



Neutral Citation Number: [2021] EWHC 953 (Ch)

CLAIM 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: 28 April 2021

Before :

DAVID STONE

(sitting as a Deputy Judge of the High Court)

Between :

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

Claimants

- and -

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

Defendant

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

The **Third Claimants** were not represented

Mr Chris Aikens (instructed by Fieldfisher) for the **Defendants**

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 28 April 2021.

David Stone (sitting as a Deputy Judge of the High Court):

1. On 24 February 2021, I gave judgment in these proceedings 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 the Claimants say are infringed by the Defendants. I found that seven of the Selected Garments infringe both UKUDR and CUDR and 13 do not. I also dismissed the Claimants' passing off action. That judgment (the **Main Judgment**) can be found at [2021] EWHC 294 (Ch).
2. The parties' representatives were unable to agree a form of order, and were unable to accommodate a form of order hearing until 1 April 2021. On that day, I made orders for dealing with the remaining 71 garments (the **Remaining Garments**) which have not yet been adjudicated, and for an account of profits/damages enquiry. 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. I reserved costs, with reasons to be given later – those reasons can be found at [2021] EWHC 954 (Ch).
3. Following the form of order hearing, on 7 April 2021 I received an email from counsel for the Defendants concerning what he described as “some perceived lacunae” in the Main Judgment. These were said to arise because, whilst the Main Judgment dealt with different colourways in relation to some of the infringing garments (D4, D61 and D91), it did not deal with different colourways in relation to D2, D12, D13 and D35.
4. In response to counsel for the Defendants' email, I received an email from counsel for the First and Second Claimants (the Third Claimant since having gone into liquidation, and not currently being represented before me) which submitted that the additional findings are not necessary. As will be apparent from the Main Judgment, injunctions will be issued to prevent further sales of D2, D12, D13 and D35 in *all* colourways because, as I have found, they infringe UKUDR in C2, C12, C13 and C35, regardless of colourway.
5. I agree with this submission. My findings in relation to UKUDR prevent future sales of all colourways of D2, D12, D13 and D35, because UKUDR is not reliant on colour (it relates only to shape and/or configuration of the article). UKUDR is a longer-lasting right than CUDR, and counsel for the Claimants was clear at the Pre-Trial Review that no pan-EU relief was sought in relation to the non-UK aspect of CUDR infringement. The Claimants know that they cannot recover twice in relation to both UKUDR infringement and CUDR infringement in relation to the same garment. Whilst the Defendants' counsel submitted that it matters for the purposes of *Island Records v Tring* disclosure, without deciding the point I cannot immediately see how that might be the case. Therefore, it seems to me that the Defendants' request does not make any difference *for the purposes of the Selected Garments*.
6. However, as mentioned above, there is a dispute over the 71 Remaining Garments which the Claimants and Defendants are currently trying to resolve by consent. In the Main Judgment I attempted to give some guidance as to

how those 71 Remaining Garments might be dealt with. I also expressed a provisional view (without deciding the point) that a further trial on any of the 71 Remaining Garments that cannot be agreed would likely be disproportionate. I remain of that view. Therefore, to help the parties reach agreement on those 71 garments, and to ensure that the orders made in relation to the Selected Garments accurately reflect the factual reality (even though it does not matter legally), I set out below my judgment on the colourways for D2, D12, D13 and D35.

7. Neither party disputed that this Court has jurisdiction to revisit and revise a judgment at any time before the final order is perfected if to do so would be in accordance with the overriding objective to deal with the case justly: *In Re L (Children) (Preliminary Finding – Power to Reverse)* [2013] UKSC 8; [2013] 1 WLR 634, per Baroness Hale JSC (as she then was) at [16] to [27].

C2/D2

8. I set out my judgment on C2/D2, with photographs, at paragraphs 137 to 150 of the Main Judgment. The photographs show that C2 was available in wine, and D2 was available in dark rose. I found that D2 infringes UKUDR and CUDR in C2.
9. The Defendants now submit that D2 was also available in sage, shown here:



10. In my judgment, for the purposes of CUDR, the sage colour would strike the informed user such that D2 would produce on the informed user a different overall impression to C2 in wine. Therefore, whilst D2 in sage infringes UKUDR in C2, it does not infringe CUDR in C2 in wine.

C12/D12

11. I set out my judgment on C12/D12, with photographs, at paragraphs 196 to 209 of the Main Judgment. The photographs show that C12 was available in white, and D12 was available in sage. I found that D12 infringes UKUDR and CUDR in C12.

12. The Defendants now submit that D12 was also available in rose, shown here:



13. In my judgment, for the purposes of CUDR, the rose colour would strike the informed user such that D12 would produce on the informed user a different overall impression to C12 in white. Therefore, whilst D12 in rose infringes UKUDR in C12, it does not infringe CUDR in C12 in white.

C13/D13

14. I set out my judgment on C13/D13, with photographs, at paragraphs 210 to 223 of the Main Judgment. The photographs show that C13 and D13 were both available in black. I found that D13 infringes UKUDR and CUDR in C13.
15. The Defendants now submit that D13 was also available in mocha, also referred to as otter brown, shown here:



16. In my judgment, for the purposes of CUDR, the mocha colour would not strike the informed user such that D13 in mocha would produce on the informed user a different overall impression to C13 in black. The black and mocha colours are quite close and the difference would not strike the informed user. Given the other striking aspects of the shapes of the garments, the small difference in shade would not strike the informed user so as to produce a different overall impression. Therefore, D13 in mocha infringes both UKUDR and CUDR in C13.

C35/D35

17. I set out my judgment on C35/D35, with photographs, at paragraphs 253 to 264 of the Main Judgment. The photographs show that C35 and D35 were both available in baby pink. I found that D35 infringes UKUDR and CUDR in C35.
18. The Defendants now submit that D35 was also available in blue, shown here:



19. In my judgment, for the purposes of CUDR, the blue colour would strike the informed user such that D35 in blue would produce on the informed user a different overall impression to C35 in pink. Whilst the pink and blue colours are both pastel tones, the overall impressions created by the pink and blue garments differ. Therefore, D35 in blue does not infringe CUDR in C35 in pink.
20. I am hopeful that this additional guidance will assist the parties in now agreeing the disposal of the remaining UKUDR and CUDR claims in relation to the 71 Remaining Garments.