lions industry awards it was named Global Agency of the Year in 2014 and 2018 and Europe's Top Agency of the Decade in 2020. It has also won multiple industry awards for its work for JLP, which is one of adam&eveDBB's flagship clients.
8. The 2019 Christmas Advert, released on 14 November 2019, was a live-action film featuring an excitable young dragon who can't help releasing fire, in which the dragon was created by CGI ("**2019 Advert**"). The 2019 Advert was created by adam&eveDDB (to JLP's brief and with JLP's input) who outsourced the CGI aspects to a specialist company called Untold Studios Ltd ("**Untold**"), and who

worked with a director, Dougal Wilson and an external production company, Blink Productions Limited.

9. The young dragon in the 2019 Advert is also living in a human world, set in an unspecified time in the past, which appears somewhat medieval. He is shown running excitedly to help two children build a snowman, but in his excitement emitting flames which reduce it to a puddle. He is thrilled to see skaters on the village rink, and runs to join them, but inadvertently melts the ice so they are all left standing in cold water. He attends the unveiling of the splendid Christmas tree in the village square, and tries to control his excitement by tying his mouth shut with a scarf, but flames shoot out of his ears and burn it to the ground. The attendant crowd are displeased. He retreats sadly to his home, and only comes out when his best friend, a young girl, gives him a present. That turns out to be a Christmas pudding, which he carries proudly into the village Christmas banquet, and lights with his fire, to cheers from all.
10. The Defendants' case is that the 2019 Advert was based on a concept originally conceived and outlined by a leading creative at adam&eveDBB, Simon Lloyd, in 2016. They have disclosed a copy of a four-page document which the metadata shows was created on 24 February 2016 ("**2016 Outline**") which they say was one of three very similar versions of the concept created around that time. The Claimant accepts the 2016 Outline was created on that date.
11. The 2016 Outline states that the lonely dragon was to be "*the story of an adorable young dragon*" who is "*simply so excited about Christmas that he cannot control the flames from his mouth. He burns everything he encounters*" which "*is made all the more painful as all he wants to do is get involved in all the festive celebrations*". The dragon in this case appears to be living in a community of dragons in or near woods, which he is shown as flying through. His disastrous encounters include melting a snowman being built by three baby dragons, trying to decorate a Christmas tree but leaving it in cinders, melting a skating lake when trying to skate with friends, and burning wrapping paper when trying to wrap presents. He gains acceptance due to the arrival of a thoughtful gift from his friend, a candle, which allows him to channel his flames to less destructive and more useful effect. He lights the candle, and then "*leaps up and lights the street lights as they run down the road.*"

*He leans in through the window of a family eating dinner and lights their Christmas pudding*". He also melts the snow on the path of a lady who is trying to clear it, earning her gratitude. At the end, he lights the candlesticks on the Christmas lunch table.

12. The 2016 Outline was known within adam&eveDBB as the 'lonely dragon' concept. It had, together with other ideas, been pitched to JLP by adam&eveDBB as a possible concept for their Christmas Advert in 2016, 2017 and 2018, but each time JLP had preferred another option. It was pitched again in 2019, with, *inter alia*, the ending changed from lighting candles to lighting a Christmas pudding, and this won JLP's approval.
13. The 2019 Advert was supplemented by a spin-off illustrated children's book called 'Excitable Edgar'. This was commissioned by JLP from a publisher called Nosy Crow and illustrated by an illustrator named Jo Lindley. Ms Lindley drew the eponymous dragon in a simpler style than the manner in which he appeared in the 2019 Advert. Excitable Edgar was made available to purchase in John Lewis shops and Waitrose supermarkets at around the same time as the 2019 Advert was launched, as was a soft toy Edgar produced as part of the merchandising around the 2019 Advert.
14. The 2019 Advert was released by JLP online on 14 November 2019 and first shown in cinemas on 15 November 2019 and on television on 16 November 2019. Upon seeing it minutes after release on 14 November 2019, the Claimant immediately alleged on social media that JLP had copied FFD. The Claimant made a formal legal complaint about both the 2019 Advert and Excitable Edgar in December 2020. Following correspondence between the parties' legal advisors, she issued the Claim in November 2021.

## **THE RESULT**

15. It is the Claimant's case that the 2019 Advert and Excitable Edgar infringe the copyright in FFD. For reasons which I will go on to set out, I conclude that they do not, and that the Claimant has failed to satisfy me on the balance of probabilities that the employees of JLP and adam&eveDBB working on those projects, or any of the other creatives involved including the director Dougal Wilson, Untold, Nosy Crow,

and Ms Lindley, had seen FFD until after the 2019 Advert and Excitable Edgar were made and launched and the Claimant made her allegations of copying on social media.

16. There can be no copyright infringement without copying, and there can be no copying if the work alleged to have been copied has not been accessed (i.e. seen, in this case) by those said to have copied it.
17. Evidence from the Defendants' witnesses sets out how serious allegations of copyright infringement are to those working in the creative industries, and how they feel that their individual reputations, and those of the parties and other creatives involved, have been tarnished by the Claimant's allegations. I understand their concerns.
18. I have been extremely impressed by the professionalism, thoroughness, care and creativity disclosed in the evidence of all those involved in the creation of the 2019 Advert and Excitable Edgar. They each appear to be at the very top of their game in their respective industries, and I consider they exit this litigation without the slightest hint or shadow of a stain on their creative integrity.
19. However, because of those concerns, and because the Claimant for the last 3 years and more has carried on a media campaign publicising her allegations of copyright infringement, which have been unsuccessful in this Court, I will make a declaration of non-infringement and an order requiring the Claimant to publicise this judgment on her website.
20. Accordingly, I dismiss the Claim and find for the Defendants on the Counterclaim. The rest of this judgment explains my reasons for reaching these conclusions.

## **THE DRAGONS**

21. Since the dragons in the 2019 Advert and Excitable Edgar are not identical, I will refer to them in this judgment as "**TV Dragon**" and "**Edgar**" respectively.
22. Example images of the dragons from the works at issue are set out in Figures 1 – 3 below.

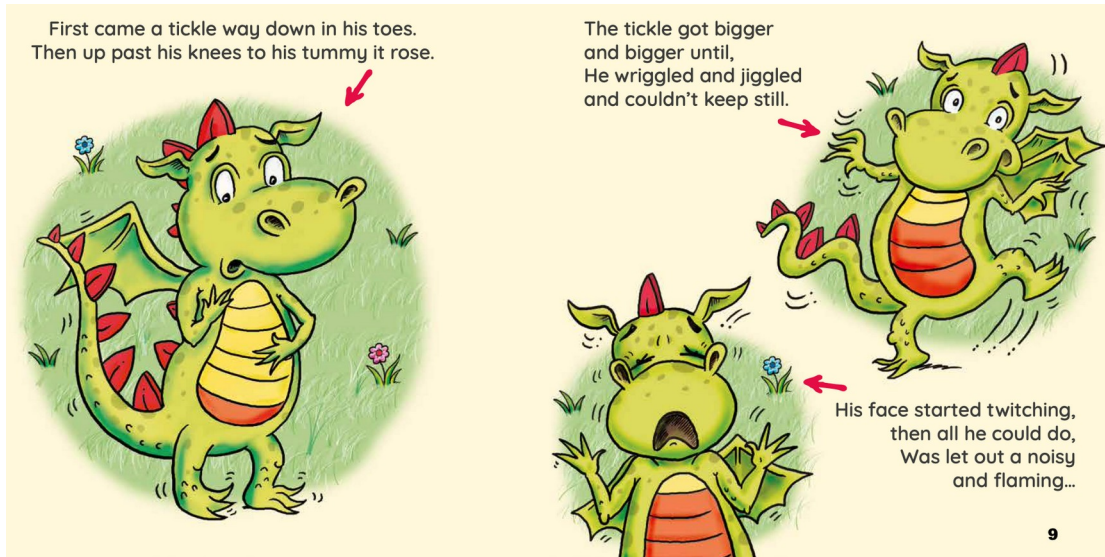


Figure 1 – Fred from FFD



Figure 2a, 2b and 2c – TV Dragon from the 2019 Advert



Figure 3 – Edgar from Excitable Edgar

## **THE PLEADED CASES**

### *The Claimant's case*

23. The Claimant claims that:

- i) FFD contains original literary and artistic works created by the Claimant and Ms Williams which encompass elements of the expression of their intellectual creation, and which qualify for copyright protection in the UK;
- ii) This includes rights of copyright in the principal character of the young dragon, Fred;
- iii) The Claimant owns the entirety of copyright in FFD as a result of the assignment by Ms Williams;
- iv) FFD was available to the public from 7 September 2017, over two years before the first broadcast of the 2019 Advert and the release of Excitable Edgar
- v) The 2019 Advert and Excitable Edgar contain striking similarities to FFD, although it is not alleged that either is an exact reproduction of the whole or part of FFD, and the similarities relied on are at various levels of generality;



