

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

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

Date: 21/11/2014

**Before :**

**HIS HONOUR JUDGE HACON**

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**Between :**

**JOHN KALDOR FABRICMAKER UK LIMITED**

**Claimant**

**- and -**

**LEE ANN FASHIONS LIMITED**

**Defendant**

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**Anna Edwards-Stuart** (instructed by **Mishcon de Reya**) for the **Claimant**  
**Ben Longstaff** (instructed by **Spearing Waite**) for the **Defendant**

Hearing dates: 9th October 2014  
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**Judgment**

**Judge Hacon :**

**Introduction**

1. The Claimant (“John Kaldor”) is a design house which makes and designs fabrics. The Defendant (“Lee Ann”) is in the fashion business, it makes and designs garments. This case concerns copyright and unregistered Community design in a fabric created by John Kaldor, given the identification code JK2926 (“the JK Fabric”). The JK Fabric is shown in Annex 1 to this judgment.
2. In August 2012 John Kaldor supplied a sample of the JK Fabric to Lee Ann. Lee Ann’s interest was driven by a brief then recently received from Marks & Spencer to pitch fabrics which could be used for Marks & Spencer’s Spring/Summer 2013 *Per Una* collection. As it turned out Lee Ann succeeded in supplying dresses to Marks & Spencer pursuant to the brief but the JK Fabric was not used.
3. In February 2013 John Kaldor became aware of a dress sold by Marks & Spencer in its *Per Una* range made from a fabric which had been supplied by Lee Ann (“the LA Fabric”). Annex 2 shows an image of the dress. John Kaldor alleges that Lee Ann amended the design of the JK Fabric to create the design for the LA Fabric and thus infringed John Kaldor’s copyright and Community design.

**Points no longer in issue**

4. The design of the JK Fabric was created on a computer, so the artistic work in which copyright is claimed is the relevant computer file. By the time of the trial Lee Ann did not dispute that copyright subsists in that work or that Community design subsists in the design which is the output of the computer file. Nor was it disputed that John Kaldor owns the relevant copyright and Community design.
5. John Kaldor did not plead that Lee Ann's alleged use of John Kaldor's Community design resulted from copying the design, but no point was taken on that. The question of copying the Community design stood or fell with the allegation of copying in relation to copyright, which was addressed in evidence and in argument.
6. John Kaldor alleged both primary and secondary infringement of copyright. At the trial no point on knowledge was argued because Lee Ann accepted that if the court were to conclude that it had copied the JK Fabric in substantial part, Lee Ann would have had sufficient knowledge of how copyright protection works in the fashion industry to know or to have reason to believe that the LA Fabric was an infringing copy of a copyright work. Lee Ann also accepted John Kaldor's fall back position that letters sent on 3 April 2013 and 9 May 2013 were sufficient to confer the requisite knowledge or reason to believe.

#### **CPR 63 PD 29.2(2)**

7. The parties are to be commended in taking a realistic view of which issues were really at stake. There was some judicial pressure exerted at the case management conference regarding subsistence and ownership of copyright but even allowing for that, the parties' conduct of these proceedings was both efficient and in my view rational.
8. Without identifying particular proceedings, I should also record that in the IPEC what some regard as a traditional approach to litigation, that is to say taking every conceivable point on the chance that something might gain traction, is never appropriate. To a degree the procedure in the IPEC allows the court to weed out points that are likely to be a waste of time by the application of CPR 63 PD 29.2(2) at the CMC. However it is not always possible for the court at that stage to recognise that a point fails the cost-benefit test. Parties are encouraged to make submissions at the CMC as to whether points taken by the opposing side satisfy the cost-benefit test, where that test properly arises. There is then a greater likelihood that arguments being run and which deserve to fail the test will not be pursued.

#### **The issues by the time of trial**

9. The issues at trial were these:
  - (1) Whether Mrs Vance copied the design of the JK Fabric in creating her design for the LA Fabric.
  - (2) If so,
    - (a) in relation to copyright, whether Mrs Vance copied a substantial part of the design of the JK Fabric; and

- (b) in relation to Community design, whether the design of the LA Fabric does not produce on the informed user a different overall impression to that of the JK Fabric.

