Neutral Citation Number: [2021] EWHC 2748 (Ch)

Case No.IL-2018-000105

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

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

Date: 15 October 2021

Before:

DAVID STONE
(sitting as a Deputy Judge of the High Court)

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Between:

(1) ORIGINAL BEAUTY TECHNOLOGY COMPANY LIMITED
(2) LINHOPE INTERNATIONAL LIMITED
(3) RETAIL INC LIMITED (in liquidation) **Claimants**

- and -

(1) G4K FASHION LIMITED
(2) CLAIRE LORRAINE HENDERSON
(3) MICHAEL JOHN BRANNEY
(4) OH POLLY LIMITED **Defendants**

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Ms Anna Edwards-Stuart and **Mr David Ivison** (instructed by **Mono Law Limited**) for the First and Second **Claimants**
Mr Chris Aikens (instructed by **Fieldfisher**) for the **Defendants**

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APPROVED JUDGMENT

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

Covid-19 Protocol: This judgment is to be handed down by the deputy judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 15 October 2021.

DAVID STONE (sitting as a Deputy Judge of the High Court):

1. By application notice dated 4 October 2021, the Defendants sought specific disclosure of various documents, pursuant to permission I had previously granted. The application was served without notice of its contents. However, the parties were able to reach a compromise on many of the requests, so that by 13 October 2021, only three requests remained. They are that:

> "The First and Second Claimants shall, by 6 October 2021, disclose the following categories of documents in the First and Second Claimants' control:
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> …
>
> (c) Sample invoice for the purchase of fabrics used to manufacture garment C27;
>
> …
>
> (d) Sample invoice for the purchase of accessories used to manufacture garment C27; and
>
> …
>
> (f) Size chart for garment C27."

2. For the purposes of these proceedings, the Claimants' garments which they alleged were infringed were each given a number, preceded by the letter C. The Defendants' allegedly infringing garments were given the corresponding number, preceded by the letter D. I should also add for clarity that when I refer to the Claimants, I mean the First and Second Claimants, the Third Claimant being in liquidation and playing no active role in the proceedings.

3. Since this application was filed, the Defendants have clarified in correspondence that:

   (a) by "sample" they meant in each case "example"; and

   (b) by "size chart" they meant "consumption chart".

4. The application was supported by a 33 paragraph witness statement of Thomas McKenna of the Defendants' legal team. Mr McKenna set out the Defendants' reasons for the request to disclose sample invoices for garment C27 – namely, that the unit cost identified for this garment (£6.10) was considered by the Defendants to be "unrealistically low". He said in his witness statement:

> "The Defendants therefore request the documents listed above in order to be able to properly scrutinise the costs the Claimants associate with this garment. … To be clear, in line with the Court's clear guidance, the Defendants have limited this request to just one garment and have identified specific requests so as to make it straightforward and inexpensive for the Claimants to comply with it."

5. After receipt of the application notice and draft order, the Claimants explained to the Defendants that they do not have the three requested documents because garment C27 was manufactured by a third party and the Claimants did not purchase the fabric or accessories directly.

6. The Defendants therefore wrote to me on 12 October 2021 setting out the history, and purporting to amend their disclosure application as follows:

> "The right course is therefore for the Court to order as follows:
>
> 1. The Claimants shall, within 24 hours, confirm which of the Claimants' Garments were made in the Claimants' own factories and therefore for which of the Claimants' Garments the Claimants are in control of fabric and accessory invoices and consumption charts.
>
> 2. Within 24 hours of receipt of that information, the Defendants shall identify one example garment in relation to which one example each of (i) fabric invoice (ii) accessory invoice and (iii) consumption chart should be disclosed."

7. The damages inquiry in this matter starts on 25 October 2021. Given the timetable, I dealt with this matter as quickly as possible, and circulated these draft reasons late in the evening on the day on which I received the Claimants' written submissions in response to the newly formulated application. Neither side requested a hearing.

Background

8. The background to these proceedings can be found in my judgment dated 10 September 2021, at [2021] EWHC 2555 (Ch). Relevantly for this application, it is sufficient to note the following points. After a trial over eight days, on 24 February 2021 I gave judgment in relation to the alleged infringement of UK unregistered design rights (**UKUDR**) and Community unregistered design rights (**CUDR**) in 20 selected garments (the **Selected Garments**) out of a total of 91 garments, which rights the Claimants said were infringed by the Defendants. That judgment can be found at [2021] EWHC 294 (Ch) (the **Main Judgment**). I found that seven of the Selected Garments infringed both UKUDR and CUDR, and that 13 infringed neither right. I dismissed the passing off claim. A form of order hearing took place on 1 April 2021: I gave a short *ex tempore* judgment (which can be found at [2021] EWHC 836 (Ch)) on the Defendants' request for declarations of non-infringement.