- vi) The similarities are identified in paragraphs 16, 17 and 20 of the Particulars of Claim and the Schedules to the Particulars of Claim, Schedule A being the pleaded material features of Fred's character and situation and Schedule B being the pleaded narrative elements of FFD; and
  - vii) The similarities can only be accounted for by the Defendants copying elements of the intellectual creation contained in FFD. Both JLP and adam&eveDBB are liable for that copyright infringement.
24. Although the Defendants have asserted in correspondence that many of the similarities between FFD and the 2019 Advert derive from the 2016 Outline, the Claimant required the Defendant to prove that was created by adam&eveDBB, its date of creation was February 2016 and that its contents were used in the creation of the 2019 Advert. In fact, the Claimant accepted all these matters at trial.
25. However, she maintained at closing the pleaded case that the 2019 Advert and Excitable Edgar reproduce elements of the expression of the intellectual creation contained in FFD which are **not** found in the 2016 Outline.
26. The Claimant seeks damages or an account of profits, an injunction against further copyright infringement in FFD, an order for delivery up of infringing materials or articles, an order for dissemination and publication of any judgment or order made in this case at the Defendants' expense, costs and interest.

***The Defendants' case***

27. The Defendants deny that any part of the 2019 Advert or Excitable Edgar was copied from FFD, or that any inference of copying can properly be drawn.
28. In the Defence, the Defendants put the Claimant to proof that FFD contains elements which are the expression of the Claimant's and Ms Williams' intellectual creation at all, but in closing, Mr Hicks for the Defendants sensibly conceded that it does. They accept that the rights of copyright in FFD are owned by the Claimant as pleaded by her.
29. The Defendants plead that there are numerous and substantial differences between FFD and the 2019 Advert, and to the extent there are any similarities, they arise

from both FFD and the 2019 Advert being based on the same underlying concept of a friendly dragon which finds it difficult to control its fire, and that this concept was developed by adam&eveDBB independently as the 2016 Outline before FFD was published, and so cannot arise as a result of copying. They plead that the 2016 Outline was further developed, without copying, to become the 2019 Advert and Excitable Edgar.

30. The Defendants deny that any individuals from JLP, adam&eveDBB, Untold or Nosy Crow, or the director of the 2019 Advert or the authors and illustrator of Excitable Edgar had any prior knowledge of FFD, nor that there is any basis to infer any prior knowledge of FFD given the limited number of sales that FFD had achieved.
31. The Defendants further plead that during the development of the 2019 Advert adam&eveDBB undertook a search for dragon-themed books before the launch of it, to check if there were any that had similarities to the 2019 Advert, and produced a schedule of their findings (“**Research Schedule**”). FFD was not identified in the course of this initial search. They attach as Annex 1 to the Defence details of other published children’s books which:
  - i) show children becoming friends with a dragon (‘Raising Dragons’ (2002); ‘Guess what I found in Dragon Wood’ (2007); ‘Dom’s Dragon’ (2013); ‘Lynnie and the Gentle Dragon’ (2017));
  - ii) involve dragons being unable to control their fire (‘The Fire-Sneezing Dragon’ (2003); ‘Willard the Dragon Sneeze’ (2016); ‘Duncan the Story Dragon’ (2017));
  - iii) show a dragon burning, melting and setting fire to things (school goalposts and other things in ‘Guess what I found in Dragon Wood’; trees in a forest and grass in ‘The Fire Sneezing Dragon’; a snow fort and a frozen lake in ‘Willard the Dragon Sneeze Fire’; a book in ‘Duncan the Story Dragon’); and
  - iv) result in the dragon’s fire being put to good use (becoming the official fire-starter for a castle cook in ‘The Fire Sneezing Dragon’; cooking and

heating food in ‘Dom’s Dragon’; lighting a firecracker to everyone’s joy in ‘Willard the Dragon Sneeze Fire’).

32. At Annex II to the Defence, the Defendants respond to the allegations made in the particulars of claim and Schedule A and B to the particulars of claim that specific elements have been copied.
33. The Defendants in their Counterclaim seek a declaration of non-infringement and a publicity order, alleging that the Claimant has publicised this case, and timed that publicity to coincide with the launch of JLP’s 2020 and 2021 Christmas Adverts (and since the Defence, the 2022 Christmas Advert), for maximum impact.

## **THE ISSUES**

34. HHJ Hacon approved a case management order agreed between the parties on 6 July 2022. This provided for a split trial, and identified in an attached schedule the list of issues for determination this trial:
  - i) Whether any of the elements of FFD listed in Schedules A and B and paragraph 20 of the Particulars of Claim (the “**Elements**”) are elements of the expression of either (a) the Claimant’s or (b) Ms Williams’s own intellectual creation (as the case may be) such that they have at material times been protected by copyright.
  - ii) To the extent that any of the Elements have been so protected:
    - a) Whether any and if so which of the Elements has been copied and to what extent so that either the Christmas Advert or *Excitable Edgar* is a reproduction of any one or more of the Elements and is thereby an infringing copy of the Claimant’s Book.
    - b) If so, whether the Defendants have infringed the Claimant’s copyright by carrying out any of the acts listed in paragraphs 22 and 23 of the Particulars of Claim.
  - iii) Whether the Claimant is entitled to the relief claimed in the Particulars of Claim.

- iv) Whether the Defendants are entitled to the relief sought in their Counterclaim.

## THE LAW

### *Copyright*

35. There is now no dispute that literary and artistic copyright subsists in FFD and is owned by the Claimant.
36. Section 16(1) of the Copyright, Designs and Patents Act 1988 (“CDPA”) 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, perform, show or play the work in public, and communicate the work to the public. Section 16(2) CDPA provides that copyright in a work is infringed by a person who does, or authorises another to do, any of the acts restricted by the copyright without the license or consent of the copyright owner: (a) in relation to the work as a whole or any substantial part of it; and (b) directly or indirectly (section 16(3) CDPA).
37. The first step, therefore, is to establish whether the Defendants have copied the copyright work. This requires a multifactorial assessment which Wilberforce J in *Francis Day & Hunter Ltd v Bron* [1963] 1 Ch 587 described as “*a judgment of fact upon a number of composite elements: the degree of familiarity (if proved at all or properly inferred) with the plaintiff’s work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendant’s work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant... and not least the quality of the defendant[‘s] own evidence on the presence or otherwise in his mind of the plaintiff’s work*”.
38. Whether what has been copied amounts to a substantial part of a copyright work is a matter of quality rather than quantity. A part is substantial if it contains elements of the expression of the intellectual creation of the author of the copyright work (*Infopaq International A/S v Danske Dagblades Forening* [2009] ECR-I 6569).