## The law

### *Copyright*

10. Primary infringement of copyright pursuant to section 16 of the Copyright, Designs and Patents Act 1988 requires the claimant to establish that (1) the alleged infringing article was copied, directly or indirectly, from the copyright work and (2) the act of copying was done in relation to the work as a whole or any substantial part of it.
11. It is unusual for a claimant to be able to adduce direct evidence that the defendant copied. Spies who were at the defendant's elbow during the relevant time are seldom available. Generally the claimant will rely on the similarities between the copyright work and the article alleged to infringe to invite an inference of copying. If such a prima facie inference can be drawn, it may be rebutted by evidence that the defendant's article was designed without reference to the copyright work, see *Stoddard International plc v William Lomas Carpets Ltd* [2001] FSR 44, at [17]. Ms Edwards-Stuart, who appeared for John Kaldor, referred me to paragraph 21 of *Stoddard*:

“The closer the similarities between the work relied on and the alleged infringement, the more likely it is that the designer's evidence of independent design will be met with incredulity. The more work which the designer can show went into the alleged infringement, either on the basis of contemporaneous events or on the basis of the designs themselves, the more willing one may be to accept that he did not save himself effort by copying the claimant. So the designer who denies copying has to climb the mountain represented by the objective similarities between the copyright work and his own and the inferences which can be drawn from them, and will be disbelieved if he or she cannot satisfactorily explain the similarities.”

Taken too literally, this passage might suggest that if there are objective similarities between the copyright work and the defendant's work, the defendant has a mountain to climb and will be met with degrees of incredulity from the court. Certainly that will not have been what Pumfrey J meant. The simple point is that the stronger the prima facie case of copying which can be inferred from the similarities, the more compelling the defendant's evidence of independent design must be to rebut that inference. Where a prima facie inference of copying can be made out but is weak, less of a rebuttal will be needed to avoid the conclusion that there was copying.

12. If copying is established, the next step is to consider whether it was done in relation to either the whole of the work or any substantial part of it.
13. Like the present case, *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700; [2001] FSR 11 (HL) was concerned with copyright in the design of a fabric. Copying had been established on the facts at first instance, largely by reference to the objective similarities between the claimant's and defendant's designs.

This was not thereafter challenged. The only issue on appeal was whether a substantial part of the copyright work had been copied.

14. Lord Hoffmann (at [18]), with whom Lord Millett agreed, took the view that consideration of the defendant's design is irrelevant at this stage. The question is whether the elements found as a fact to have been copied formed a substantial part of the copyright work.
15. Lord Scott distinguished two types of copying where less than the whole of the copyright work has been exactly copied. In the first, a part of the whole has been exactly copied. The question is then whether it constitutes a substantial part; this depends more on the quality than on the quantity of what has been taken. In the second type of copying, none of the copyright work has been exactly copied; the whole (or part) of the copyright work has been modified. This is sometimes referred to as 'altered copying'. In such a case Lord Scott identified the correct test to be whether the defendant has incorporated a substantial part of the independent skill and labour of the author of the copyright work. Differing with Lord Millett, Lord Scott took the view in applying this test the similarities between the altered copy and the original work must play a critical and often determinative role (at [61] to [65]). For his part Lord Millett said that the distinction between copying a discrete part of the copyright work and the altered copying of the whole or part of the work was not material to the case before their Lordships (at [43]).
16. It may be that the difference in approach identified by Lord Millett and Lord Scott is narrow. Although Lord Millett (with Lord Hoffmann) preferred to disregard the defendant's work when assessing substantial part, that assessment is nonetheless necessarily carried out by reference to the similarities with the defendant's work identified in relation to the question of copying. To that extent the defendant's work is not a complete absence from the assessment.
17. Lord Hoffmann recognised and referred to the distinction between the exact copying of a discrete part of a copyright work and altered copying. In the case of altered copying, when considering what is being protected by copyright Lord Hoffmann took the view that it is difficult to give any answer except that it is the idea expressed in the copyright work (at [24]). This leads to the often cited distinction between ideas, which copyright does not protect, and the expression of ideas, which it does. Lord Hoffmann said that the cases which dealt with the latter distinction support two propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. For example a literary work which describes an invention does not entitle the author to rely on copyright to protect the invention. The second proposition is that certain ideas expressed by a copyright work may not be protected because they are not original, or are so commonplace as not to form a substantial part of the work (at [25]). Thus in summary Lord Hoffmann's approach to altered copying was that the matter in common between the two works will be an idea. Copyright may protect that idea provided (a) it is connected with the nature of the copyright work and (b) it is both original and not commonplace. Subject to those restrictions, literary copyright, for example, can protect an idea in the form of a plot and artistic copyright can on certain facts protect an idea in the form of an artistic concept.