9. An issue arose after the form of order hearing in relation to the various colourways of some of the seven infringing Selected Garments, and I dealt with that in a judgment which can be found at [2021] EWHC 953 (Ch). I dealt with a further issue relating to costs where a Part 36 offer has been made: that judgment can be found at [2021] EWHC 954 (Ch).

10. Following the Claimants' election of a damages inquiry in relation to the infringing Selected Garments, I heard a CMC on 24 June 2021. I allowed the Claimants to amend their pleadings for the reasons set out at [2021] EWHC 1848 (Ch).

11. In the end, the Claimants' Points of Claim were served on 20 August 2021. Points of Defence were served on 7 September 2021. As mentioned above, there was a hearing before me on 10 September 2021 at which I ordered the Claimants to provide responses to the Defendants'

Request for Further Information dated 24 August 2021: that was duly done on 17 September 2021. Also on 10 September 2021, I refused the Defendants' request to institute the disclosure pilot and refused most of the Defendants' requests for specific disclosure. The Defendants' application to the Court of Appeal for permission to appeal was refused.

12. On 1 October 2021, I refused the Defendants' application to vacate the hearing of the damages inquiry ([2021] EWHC 2632 (Ch)). The Defendants' application to the Court of Appeal for permission to appeal was refused.

Discussion

13. I can deal briefly with the three remaining paragraphs of the draft order as filed and served with the application notice. The Claimants say that they do not have control of such documents, and the Defendants do not suggest that that statement is untrue. As the Claimants do not have the documents, there is no point to the order as filed with the application notice, and I decline to make it.

14. But as noted above, the order as sought has now transformed into something quite different. It is no longer a request for three documents relating to garment C27 – a fabric invoice, an accessory invoice and a consumption chart. Rather, the Defendants seek a form of further information – that is, a list of which of the Claimants' infringed garments were made by its own factories, and which were made by third parties. Based on the receipt of that information, the Defendants then say they should be able to elect one garment for which the Claimants should be required to provide a fabric invoice, an accessory invoice and a consumption chart.

15. The first part of this order as now requested is self-evidently not a request for disclosure. It is a request for further information, and I am prepared to dismiss it on that basis alone. However, the Defendants seek to justify the amended request on the grounds that they had understood that all of the Claimants' infringed garments were manufactured in the Claimants' factories, because that had been my finding in the Main Judgment.

16. Less than two weeks before the damages inquiry is a late stage at which to be raising such a question. The Claimants' answer is, however, a simple one – the Claimants say that whilst their evidence at the liability trial was that they opened their own factories, they did not advance evidence that *all* garments were manufactured in those factories, and I did not make such a finding.

17. Further, the Claimants submitted that their damages theory has been known to the Defendants since 20 August 2021 when the Points of Claim were served, and hence any disclosure should have been sought earlier than now. Further, the Claimants say that "despite accepting that they cannot have the documents requested in relation to garment C27, the Defendants are now fishing around for documents related to garments not covered by the evidence supporting their application." The Claimants also submitted that it is unclear how the information requested would be deployed at the damages inquiry, given that factual evidence has been served, and expert evidence is complete, if not yet formally served.

18. I agree with the Claimants' submissions. In my judgment, this is a fishing expedition. It is not a request for disclosure – it is a request for further information. To the extent that it is a request for disclosure (once the requested further information has been provided), it should have been made earlier: as noted above, I have already dealt with the disclosure request for which permission was given in a judgment given on 10 September 2021, more than a month ago.

Complying with the request as now drafted is not, as Mr McKenna set out, an "identified specific request", nor would it be "straightforward and inexpensive for the Claimants to comply". It is an inappropriate distraction at a time when all parties ought to be preparing for the damages inquiry.

19. The Claimants submitted that "this is another in a long line of pointless and distracting interim applications on the part of the Defendants". The Defendants deny that allegation. I do not need to reach a concluded view. However, with just over a week until the damages inquiry begins, I urge the parties and those advising them to concentrate their efforts on preparing for that five day hearing.

20. I refuse the application.