39. Ms Watkinson submits that copyright can subsist not only in the words of a literary work but also in the selection, arrangement and development of ideas, characters and narrative in such works, relying on *Baigent v Random House Group Ltd* [2007] EWCA Civ 247 (Mummery LJ at [141]); *Kogan v Martin* [2019] EWCA Civ 1645, (Floyd LJ at [34] (“*copyright protection can extend to the plot of a literary work, even where the precise words of the work are not taken*”), [41] (“*it is the skill and effort involved in creating, selecting or gathering together the detailed concepts or emotions which the words have fixed in writing which is protected in the case of a literary or dramatic work...*” and [42])); *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC) where Mr John Kimbell QC (sitting as a Deputy High Court Judge) held that the characteristics of a fictional character are protectable by copyright as a literary work at [113]; and *Pasternak v Prescott* [2022] EWHC 2695 (Ch) where Johnson J held that the selection, arrangement and structure of events, together with the forms of expression of facts and incidents, can be copied and result in infringement even where there is no copying of the text (at [142]) and that copyright can subsist in a selection of events which form only part of a larger selection of events, and infringement can occur if there is copying of only part of that selection (at [178]).
40. These cases all seem to me to be examples of the application of the test from *Infopaq* (even in the case of *Baigent*, as although it pre-dates *Infopaq* such a qualitative test existed before *Infopaq*: see, for example, HHJ Birss QC as he then was in *Hodgson v Isaac* [2010] EWPC 37 at [77]), that copyright subsists in the expression of the intellectual creation of the author so long as it is identifiable with sufficient precision and objectivity, and that there will be copyright infringement if what has been taken includes the expression of that intellectual creation.
41. Mr Hicks draws my attention to the warning given by Laddie J in *IPC Media Limited v Highbury-Leisure Publishing Limited* [2004] EWHC 2985 that focussing too much on similarities and ignoring the full context within which those similarities exist, can give rise to a misleading impression, as “*In copyright cases, chipping away and ignoring all the bits which are undoubtedly not copied may result in the creation of an illusion of copying in what is left*”.

42. The Claimant submits that *IPC Media* pre-dates *Infopaq*, and the law has moved on since that decision was made in 2004. She submits for the Claimant that the correct approach in determining whether a defendant has copied a substantial amount of work is to focus on the elements which have been taken and determine whether those elements reproduce elements of the author's intellectual creation, rather than the approach set out in *IPC Media*. I do not disagree with her, but I think that *IPC Media* remains a useful warning that where one has chipped away at something, one must examine what remains carefully to assess whether it does truly reproduce elements of the author's intellectual creation, or merely gives the illusion of it.
43. In relation to access, there was a dispute between the parties about the extent to which the Claimant was required to prove on the balance of probabilities that there was access to FFD, or merely required to prove the possibility of access to FFD. Mr Hicks relies on the decision of Zacaroli J in *Sheeran v Chokri* [2022] EWHC 827 (Ch) when this issue arose for his determination in the context of alleged infringement of a musical work. He said:

[24] While the legal burden rests with the person alleging infringement, in the case of conscious copying the evidential burden shifts to the alleged infringer if there is proof of sufficient similarity and proof of access. There was some debate as to whether what was required was a proof of access, or proof of the possibility of access.

[25] The weight of authority supports the former: see, for example, *Designers Guild* (above), per Lord Millett at p.2425E; *Baigent v Random House* [2007] EWCA Civ 247 at [4], although I do not think anything turns on it in this case. Tens of thousands of new songs are uploaded to Internet sites daily. It clearly cannot be enough to shift the burden of proof that a song was uploaded to the Internet thereby giving the alleged infringer means of accessing it. In every case, it must be a question of fact and degree whether the extent of the alleged infringer's access to the original work, combined with the extent of the similarities, raises a sufficient possibility of copying to shift the evidential burden. ...

[26] Irrespective of where the burden lies, infringement requires there to have been *actual* copying, which necessarily entails that the alleged infringer not only had access to the original work, but actually saw or heard it.

44. The Defendants rely on this passage to submit that the Claimant must provide evidence that the Defendants actually accessed the claimant's book and copied it rather than just raise a possibility of access. The Claimant submits that Zacaroli J made clear at para 25 (quoted above) that nothing turned on the point.
45. In my judgment, as Zacaroli J states above, the question for the Court is whether there has been actual copying, and that requires access and not just the possibility of access. However, that access may either be evidenced directly, or it may be inferred from the possibility of access and other circumstances in the case. That is the point made by Wilberforce J in *Hunter Day*, quoted above, I believe, when he referred to: "*the degree of familiarity (if proved at all or properly inferred) with the plaintiff's work*". That inference must, of course, be properly drawn. But where there is only a possibility of access and an inference cannot properly be drawn that the alleged infringer actually did access the original work, then there cannot be a finding of copying.

## **THE WITNESSES**

46. I heard from five witnesses of fact at trial, each of whom filed a witness statement and was cross-examined.
47. For the Claimant, I heard from Ms Evans herself and Ms Williams, the illustrator of FFD.
48. The Defendants make no criticism of Ms Williams, and I accept her as an honest and truthful witness who came to Court to assist it to the best of her ability.
49. The Defendants criticise Ms Evans' evidence relating to the reasons for and timing of her press releases and publicity surrounding the case. Ms Evans was a little cagey, I felt, about a series of press releases in which she made allegations of copyright infringement against John Lewis, which she drafted and released to the media in November 2019, December 2020 and November 2021. She first said that she released them as she considered that it was in the public interest to do so, and then said that she gained confidence from public support. It was put to her that the press releases were made in order to promote the sale of her books and the financing of a proposed musical based on FFD. At first she denied it, but then accepted that they

were, in part, for self-publicity. She denied deliberately releasing them to coincide with the launch of the John Lewis adverts in each year, and sought to say, in effect, that was mere coincidence, and she had chosen the timing as certain particular stages of these proceedings had been reached.

50. Ms Watkinson asked me to find that was a clear and honest explanation, but I found her very unconvincing on this point. I am satisfied on the balance of probabilities that she was using JLP's Christmas Adverts each year as a hook to gain more publicity to raise her profile as an author and drive book sales, rather than because there was anything particularly newsworthy about these proceedings to report at the time. I do not have any material concerns about the rest of her evidence, much of which related to her creative process which is of less relevance now that the Defendants accept that literary and artistic copyright subsists in FFD and vests in the Claimant. I accept Ms Watkinson's submission that Ms Evans honestly believes that the Defendants have copied her book and committed a grave injustice against her.

51. For the Defendants I heard from:

- i) Ms Holly Kicul, the Senior Advertising Manager at JLP;
- ii) Mr Richard Brim, the Chief Creative Officer at adam&eveDDB;
- iii) Mr Paul Billingsley, who was the Managing Director of adam&eveDDB at all material times until he left the company in October 2022.

52. The Defendants submit that their witnesses were good witnesses doing their best to assist the Court which should have no hesitation in accepting their evidence. Ms Watkinson for the Claimant agrees, describing them as honest, truthful and straightforward, although has submissions to make about evidence that they were not able to provide and questions they were not able to answer. I agree with those assessments.