18. The question of substantial part has to be considered even if copying has been proved, though the establishment of copying was very likely to lead, in *Designers Guild* anyway, to the conclusion that a substantial part of the claimant's work had been copied. Lord Bingham (with whom Lord Hoffmann, Lord Hope and Lord Millett agreed) said (at [5] and [6]):

“Since the judge had based his finding of copying largely on the similarity between the two designs it would have been very surprising if he had found that [the defendant] had not copied a substantial part of [the claimant's] *Ixia* design, but it was necessary for the judge to consider that question, and he did. He found that there had been copying of a substantial part.

... While the finding of copying did not in theory conclude the issue of substantiality, on the facts here it was almost bound to do so.”

Lord Millett put it this way (at [43]):

“... the issues of copying and substantiality are treated as separate questions. Where, however, it is alleged that some but not all the features of the copyright work have been taken, the answer to the first question will almost inevitably answer both, for if the similarities are sufficiently numerous or extensive to justify an inference of copying they are likely to be sufficiently substantial to satisfy this requirement also”.

19. Lord Scott took this one step further. In at least that instance of altered copying, since the similarities between the two works were necessarily sufficient to justify the inference that one had been copied from the other, there was no further part for the concept of substantiality to play – there was bound to be infringement (at [75] to [76]). Though none of their Lordships said so, it seems to follow that the connection between a finding of copying and substantiality will depend on the extent to which the finding was based on an inference drawn from the similarities between the works, as opposed to other matters.
20. Two of their Lordships also considered the consequence of the court reaching the view that elements of the copyright work are commonplace. As I have indicated, Lord Hoffmann's view was that if the claimant is relying on a feature that is defined at a sufficiently high level of abstraction, such as the mere notion of combining stripes and flowers, this will be a commonplace feature which will not attract copyright protection. Such features, singly or collectively, will not form a substantial part of the copyright work (at [25] to [26]). Lord Millett, who agreed with Lord Hoffmann, also expressed the view that the question of commonplace similarities is relevant to the stage of assessing whether copying had taken place. In that assessment, commonplace similarities are to be disregarded (at [39]).
21. To the extent that the judgment of the House of Lords in *Designers Guild* was based on the English principle that copyright protects the skill and labour of the author, the law there stated is liable to have changed as a consequence of more recent judgments of the Court of Justice, particularly in *Case-5/08 Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569. I refer in particular to the ruling of the Court of Justice that it is the expression of the intellectual creation of the author of the work that is entitled to copyright protection. Both Ms Edwards-Stuart and Mr

Longstaff, who appeared for Lee Ann, submitted that such a change in the underlying basis for the subsistence of copyright made no difference on the present facts. I agree.