## **THE EVIDENCE**

### **The creation of Fred and FFD**



53. Ms Evans in her witness statement describes her process of creating and developing the rhyming story which became the final text for FFD. This process started, she says, by early thoughts and notes in around April 2015, including initial rhyming couplets about a dragon living in a land of dragons, to a more developed draft a year later, on 16 April 2016, which set the narrative of a solitary dragon pupil within a school populated with human characters. This was followed by a further version including the introduction of a repeated chorus describing how the sneeze builds up within the dragon's body, on 19 April 2016. After some further edits, she produced the final version which became the text for FFD on 4 May 2016 and submitted it to 16 literary agencies between 13 December 2016 and 3 February 2017. I have seen copies of those drafts, the emails out, and the emails received back from some of those agents, none of whom wished to take it on, for various different reasons.
54. Ms Evans then decided to self-publish, and worked with an organisation called Team Author UK to realise that. She sent her story to three potential illustrators, asking them to create an initial sketch of Fred so she could see their style and creative approach. In oral evidence she said that she deliberately did not provide much of a brief, to see what came back. One of these illustrators was Lisa Williams. I have seen the sketches that resulted from all three approaches.
55. Ms Evans preferred Ms Williams' initial sketch, and they entered into correspondence, with Ms Evans providing feedback on various sketches and making suggestions. This included telling Ms Williams that although children she had read the story to at a local school thought Fred would be red, she saw Fred as being green, as she had a childhood memory of the green cartoon dragon from a 1977 film called '*Pete's Dragon*'. Ms Evans also suggested that as the sneeze started to build up, Fred could blush red. Following further discussion, Ms Williams incorporated this in her drawings as Fred's stomach striations turning red as the urge to sneeze grows stronger, rather like the rising mercury in a thermometer.
56. Ms Williams' evidence is that she does not use third party material when creating her illustrations, and she did not look at any other images of dragons and use them as inspiration or a base for the sketches she produced for Ms Evans. She developed them from her own artistic imagination, using the story and Ms Evans' prompts, in order to reflect in Fred what she thought Ms Evans saw in her mind's eye.

57. Various sketches passed between Ms Evans and Ms Williams until the final illustrations, including those for the front and back cover, were completed. Those were sent to a graphic designer for typesetting on 3 July 2017. Ms Evans ordered the first print batch of 500 copies on 9 August 2017. Ms Evans's website at the domain fayevansauthor.co.uk was also developed at the same time, and went live on 4 July 2017. By 18 August 2017 this included a facility for direct online sales of FFD. Ms Evans did two readings of the text of FFD in early 2017 (before any illustrations existed) but the first time printed copies of FFD were made available to the public was on launch on 7 September 2017.
58. Ms Evans publicised FFD in public book readings, mostly at primary schools in the North West of England but also at other networking and author events, from launch to December 2018. On 15 December 2018 she published a second children's book called *'Bob's Beard'* which she says was her primary focus from then and throughout 2019, although she continued to give public readings of FFD at primary school author visits. I have already set out details of the sales of FFD she achieved up to 31 October 2019, being just 914 copies, 709 of those sales arising from those primary school visits.
59. In 2018 Ms Evans wrote a sequel to FFD called *"Fred the Fire-Sneezing Dragon – School Trips"*, in which Fred goes on further adventures, including going on a school trip to an ice rink where his sneezing causes the ice to melt. She once again sought literary agent representation for the book from 30 April 2018 onwards, but was unsuccessful and that remained unpublished before the 2019 Advert was released.
60. Ms Evans says that she saw the 2019 Advert within minutes of its release, and *"within seconds I immediately recognised the remarkable visual appearance of the main dragon character, Edgar, who I thought closely resembled a CGI version of Fred. As well as being depicted as a lone dragon living in a human world, I also recognised Fred's unique character traits, his accidental sudden emissions of fire, the melting and destruction of inanimate objects, the final warming of food and human hearts, as the storyline from my book [FFD]."* It is now accepted by her that the TV Dragon's accidental sudden emissions of fire, the melting and destruction of inanimate objects and the warming of food were all to be seen in the 2016 Outline

which predates the release of FFD and so could not have come from the storyline of FFD. I otherwise accept Ms Evans' evidence as summarised above.

### **The creation of the TV Advert**

61. Ms Kicul has had a leading role in delivering the JLP Christmas campaign, including the Christmas Advert, since 2018. She says that she works on it all year round, starting in January each year with the brief that JLP sends to adam&eveDBB to inform the ideas that they then pitch to JLP. Her evidence is that in 2019 JLP changed their approach from having separate ads for John Lewis and Waitrose to a joint John Lewis/Waitrose brief for the Christmas Advert on the theme of *"thoughtfulness at Christmas"*. The brief asked adam&eveDBB to create a Christmas Advert that was *"greater than the sum of the parts, not a compromise for either or both brands"*.
62. Mr Billingsley describes how a JLP brief for a Christmas Advert, once received in the agency, would be sent out to all of the creative teams who would then submit their ideas. He said there were about 40 such teams, of one or two creatives in each, and this would result in 200-300 ideas, which would be reviewed and sifted by the creative directors, led by Mr Brim as Chief Creative Officer. Those would often include ideas put forward from previous years which the creative teams thought were still worthy of consideration, and in 2019 these included Simon Lloyd's 'lonely dragon' concept from the 2016 Outline which had been pitched in 2016, 2017 and 2018. Some of this deluge of ideas would be rejected outright, some would be sent back to the creative teams for reconsideration and reworking before submission again, and eventually Mr Brim, Mr Billingsley and other senior staff at adam&eveDBB reduced the ideas down to a shortlist of concepts to pitch to JLP at a course of initial meetings. On 13 March 2019, the 'lonely dragon' concept was pitched to JLP, once again.
63. Mr Brim's evidence was that he had been involved in the development of the 2016 Outline, saying in his witness statement that he discussed the concept of the 'lonely dragon' with Mr Lloyd and others in the creative and account management teams at various meetings in 2016. *"I had once owned a dog that used to get so excited that it would urinate, and the idea was that the dragon would get excited and let out a*

*little puff of smoke or flames in the similar way. In particular, Simon Lloyd, Christine Turner and I discussed the dragon becoming so excited about Christmas that he would let out little bits of fire from his nostrils and accidentally set fire to things. I recall that one idea we came up with was that there had been a storm and the power had gone out, and that the dragon would ultimately find use for its flames by lighting candles.”.* Mr Brim explains that he thought it was a good fit for the changed joint John Lewis/Waitrose brief in 2019, because it could be slightly reworked to provide a significant emphasis on Waitrose by changing the ending from the dragon redeeming himself by lighting a candle, to lighting a beautiful Waitrose Christmas pudding as the finale to a Christmas banquet. I remind myself that the dragon lighting a Christmas pudding can be seen in the 2016 Outline, albeit not as the finale. In oral evidence Mr Brim said that although Simon Lloyd was responsible for changes from the 2016 Outline to the script pitched to JLP in 2019, he himself was ultimately responsible, as he had ultimate creative control for all ideas put forward by the creative department, working with both the creative and account management teams.

64. Mr Brim said that he discussed the ‘lonely dragon’ concept with Mr Lloyd and the creative team and *“talked about all the things that are associated with Christmas (snow, snowmen, ice skating, Christmas trees, decorations etc.) and how the dragon’s fire could accidentally burn/melt them. We thought about the useful things the dragon could do with its fire, such as lighting candles for the table, and then landed on the idea of the dragon presenting and lighting a Christmas pudding at a banquet, bringing people together and leading to the dragon being accepted by the community. It had the inclusiveness message that was important for the concept, but also brought in the food element which was crucial to meet the brief given the ad was for Waitrose as well as John Lewis”.*
65. At the 13 March 2019 meeting, JLP chose five pitched concepts to be the subject of a further presentation on 3 May 2019, including the reworked ‘lonely dragon’ concept. This caused the production of a document setting out the core idea and including a mood board indicating the creative direction that they were proposing to use for the dragon character. The concept was given a working title of ‘PALS’. The ‘idea’ was described in that document as follows:

“This is the tale of an adorable young dragon but one who suffers at this time every year. For he is simply so excited about Christmas that he cannot control the flames from his mouth. He burns everything he encounters, putting a real downer on everyone’s Christmas spirit. His friends and family don’t even want to go near him. So much so that one Christmas he leaves to make everyone around him happier. But his best friend has other ideas. On Christmas day he sees the incredible spread laid on and sees a special something needs to be lit. A delicious plump Christmas Pudding. This turns into a simple gift that helps display true acceptance and makes the little dragon realise that people really do care. Especially at Christmas.”

66. The mood board has eight images of quite different looking dragons, but each looks friendly or at least not threatening. It is accompanied by a narrative describing the two pals as *“A little boy and an adorable young dragon”*.
67. By a final meeting on 24 May 2019, JLP had narrowed their choice to two competing concepts, of which ‘PALS’ was one and ‘Unexpected Guest’ was another. In advance of that meeting, adam&eveDBB further developed the idea and mood board of ‘PALS’ and included a script. At the meeting, JLP chose ‘PALS’ for the 2019 Christmas Advert, and agreed the final script (“the Script”). Although ‘Unexpected Guest’ was not chosen in 2019, it eventually became the 2021 Christmas Advert.
68. Following JLP’s choice, adam&eveDBB spoke to a number of potential directors and production/animation companies and sent them the Script. Each potential director produced a ‘treatment’ showing how they envisaged bringing the Script to life. I have seen three of those treatments, which are quite different in approach and in the extent to which they have developed their ideas. For example, one director set the story in modern-day suburbia, featuring locations including a tired shopping mall and a gritty urban underpass. Another produced a very extensive treatment, including offering suggested dialogue and multiple sketches of how the dragon could look. However, both Defendants agreed that Dougal Wilson’s treatment, although comparatively minimal, was the best for the campaign. He had directed three previous Christmas Adverts. He pitched alongside Untold, who was chosen for the production agency.
69. I have seen a great deal of documentation and video evidence about the visual development of the TV Dragon by Untold, working with Mr Wilson and

adam&eveDBB: from documentation recording very early concepts and inspiration photographs from the natural world for features and textures of the dragon's appearance; to sketches showing possibilities for and development of the overall look of the dragon; to computer-generated visuals and video clips dealing with the dragon's shape and stance (from the skeleton to its musculature and then fully rendered), the way it moves and its facial expressions for different feelings.

70. This documentation alone records the level of thought and creativity that went into establishing the overall look of the TV Dragon in the earliest stages, in my judgment. It is all dated (or the dates of creation can be seen from metatags), and the Defendant does not question the authenticity of any of it. A document produced by Untold immediately after an initial meeting with JLP, in which Untold showed a photograph of a baby hippopotamus which it felt could be an inspiration for a young and adorable dragon, showed something very spiky, roughly textured and brown, with a segmented tail almost like a scorpion, but bearing a hippopotamus-like face with small eyes and prominent nostrils. It bears almost no relation to the TV Dragon or Edgar. Ms Kicul said in her evidence that she found some of the early visuals to be a bit crocodilian and scary, and instead wanted a dragon that seemed cute. This appears to be an example of what she wanted to move away from.
71. Shortly afterwards, Untold produced a document setting out their approach to the character design of the TV Dragon, which asked questions such as *"How big is he? Does he walk on two or four legs?..... or maybe he does both. Does he have wings? .... Can he fly?"* and commenting *"Every single design decision contributes to who [the dragon] is and how the audience relate to him. His face and eyes, the size of his feet, the colour of skin all play their part like the instruments in an orchestra"*. It describes how the dragon moves and his expressions as *"Equally important to his look"* and states that Untold wants the dragon *"to feel like a real animal and not a cartoon creature that happens to inhabit the real world... He feels dragon embarrassment and frustration, dragon joy and sadness"*. In that document Untold then provides numerous sketches: of very traditional looking dragons of the type that might slay St George – with powerful haunches and strong, broad wings; of young dragons looking a bit scruffy and semi-fledged, with different treatments of the mouth or muzzle ranging from beak-like to more rounded; younger and older

teenage dragons with attitude; dragons of different hues and expressions. They show a number of quite different possibilities, but with common features. All have spikes on their head and at least the upper part of their backs; all have wings albeit of different sizes and treatments; most have striated abdomens; all but one stand on their rear legs; all have their front legs positioned, or used, as arms.

72. A later document, called “*Developing Dave*” (Dave being a working name at the time for the dragon) shows a dragon who is recognisably the TV Dragon from the 2019 Advert. It has his dumpy physique, somewhat rounded muzzle, protruding, uneven teeth, small wings, more rounded spikes all the way down his back, small arms and a striated abdomen. Mr Brim describes the dragon as having “*cuteness with a degree of realism*”. This document explores the dragon’s character through different expressions. A page of sketches headed “*Dougal Comments*” has comments from the director, showing that he asked for smaller wings, smaller, round eyes with round pupils, and a ‘slightly squashed’ torso. It comments that he does not want the dragon’s muzzle too ‘beaky’ but he does want uneven teeth and a big grin, for example.
73. These preferences can be seen as being followed in the later sketches and CGI visuals and videos. The TV Dragon’s torso becomes dumpier and compressed, with a protruding rounded abdomen that sits low and almost on the ground. The eyes shrink and become rounder. His sparse, uneven teeth poking out of his mouth are a feature adding to his gawkiness and approachability. The exploration of the TV Dragon’s movement and expressions in CGI video clips alone must represent many hundreds of hours of work.
74. All of this development work was taking place with creative input from adam&eveDBB and the director, and alongside work on the storyboarding of the film from the Script, in close conjunction with the director, and the pre-production work on locations, casting, costuming etc with Blink. Filming took place abroad in September, with the CGI TV Dragon inserted in post-production.
75. Both Mr Billingsley and Mr Brim describe in written and oral evidence the very collaborative and creative nature of the process which took place between Untold, the director, Blink, them and others at adam&eveDBB in pre- and post-production in

bringing the initial concept and Script to the final 2019 Advert, with JLP providing feedback to the visuals and story development. Mr Brim in particular described that in part as involving multiple creatives in a room, throwing out and discussing ideas, some of which were taken up and explored and either further developed or discarded, in a very collaborative and iterative process. In cross-examination he was questioned about why no documentation of the various developments of the Script existed, and he explained firstly that the Script was never further developed itself, but was moved onto storyboards which developed the story in sketches and images, and secondly that the creatives simply did not work that way. I accept Mr Brim's evidence, and the Defendant accepts him as an honest and straightforward witness.

76. Mr Billingsley thought that some of the meetings resulted in written notes, but if so, these notes have not been disclosed. The Claimant took issue with this in closing argument, described this as *"a hole in the Defendants' evidence of the development of the 2019... Advert"* and submitted that the Defendants have provided no documentary evidence to explain how the 2016 Outline was used in the creation of the 2019 Advert, or how the idea of the 2016 Outline was developed in order to become the narrative which is in the 2019 Advert. I disagree. I have seen how the 2016 Outline progressed in 2019 to the 'lonely dragon' concept pitched as PALS, and heard Mr Brim's clear evidence that the 2016 Outline was not otherwise developed in 2016, 2017 or 2018. I have heard how that 'lonely dragon' concept was further developed through the pitching process, and that can be traced in the various documents presented to JLP, resulting in the Script. I have seen the development from the Script to the narrative in the 2019 Advert in the process of storyboarding, and those storyboards have been copied and are included within the trial bundle.
77. Furthermore I have read and heard evidence from two people involved in the creative process at adam&eveDBB, Mr Brim and Mr Billingsley, who the Claimant accepts as honest and truthful. When I put this to Ms Watkinson she said *"Well, I suppose there was no documentary evidence given before we heard the oral evidence... and in our submission there has been no sufficient explanation...[or] documentary evidence to show how these decisions were made, to show how the decisions have been taken"*. She submits that when she asked the witnesses in cross-examination to explain how decisions were made or who took them, the witnesses



were not able to give her an answer to that. However, I accept Mr Brim's evidence that there was no formal documentation of who made various creative decisions because these were made collaboratively and interactively, by creative people in a room doing what creatives do, and that there was no need to attribute decisions to individuals as Mr Brim took ultimate responsibility for them all.

### **The creation of Excitable Edgar**

78. In relation to Excitable Edgar, Ms Kicul explains that she met with Nosy Crow, the publishers of the book with whom she had worked before, on 12 June 2019. Rather than provide them with the final script of the 2019 Advert, to minimise the risk of leaks she read it to them, and showed them a few early sketches produced by Untold. She chose Ms Lindley as illustrator a few days later from the work of three illustrators provided to her by Nosy Crow, and over the course of the next month or so, Nosy Crow and Ms Lindley produced drafts of the text and illustrations of the book. Ms Kicul and another colleague from JLP would suggest changes depending on how the advert was developing. She says that she shared Untold's illustrations of the TV Dragon with Nosy Crow in August 2019, and approved the final version of Excitable Edgar around 5 September 2019, which was sent to the printer a few days later.