22. I draw the following from the foregoing cases:

- (1) The first stage is to consider whether the claimant has established a prima facie inference of direct or indirect copying by reason of the similarities between the copyright work and the defendant's work.
- (2) Similarities which constitute the expression of ideas that have no connection with the literary, dramatic, musical or artistic nature of the work are to be disregarded.
- (3) Similarities not thus excluded but which are shown to be commonplace give rise to little or no inference of copying; the nearer a similarity approaches the strikingly original end of the spectrum, the greater weight it carries in supporting an inference of copying.
- (4) If the claimant establishes a prima facie case of inferred copying, this may be rebutted by the defendant's evidence of independent design. The stronger the prima facie case, the more cogent the defendant's evidence must be to rebut the inference.
- (5) If there is no finding of copying, there is no infringement. If there is a finding of fact that there has been copying, the next stage is to consider whether copying was done either in relation to the copyright work as a whole or any substantial part of it.
- (6) *Designers Guild* sanctions two alternative approaches to the question of substantial part. They are alternatives because neither was expressly endorsed by a majority. The first is to disregard the defendant's work and to assess whether the similarities from which an inference of copying was drawn constitute a substantial part of the copyright work. This is a qualitative, not a quantitative assessment. The second, which applies only in an instance of altered copying, is to determine whether the infringer has incorporated a substantial part of the intellectual creation of the author of the work. In many cases the difference between the two approaches to an allegation of altered copying may be limited.
- (7) To the extent that it has not already been excluded under step (3), a commonplace similarity can in any event make no contribution to any substantial part of the copyright work alleged to have been copied since it is not capable of attracting copyright protection.
- (8) Assessment of whether there has been copying of a substantial part of the copyright work is a necessary and distinct step in the determination of whether the defendant has infringed. However, where copying has been established, on the facts it may be that this will almost inevitably lead to the conclusion that a substantial part of the copyright work has been copied. This may be influenced by the degree to which the finding of copying depended on the similarities between the two works.

*Unregistered Community design right*

23. The parties were agreed as to the characteristics of the informed user. He or she would be a person with a keen fashion sense and a good knowledge of the design of prints for women's fashion wear including tops, skirts and dresses.
24. At trial counsel also agreed that the question whether the design of the LA Fabric does not produce on the informed user a different overall impression to that produced by the JK Fabric stood or fell, on the present facts, with the question whether Lee Ann had copied a substantial part of John Kaldor's design – on the assumption that there was copying at all. As I have indicated, there was no distinction between the issues of copying arising in the two causes of action.

**Prima facie inference of copying**

25. I have considered carefully the design of the JK Fabric and that of the LA Fabric. I have done this taking into account both sides' set of 10 designs to represent the design corpus. Although the design corpus is strictly relevant only to issues regarding Community design, I believe they should be considered also in this context to give me some objective idea of where design features fall on the spectrum between commonplace and strikingly original.
26. I also did this with the list of similarities pleaded by John Kaldor in mind. They are:
  - “(a) the lines, patterns, contours, colours, shapes and dimensions (including relative dimensions) of the repeated small diamond block shapes;
  - (b) the lines, patterns, contours, colours, shapes and dimensions (including relative dimensions) of the repeated small triangle block shapes;
  - (c) the lines, patterns, contours, colours, shapes of the background pattern of the design being a mix of contrasting colours which appear to be “feathered” onto the fabric;
  - (d) the predominant use of four colours in the background pattern;
  - (e) the repeated use of diamond shapes in larger areas and triangles in smaller and fill-in areas on sections of the pattern;
  - (f) the repeated use of patched and spliced sections of the pattern in chunks on the fabric, interlocking with different repeated pattern sections at different angles, to build a multi-directional repeated pattern.”
27. In her skeleton argument Ms Edwards-Stuart quite significantly reformulated the list of similarities, which became 8 instead of 6. Mr Longstaff objected and I think rightly. Lee Ann's case had been prepared by reference to the pleaded list and any reformulation after the CMC would not comply with CPR 63.23(2) in the absence of exceptional circumstances. None were suggested here. As it happens, I do not believe the change in formulation made any difference.
28. I find pleaded similarities (a), (b), (c) and (e) quite hard to interpret. This could either be because similarities which strike the eye are hard to reduce to words or because

John Kaldor's difficulty in clearly expressing a similarity is the product of there being no such real similarity, or a mixture of both. With regard to (d), I am not convinced that the design of the JK Fabric is limited to four colours in the background pattern.

29. Use of the shorthand 'an inference of copying' for the first stage of an assessment of copyright infringement is a little misleading because it implies a binary question: is there an inference of copying or no inference of copying? Those extremes will often not apply. Frequently, as here, there will be an inference of a possibility of copying. The real question is: how strong is that possibility? I have come to the view – this from considering the two designs, the corpus and the pleaded list of similarities – that there is a prima facie possibility that there was copying, but the possibility is neither strong nor negligible.
30. It follows that Lee Ann's evidence of independent design is particularly important in the present case. Secondly, while that evidence must be reviewed with commensurate care, this was not an instance in which the evidence was delivered to an incredulous court. Mountain climbing metaphors are not applicable.

### **Chronology of events**

31. I turn to set out a more detailed account of the relevant events. Some time before the start of August 2012 Lee Ann received a written brief from Marks & Spencer. One line which Marks & Spencer wanted to create was called 'Discovery Bay' and the section of the brief on that line included this:

**“Print Direction**

More primitive wood blocking prints, bold batiks, multi-stripes and tribal prints. Often these are anchored with stone and Black with highlights of the colour pops of the collection”

32. On 2 August 2012 Emel Haykiran, sales executive at John Kaldor, attended a meeting with designers and others from Lee Ann. Though it was not solely concerned with Marks & Spencer, the M&S brief is likely to have been one reason for the meeting. Ms Haykiran showed Lee Ann around 100 fabric samples. Lee Ann asked to be supplied with 22 of them. On 8 August 2012 Ms Haykiran supplied 18 and the remaining four on the next day. By an email dated 9 August 2012 Ms Haykiran informed Kate Cook, a design manager at Lee Ann, and Anna Price, Ms Cook's assistant, that the samples were to be expected. These included a 4 metre sample of the JK Fabric.
33. In an email dated 25 September 2012 Ms Price told Ms Haykiran that Marks & Spencer had asked Lee Ann to give prices for dresses made using three of John Kaldor's fabrics, including the sample JK Fabric. Ms Price asked to be quoted John Kaldor's price for the JK Fabric so that Lee Ann could make a competitive offer on price to Marks & Spencer. There was no evidence of a written response but in cross-examination Ms Haykiran said that John Kaldor must have responded, either by email or by phone. In any event nothing came of the proposal to use the JK Fabric.
34. Things must have moved quickly. On 27 September 2012 Rachel Vance, a print designer at Lee Ann, was asked by Kate Cook and one of Lee Ann's designers to create a design for a fabric which could be used to fulfil the 'Discovery Bay' part of



Marks & Spencer's brief. Mrs Vance was not sure who it was, aside from Ms Cook, who gave her the instructions on 27 September 2012. In a Response to the Claimant's Request for Further Information signed by Mrs Vance on 25 September 2014, Mrs Vance said that it is likely to have been Annette Kelley. In cross-examination she accepted that it could have been Ms Price. I don't think anything turns on it.

35. Ms Cook explained to Mrs Vance that Marks & Spencer had changed the colour palette for the 'Discovery Bay' part of the brief. It was now to be the palette of another part of the brief: 'the *Savannah* story'. Ms Cook explained that a 'tribal print' was to be the key to the design for M&S brief.
36. Mrs Vance had earlier created tribal prints which were collected in her computer archive. She selected one of these as her starting point. It was referred to as 'the Earlier Design'. It contained a number shapes in juxtaposition to create an African 'tribal' look. Mrs Vance selected the triangles, chevrons and 'bow tie and dot' shapes. Two triangles were merged to create a fourth, diamond shape. Using Photoshop the four individual shapes were distorted to make them more individual. 'Swatch tiles' of each of the four shapes were created and juxtaposed. The tiles were distorted and stretched to alter the design. A 'repeat tile' was then created which formed the basic unit which is repeated to create the design. Finally colours were added using computer brushstrokes. The design was given the number RAS-790 and six colour versions were identified as RAS-790A to F. Images of these were sent to Mark & Spencer. They selected RAS-790C, which was the design to which the fabric alleged to infringe was later made. All this was done on 27 September 2012.

### **The key events of 27 September 2012**

37. Save for minor matters, the foregoing chronology is not in dispute. John Kaldor's case rests on what else happened on 27 September 2012. Ms Edwards-Stuart advanced three alternative hypotheses which she entitled 'conscious copying', 'sub-conscious copying' and 'indirect copying':

- (1) *Conscious copying*

Mrs Vance knowingly copied the JK Fabric, either from a sample of it or from a dress made from the fabric.

- (2) *Subconscious copying*

Mrs Vance had seen the JK Fabric at Lee Ann's premises, either as a sample or made into a dress and subconsciously copied it when she was designing the LA Fabric.

- (3) *Indirect copying*

Mrs Vance never saw the JK Fabric but the instructions she was given by Ms Cook on 27 September were sufficiently detailed to amount to an oral description of the JK Fabric and thus a substantial part of the design of that fabric became incorporated into the design of the LA Fabric.