### **Access to FFD by the parties and creative teams**

79. Ms Kicul's evidence is that she did not know of, see or hear about FFD until the Claimant made allegations that the 2019 Advert copied her book on social media in November 2019. She says she asked all of the small number of JLP employees who worked on the 2019 Advert and Excitable Edgar (listed in her witness statement) if they had seen FFD before the 2019 Advert was released and they confirmed they did not. She made the same enquiry of Nosy Crow who gave a similar confirmation.

80. In oral evidence Ms Kicul said that the legal team at JLP had undertaken research into books containing stories about dragons, and cleared them all, but was unable to give details about how that research was undertaken. There is no evidence or disclosure on the point and so there is no documentary evidence as to exactly which books were looked at by JLP (as opposed to adam&eveDBB who recorded their

process in the Research Schedule) and what was found in the search. However, given her evidence that she made specific enquiries and neither she nor any of the JLP team members involved in the 2019 Advert and Excitable Edgar had heard of FFD before November 2019, if the JLP legal department did turn up FFD in a review they do not appear to have raised any concerns about it with Ms Kicul or her team. I am satisfied that on the JLP side, none of the team had previous access to FFD and cannot have copied it.

81. Mr Brim and Mr Billingsley also state that they had not seen and did not know of FFD until after the Claimant's initial complaints. Mr Brim said that he did not think there was any truth in her complaints *"since I knew our idea had been created independently, at least in one form before her book had been published, and at no point in the creative process had anyone within our agency suggested to me or as far as I know anyone else that they were aware of this book"*.
82. Ms Kicul says that JLP is sensitive to claims that the Christmas Adverts are based on published books, as they have had similar allegations made in the past, so she asked Mr Billingsley during the course of development to ensure there was *"clear water"* between the 2019 Advert and any other stories featuring dragons or dragon illustrations. She says that he told her in around July 2019 that adam&eveDBB would do a search to ensure there was nothing that someone might say JLP had copied.
83. adam&eveDBB have disclosed a 45-page Research Schedule of about 90 children's books involving dragons that they reviewed and cleared. Some of the entries have a red star beside them, which Mr Billingsley explains indicates that adam&eveDBB actually bought the book, to double-check that they had not inadvertently created something that was similar. This document is titled *"Dave – PALS Research"*, and Mr Billingsley refers to it as a research document compiled as part of the due diligence process that his account managers typically embarked upon once they knew that a certain creative idea was a front-runner.
84. One item on the Research Schedule is FFD, but Mr Billingsley says FFD was added after they had heard about the Claimant's complaint, which he suspects was the first time that anyone was aware of the existence of it. This is supported by the document

itself. It was created as a Google Slides document which discloses the history of its creation and amendment. This shows that the document was created on 22 July 2019, most of the books listed were added to it on or before 1 August 2019, and the very last entry was that relating to FFD, which was only added between 14 and 18 November 2019. There is no red star against FFD, and Mr Billingsley believes this indicates that the agency did not buy a copy of FFD at this time, but it did later, after the Claimant sent a legal letter to JLP in 2020.

85. The Claimant accepts what the Google Slides history shows about the document's version history and does not suggest that the reference to FFD was added to the Research Schedule earlier than indicated. She submits that she has no evidence about when and how a copy of FFD was purchased by adam&eveDBB, and neither Mr Billingsley nor Mr Brim could assist with that in cross-examination, but I think this ignores Mr Billingsley's written evidence about the absence of the red star on the Research Schedule. I am satisfied on the balance of probabilities that adam&eveDBB did not buy FFD until sometime after FFD was added to that document in mid-November 2019, as Mr Billingsley suggests.
86. Mr Billingsley says that the Research Document was created by the account management team and never used by or even shown to the creative team, so far as he was aware. Mr Brim confirms that he does not recollect ever seeing the Research Document before the litigation process commenced, and that it was not part of the creative process of the 2019 Advert, saying "*Trawling through children's books was simply not part of the process of creating the Christmas Advert or any creative work. I do not believe that anyone involved looked at any dragon-themed children's books for creative inspiration, and certainly none were mentioned to me as part of creating the outline or in any way in relation to the [2019] Advert... I can categorically confirm that it is an original creative work that was the result of hard work and creativity of myself, my colleagues at adam&eveDBB, Dougal [Wilson], Untold and JLP*".

## **DETERMINATION OF ISSUES**

**Are the pleaded elements of Fred's character and appearance or the narrative elements of FFD protected by copyright and is there a prima facie case of copying by**

**the Defendants?**

87. The first issue is whether the similarities between FFD and the 2019 Advert and Excitable Edgar listed in Schedules A and B and paragraph 20 to the Particulars of Claim show that the Defendants have copied elements of the intellectual creation of the Claimant or Ms Williams, as the case may be.

***Pleaded elements of Fred's character and appearance (Schedule A of the PoC)***

88. A number of the Claimant's pleaded similarities in respect of features of Fred to those of the TV Dragon and Edgar are found in the 2016 Outline and so I am satisfied they cannot have been copied from FFD. Those include that the dragons are young, accidentally breathe/emit fire, stand and move on two hind legs with forelegs used as arms, have a cute and loveable appearance, but can appear sad and forlorn following episodes of fiery destruction. In relation to the hind legs point, as the Defendant notes, in fact the TV Dragon is the only one of the three Dragons who is shown running on occasion on all four legs like a dog, so there is a difference to Fred in that similarity.

89. Ms Watkinson submits that the 2019 Advert and Excitable Edgar nevertheless reproduce other features of Fred which amount to elements of the expression of the intellectual creation contained in FFD, namely:

- i) The fact the dragon is of child-size;
- ii) The dragon is of a green colour, has a ribbed front, a series of triangular spikes on his head and back, two arms, some of the facial features and has the general body shape of the dragon in the claimant's book.

*Child-size*

90. I accept that Fred, the TV Dragon and Edgar are all child-sized. The Defendant submits that this is because they are all required to be child-friendly and non-threatening in appearance, but this is a specific choice which in the case of Fred, I am satisfied is an element of either the Claimant's or Ms Williams' intellectual creation of the characters (I do not know whose choice it was). It was not necessary

to make the dragon child-sized; there are plenty of examples of large yet child-friendly and non-threatening dragons in children's literature.

91. It is difficult to judge Fred's size relative to the children around him, as he so often appears in the foreground of the illustration with children further in the background, looking much smaller because of the effect of perspective. It is only when Fred is illustrated standing next to the school cook, who I presume is an average-sized adult woman, that it can be seen he comes up to about her shoulder, making Fred perhaps the size of a child of 10 – 13 years old. Both the TV Dragon and Edgar appear to be much smaller. They are both often depicted walking next to the girl who is their best friend. In both formats she is young – about 10 – and the dragons are around half to two thirds her height, seemingly the height of about a 4 or 5 year old child. That seems to me to be quite a different choice to that made by the Claimant.
92. Accordingly, although I am satisfied that the choice of Fred's size is protected by copyright, I am not satisfied that there is a sufficient similarity in the size chosen for the TV Dragon and Edgar such as to raise a presumption of copying.

### *Green*

93. In respect of the second submission, this further generalises the more specific similarities which the Claimant pleaded as particular elements of intellectual creation in Schedule A.
94. For example, the Claimant did not plead that all three dragons were green: she pleaded that they had similarities in their "*general body colour/texture*", and described Fred as "*Green with darker green spots and some scales*", the TV Dragon as "*Shades of green with a stippled rough surface*" and Edgar as "*Dark green with small light green spots (otherwise smooth)*". All of the other choices the Claimant made and pleaded as elements of the intellectual creation of Fred - the differentiated green colour in the form of spots and the darker green colour of those spots, the texture provided by some scales – are not seen in the TV Dragon. Edgar does have some spots, but so does the young dragon depicted in the 2016 Outline.
95. To reduce the pleaded element merely to "*green*" really goes to Mr Hicks' point made from *IPC Media* that if you take out all the dissimilarities all that is left is

what is similar.