### **The witnesses**

38. John Kaldor's witnesses who were cross-examined were Nick Ciccone, Design Manager at John Kaldor, who gave evidence about John Kaldor's suggested design corpus, and Ms Haykiran. I found them both to be straightforward witnesses.
39. On Lee Ann's side Sukhbir Johal, who is Lee Ann's Managing Director, gave evidence, primarily about Lee Ann's rival selection of 10 items to represent the design corpus. He also was a straightforward witness. The other from Lee Ann was Mrs Vance, who was a key witness. Mrs Vance gave her evidence quietly and carefully. She conceded inaccuracies in her evidence regarding matters such as style numbers, but otherwise in cross-examination maintained her evidence of having created the design of the LA Fabric on 27 September 2012 independently both of any sight of the JK Fabric and any input from Ms Cook aside from Ms Cook's instruction that 'tribal print' was to be the key to John Kaldor's approach to the Marks & Spencer brief.

### **The evidence of independent design**

40. I have set out in summary above Lee Ann's case on how Mrs Vance came to design the LA Fabric independently of the JK fabric. That account seems to me to be credible on its face. The real issue under the present head is whether there was sufficient evidence for me to disbelieve that account and Mrs Vance in particular.

#### *Access to the JK fabric*

41. Lee Ann did not dispute that Mrs Vance could have seen the JK fabric. It appears that a dress was made up using a 4 metre sample of the fabric supplied to Lee Ann and that it was shown to Marks & Spencer. The dress is referred to in an email dated 25 September 2012 from Ms Price to Ms Haykiran. It was not clear what became of the dress and any leftover fabric, if there was any to speak of. I am satisfied that it was possible for Mrs Vance to have seen the JK Fabric, though there is no direct evidence in support of John Kaldor's case that she saw it and singled it out from the other 21 fabrics supplied on 8 and 9 August 2012. Mrs Vance said she had no recollection of seeing the dress or JK Fabric.

#### *The first colourway created by Mrs Vance*

42. Ms Edwards-Stuart alleged that the first colourway of the design created by Mrs Vance used the same palette as the JK Fabric and argued that this can only have been because Mrs Vance had the JK Fabric in mind. This sort of argument is difficult to run because necessarily it must be done by reference to photocopied images with colours that may not be accurate. It is not self-evident that the first colourway is the same as the colours of the JK Fabric. The point was put to Mrs Vance who said that there was only a slight similarity in colours, her choice being pinker.

#### *Phone call between Ms Haykiran and Ms Price*

43. John Kaldor alleged that on 19 February 2013, after John Kaldor had become aware of the dress shown in Annex 2, Ms Haykiran phoned Ms Price of Lee Ann to discuss the matter. It was said that in the course of this call Ms Price admitted that Lee Ann had "re-worked" the JK Fabric to create the LA Fabric. This allegation is set out in paragraph 6(9) of the Particulars of Claim. It is denied in paragraph 12 of the Amended Defence, which states an understanding on Lee Ann's part that "Miss Price

will say that she made no such statement". The statement of truth at the end of the Amended Defence is signed by Sukhbir Johal, managing director of Lee Ann. In cross-examination Mr Johal said that the understanding of Ms Price's position came from a conversation with her. However Ms Price herself did not give evidence.

44. In cross-examination Ms Haykiran admitted that during the phone call relied on Ms Price may not have known which fabric Ms Haykiran was talking about. Ms Haykiran referred to a second phone call and said that Ms Price would have known by then. This was not explored. The date on which this second phone call took place was not identified, nor was it clarified why Ms Price must have realised which fabric Ms Haykiran was referring to by that time. Finally, assuming Ms Price was clear on the second occasion that Ms Haykiran was talking about John Kaldor's JK Fabric, Ms Haykiran did not say whether Ms Price still maintained that this fabric had been re-worked. Ms Haykiran conceded in cross-examination that she had no knowledge as to whether Ms Price was familiar with what Mrs Vance had done in the creation of the LA Fabric, but I give this no weight.
45. I do not think that Ms Haykiran was inventing this aspect or any other part of her evidence. On the other hand, there are uncertainties surrounding what happened and whether Ms Haykiran's current understanding of what Ms Price must have meant is accurate. The uncertainties are enough for me, on balance, to reject John Kaldor's contention that Ms Haykiran's account of what became two phone calls with Ms Price was powerful evidence of copying by Mrs Vance. I do not believe that I can place great reliance on it.