96. Is the mere choice of the colour green for the dragon an element of the intellectual creation of the author and/or illustrator? Well, it is one choice, but we know from nature that there are millions of different shades and textures of green. We also know that green is probably the most common choice of colour for a dragon. It is also a choice that was made in the 2016 Outline, where one image shows a green dragon in the forest.
97. As it is not pleaded, I am not satisfied that “*green*”, without more, is an element of Fred’s appearance amounting to the expression of the Claimant’s or Ms Williams’ own intellectual creation such that it has at material times been protected by copyright. Even if I am wrong about that, the fact that it was used as a colour for a dragon in the 2016 Outline means I am not satisfied that it was used for the TV Dragon and Edgar as a result of copying.

*Ribbed front, triangular spikes, two arms*

98. I accept that Fred, the TV Dragon and Edgar all have ribbed fronts, triangular spikes down the full length of their back and tails and are possessed of two arms, but (i) the young dragon in the 2016 Outline has spikes down the full length of his back and tail, as well as two arms; and (ii) a ribbed stomach, two arms and triangular spikes are entirely commonplace features, almost ubiquitous in depictions of dragons, as can be seen by the numerous illustrated dragons in the picture books contained in the Research Schedule and in Untold’s document exploring the potential appearance of the lonely dragon which I have described in some detail. They have been treated quite differently in the TV Dragon and Edgar compared to Fred, in terms of both the detail of those features, and their colour and general appearance. Fred’s ribbed stomach which changes colour as his sneeze builds up, for example, is nowhere seen in the TV Dragon or Edgar.
99. I accept that these features together can amount to elements of the expression of the Claimant’s or Ms Williams’ own intellectual creation (as the case may be) such that they have at material times been protected by copyright, but in relation to those elements which are found in the 2016 Outline, they cannot result from copying. In

relation to the ribbed stomach and the triangular spikes, those similarities are not so similar that they are sufficient to raise a presumption of copying, in my judgment.

*Facial features*

100. “*Some of the facial features*” is again at a very high level of generality, and is not pleaded in those general terms. Specific facial features of Fred are pleaded in Schedule A as elements of the author’s and illustrator’s intellectual creation: it is not clear which, if any, the Claimant says survive the 2016 Outline. I am left to guess. The eyes? The TV Dragon and Edgar have large expressive eyes and black pupils, but so does the young dragon in the 2016 Outline. The only similarity around the eyes which is not seen in the 2016 Outline is that each of Fred, the TV Dragon and Edgar have eyebrows. The nostrils? All three dragons have prominent nostrils (albeit I consider they are of quite a different type in Fred), but so does the young dragon in the 2016 Outline. The mouth? The Claimant pleads that sometimes Fred’s mouth appears wide, but this is clutching at straws, in my judgment. Both Edgar and the TV Dragon have very wide mouths at all times, and Fred’s mouth at rest is smaller and rounded and set back below a long muzzle.
101. I accept that these features together can amount to elements of the expression of the Claimant’s or Ms Williams’s own intellectual creation (as the case may be) such that they have at material times been protected by copyright, but in relation to those pleaded elements of Fred which are not found in the 2016 Outline, which appear to be just a pair of eyebrows and a mouth which looks quite dissimilar but can be depicted more similarly when it is stretched wide, I find insufficient similarities to raise a presumption of copying.

*General body shape of the dragon*

102. This is not a pleaded element in Schedule A. In any event, the body shapes of Fred on the one hand and the TV Dragon and Edgar on the other are in my judgment quite different. Fred appears taller, longer and leaner. The TV Dragon and Edgar are much dumpier but more muscular and dog-like. The TV Dragon in particular is quite compressed, with his stomach almost sitting on the ground as he stands and walks on his rear legs. As I have noted, that arose from a comment of Dougal Wilson to Untold during character development. As I have also noted, the TV Dragon also

runs on all fours at times. As it is not pleaded as an element of the expression of the Claimant's or Ms Williams' intellectual creation, I do not take this submission further. If it had been pleaded, for the reasons I have given I would not find sufficient similarity to raise a presumption of copying.

103. I also stand back and look at the similarities that I have found in the character and appearance of Fred which are not found in the earlier 2016 Outline, and check whether, when viewed together, they are sufficiently similar to raise a presumption of copying. At the highest, those are the child-like size, the ribbed stomach, triangular spikes and eyebrows. I am satisfied they are not.

***Narrative elements of FFD (Schedule B of the PoC)***

104. The narrative features of FFD that Ms Watkinson in closing submits are not found in the 2016 Outline and are to be found in the 2019 Advert and Excitable Edgar are that in each case:

- i) the dragon does not fly unlike many dragons, and unlike the dragon in the 2016 Outline;
- ii) the dragon is the only dragon in the narrative unlike in the 2016 Outline;
- iii) all of the dragon's friends and acquaintances are human, unlike in the 2016 Outline;
- iv) the dragon, despite irritating and annoying the people around him, is permitted to participate in communal life;
- v) the dragon earns applause at the end of the narrative and becomes the hero of the story.

105. I disagree with the premise of the submissions in respect of (iv) and (v). I am satisfied that the young dragon in the 2016 Outline, despite irritating and annoying those around him, is permitted to participate in communal life, as can be seen by his good deeds lighting the town lamps and assisting a woman with clearing her path from snow. Similarly, when he does clean her path from snow, she is delighted and he can be said to have earned her applause, and it seems to me that he is



undoubtedly the hero of his story as he learns to use his fire for useful rather than destructive purposes and to benefit his community and those who live in it. Accordingly those similarities, arising as they do before the publication of FFD cannot, in my judgment, arise from copying.

106. In respect of the remaining elements, (i) is arguably not a narrative element at all. It is not the case that the dragon tries to fly but cannot, or is prevented -rather that he does not attempt to fly. Flight is not mentioned. Nor does Fred (or the TV Dragon, or Edgar) roar or harm anyone or scratch himself with his foot, as random examples of things that he could do, if different creative choices had been made by the Claimant - but those are also not narrative elements amounting to similarities amounting to copyright infringement by the 2019 Advert and Excitable Edgar. I do not consider that 'not flying' is an expression of the author or illustrator's intellectual creation in the context where flight is simply not part of the narrative at all.
107. Elements (ii) and (iii) above are not quite two sides of the same coin, but are similar and result from the Claimant's choice to place Fred by himself, in a human world. I accept that those are choices which are expressions of the Claimant's intellectual creation, and she explained in evidence how at the beginning of her development of what became FFD, she had her dragon hero (then called Albert) in a dragon-world, interacting with other dragons. She made a conscious choice to move the narrative into a human world, in part for comic effect, I understand, and I am satisfied that is protected by copyright.
108. This is also a choice that appears to have been made by the Defendants between the 2016 Outline, set in dragon-world, and the pitch for the 2019 Advert, which placed the dragon as the only dragon in a community of humans. This was followed through into Excitable Edgar. As such, I accept those are similarities with FFD.
109. Whether it is sufficient, together with the few other similarities I have found relating to the features and character of Fred, to raise a presumption of copying rather than coincidence is another matter. In my judgment it is not, because the Claimant has not satisfied me that access by the Defendants has been evidenced or can be properly inferred.

## Access

110. In my judgment the Claimant's case on access by the Defendants is so weak that that it seems to me to be extremely unlikely that anyone involved in the 2019 Advert or Excitable Edgar had access to FFD before launch at all. There is no direct evidence that they have, so the question is whether I can properly draw an inference that it was both seen and copied, as the Claimant asks me to do.

111. I do not consider that I am able to do so. This is not a case where the work said to be copied is so ubiquitous or well-known that it is more likely than not that it has been accessed, or the similarities are so numerous and such a large part has been taken, that coincidence is a less likely explanation than copying, or that there is something common to the allegedly infringing work and the work said to be copied which can only be explained by copying (such as a printing error or other mistake, for example). In my judgment, the circumstances of this case do not lead me to infer access, as:

- i) the similarities between FFD on the one hand and the 2019 Advert/Excitable Edgar are few in number and can easily be explained by coincidence rather than copying, as I have set out;
- ii) FFD has sold in very small numbers, mainly in primary schools in the North West where there is no evidence that anyone involved in the creation of the 2019 Advert or Excitable Edgar lives, with only 120 or so copies being purchased from Amazon or on the Claimant's website;
- iii) I accept that the fact that an employee of adam&eveDBB found FFD, reviewed it and added it to the Research Schedule in November 2019 after the complaint was made shows that it was available to be found, but as Mr Hicks submits, that was only once the name of the book and the author was known. It was not found in adam&eveDBB's main due diligence trawl which resulted in the Research Document, although over 80 other children's books about dragons were found;
- iv) I have rejected the Claimant's suggestion that adam&eveDBB may have known about FFD before it was added to the Research Schedule;

- v) It is not marked with a red star indicating that a copy of the book was purchased at the time it was added onto the Research Schedule, and I have found a copy was purchased by adam&eveDBB later;
  - vi) The evidence of all three witnesses for the Defendants, who the Claimant accept as honest and truthful, is that neither FFD nor the Claimant was ever mentioned during the course of the development from the 2016 Outline; and
  - vii) The Defendants carried out searches of their systems for any references to the Claimant or FFD by way of keywords agreed by the Claimant which resulted in nothing at all being found.
112. Accordingly, there is not a scrap of evidence of actual access to FFD by the Defendants or their teams before me, and although there is a possibility of access as FFD was available on Amazon and the Claimant's website, that any such access was actually obtained appears to be so remote as to be almost entirely theoretical.
113. The Claimant submits that Mr Lloyd, the creative responsible for the team which produced the 2016 Outline, and also responsible for the development of the 2016 Outline in 2019, may have known of FFD, and that by not calling him as a witness the Defendants have prevented them from exploring this with him. They submit that per *Wisniewski v Central Manchester Health Authority* [1988] PIQR 324, Mr Lloyd might be expected to have material evidence to give on this issue, as he was responsible for the 2016 Outline and its development into the 2019 concept pitched to JLP as 'lonely dragon', and this entitles me to draw inferences which goes to the strength of the evidence adduced on that issue by the Defendants.
114. Mr Brim has given clear evidence that nobody working on the project ever mentioned the Claimant, Fred or FFD to him and that must include Mr Lloyd. He is certain that none of his creative team, including Mr Lloyd, would have looked at third party materials let alone copied them. If Mr Lloyd did access FFD and did copy it, therefore, I am satisfied he must have done so clandestinely. Such an inference as I am asked to draw would be hugely damaging to someone, such as Mr Lloyd, who makes his living as a creative and I am satisfied that it should only be

drawn if there are cogent reasons to do so derived from all the circumstances of the case.

115. I have heard, accepted and set out in detail the type of collaborative, creative, iterative approach that Mr Brim says went into the development of the 2016 Outline and later development into the ‘lonely dragon’ concept in 2019.
116. As Mr Hicks submits, the Claimant has not suggested any reason why Mr Lloyd, if he had seen FFD, would have hidden that from the other creatives he worked with, and clandestinely copied only a few small elements from it, somehow driving it through this collaborative, iterative process without raising any suspicions of any of the others in the team, when he could just as easily have arrived at those few small elements independently. Mr Lloyd was a creative person at the top of his game, in one of the most respected advertising agencies in Europe, working on pitches for his agency’s flagship client. To put it bluntly, and I am sorry to have to do so, Fred just is not that interesting or innovative a character for me to accept as a real possibility that he would abandon his ethical standards in that way and put himself, his agency and JLP at risk.
117. Nor is there any explanation about how or why Mr Lloyd would have influenced Untold, with their hundreds of hours of painstaking creative work on the creation of the character and appearance of the TV Dragon (which I have reviewed with admiration for the quality, artistry and thoughtful creativity that it represents) merely to include a few small elements copied from the appearance and character of Fred. It is entirely implausible, in my judgment.
118. Mr Brim has explained why he thought he was better placed to provide evidence to this Court than Mr Lloyd, who no longer works for adam&eveDBB. He said that Mr Lloyd was responsible for the 2016 Outline which pre-dated the book, and for amending and developing the script for the lonely dragon concept in 2019, but Mr Brim was involved in both the development of the 2016 Outline and the 2019 changes (as I have already set out), and was ultimately responsible for all the creative work that happened in 2019, so he thought the Court would benefit from hearing from him. I accept that explanation as honestly given, and it satisfies the Court. I decline to draw the adverse inference that the Claimant seeks from Mr

Lloyd's absence, and I further decline to infer that if Mr Lloyd had been called, it is more likely than not that he would have materially strengthened the Claimant's case on access. I think that amounts to nothing more than wishful thinking on the part of the Claimant.

119. For all those reasons, I reject the Claimant's submission that the similarities between the work and the possibility of access mean that the presumption of copying has been raised, such that it is for the Defendants to prove independent creation of the 2019 Advert and Excitable Edgar. I am satisfied on the balance of probabilities that there was no access to FFD by any of the creatives involved in the development of the 2019 Advert and Excitable Edgar, and so there can have been no copying.
120. For those reasons I dismiss the Claim.

## **COUNTERCLAIM**

121. The Defendants seek by way of counterclaim a declaration of non-infringement and a publicity order.
122. The Claimant submits that both are unnecessary given the fact that the case has already received so much media attention and the outcome will no doubt be reported by the media in any event. I put it to Ms Watkinson for the Claimant that this media attention might be a reason in favour of granting the declaration sought, rather than against it. She submits that the judgment itself would be enough to clear the water, and the Defendants could choose to publicise the judgment if it wished to do so.
123. There is no dispute that the court has the power to grant a declaration of non-infringement, taking into account justice to the Claimant, justice to the Defendants, whether it would serve a useful purpose and whether there are any special reasons why or why not the Court should grant the declaration (per Neuberger J at p.11 of *Financial Services Authority v Rourke* [2002] CP Rep 14). The Claimant has not suggested any special reasons why it should not be granted, and as I have made clear at the start of this judgment, I consider that it would suit the useful purpose of making clear to the public and the industries in which the Defendants and their creative partners work that the allegations of copyright infringement impugning the

integrity of their creativity have been rejected by this Court, providing some justice to the Defendants without any appreciable prejudice to the Claimant.

124. Similarly, there is no dispute that the Court can make a publicity order against a party who unsuccessfully alleges infringement, where there is a real need to dispel commercial uncertainty, per Jacob LJ in *Samsung v Apple* [2012] EWCA Civ 1339, at [70] – [74]. This is a discretionary, equitable remedy and the discretion must as always, be exercised judicially, taking into account all the relevant circumstances of the case. I accept the Defendants’ submission that any commercial uncertainty caused by the bringing of this claim for copyright infringement against them has been magnified by the publicity campaign carried out by the Claimant over the past 3.5 years, including around the trial itself. Ms Watkinson submits that she was entitled to publicise her claim and I do not disagree with that. The *quid pro quo* is that, her claims having been rejected by the Court, the Court will require her to publicise the judgment and order made against her in order to endeavour to redress the balance.
125. After circulating this judgment in draft, the parties agreed the terms of such a publicity order by agreeing the terms and format of a notice to be published for at least six months on the home page of the Claimant’s website, on her Facebook page and Twitter account. That notice includes a link to this judgment. I am grateful to them for doing so.