*No evidence from Ms Price, Ms Cook or the designer*

46. The court did not have the benefit of evidence from Ms Price, as I have already mentioned, nor from Ms Cook or the other individual, a Lee Ann designer, who gave Mrs Vance her instructions on 27 September 2012. Ms Edwards-Stuart invited me to draw adverse inferences from this. I do not do so. Ms Price aside, it is not clear that the other witnesses would have added anything and in the IPEC the number of witnesses must be kept to a minimum. The most that can be said is that their absence left John Kaldor's evidence, particularly that of Ms Haykiran, to be all there was to go on.

*Errors in Mrs Vance's evidence*

47. In cross-examination Mrs Vance was forced to accept that her evidence contained errors regarding dates, design numbers, the time she had been at Lee Ann and the approval process for designs. But these were all peripheral points. The most that be said is that Mrs Vance did not always have a sense of precision in relation to her explanation of such matters. She freely accepted correction in cross-examination. In my view these errors did not bring into real doubt the more central aspects of Mrs Vance's evidence.

*Conclusion on independent design*

48. The arguments advanced on behalf of John Kaldor are not in my view collectively enough for me to reject the clear evidence given by Mrs Vance that she created the design of the LA Fabric independently of the conscious influence of the JK Fabric.

With regard to indirect copying, Mrs Vance said that she could not remember the precise words of instruction she was given by Ms Cook or the other individual at Lee Ann which led to her creation of the LA Fabric. She also said that she was given a general design brief, including the requirement of a tribal look, as opposed to specific instructions, by way of the starting point for her design process. She said that she came up with the design herself. I have no good and sufficient reason to reject that evidence. Finally there is Lee Ann's allegation of unconscious copying. That argument could only be sustained by a strong inference of copying from similarities between the two designs. As I have already stated, I do not find those similarities sufficiently compelling from which to infer a strong inference of copying.

49. I conclude and find that Mrs Vance did not copy the JK Fabric when she created the LA Fabric.

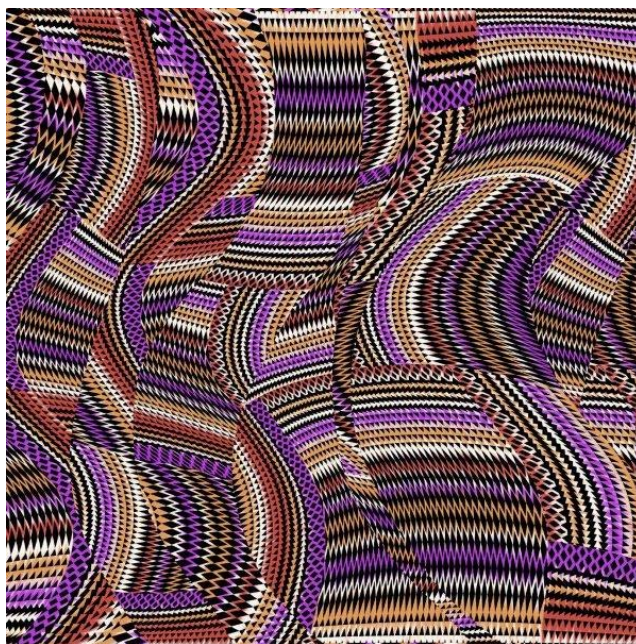
### **Substantial part and overall impression**

50. The question whether Lee Ann copied the JK Fabric in substantial part does not arise since no part was copied.
51. It was common ground that the question whether the design of the LA Fabric does not produce on the informed user a different overall impression to that produced by the JK Fabric stands or falls with the question whether Lee Ann had copied a substantial part of John Kaldor's design.

### **Conclusion**

52. The claims for both infringement of copyright in the JK Fabric and infringement of unregistered Community design in the same fabric are dismissed.

**ANNEX 1**



**ANNEX 2**

