



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: [2019] EWHC 3166 (IPEC)
Date: 21 November 2019

Before:

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

B E T W E E N:

Claim No: IP-2017-000238

ASHLEY WILDE GROUP LIMITED

Claimant

- and -

BCPL LIMITED

Defendant

Mr Michael Smith (instructed by **Taylor's Solicitors LLP**) for the **Claimant**
Ms Anna Edwards-Stuart (instructed by **Joelson JD LLP**) for the **Defendant**

Trial dates: 9 and 10 October 2019

APPROVED JUDGMENT

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is a copyright dispute relating to two celebrity bedding ranges. The celebrities in question are Kylie Minogue, the iconic Australian singer, and Caprice Bourret, the highly successful model and reality television star. The Claimant (“**Ashley Wilde**”) manufactures and sells, inter alia, duvet covers for the ‘Kylie Minogue At Home’ brand (“**KMAH**”). The Defendant (“**BCPL**”) manufactures and sells, inter alia, duvet covers and bed runners for the ‘By Caprice Home’ brand (“**BCH**”).
2. It is now accepted by BCPL that Ashley Wilde is the first owner of the copyright in an original artistic work, namely a prototype fabric for use in a KMAH bedlinen range (the “**Evangeline Design**”), which was created by its employee Laura Spencer in early July 2012 in the course of her employment. There is no dispute that Laura Spencer was a UK citizen and resident at the relevant time and so is a qualifying person for the purposes of section 154 Copyright Designs and Patents Act 1988 (“**CDPA**”).



Fig. 1 The Evangeline Design

3. Ashley Wilde’s case is that it used the Evangeline Design to manufacture, *inter alia*, a duvet cover in a KMAH range of bedlinens which was marketed in the UK under the name ‘Evangeline’ (“**Evangeline Duvet Cover**”). It is not disputed that Ashley Wilde sold this range in the UK through a number of online and ‘bricks and mortar’ retail channels in at least 2014 and 2015.
4. It is not disputed that from around April 2017 BCPL manufactured and sold in the UK a duvet cover and matching bed runner called “Amore”, as part of a range of BCH bedlinens marketed under that name (the “**Amore Products**”). BCPL says the Amore Products were designed by a freelance designer named Fiona Graham, on BCPL’s

behalf, working with Tansy Wilson of the Chinese manufacturer Beijing Shanghai Textiles (“BST”), and were approved for production by Ms Bourret.



Fig 2. The Evangeline Duvet Cover (above) and the Amore duvet cover (below)

THE PARTIES' CASES

5. Ashley Wilde alleges that the Amore Products are indirect copies of the Evangeline Design, because each reproduces the whole or a substantial part of the Evangeline Design by copying the Evangeline Duvet Cover. In the Amended Particulars of Claim (paragraph 7) it identifies the following similarities:
 - i) The choice of using a repeating pattern of scallop-style pleats in repeating horizontal rows;
 - ii) The relative size of each scallop-style pleat;
 - iii) The relative spacing between each scallop-style pleat;
 - iv) The relative spacing between each horizontal row of scallop-style pleats.
6. Ashley Wilde alleges that the Evangeline Duvet Cover was widely available in the UK and that BCPL or its designer had access to it and copied it. It pleads that by authorising the design and/or production of the Amore Products, putting them on the market within the EEA, and importing, stocking and selling them in the course of a business, BCPL has infringed Ashley Wilde’s copyright in the Evangeline Design.
7. Ashley Wilde seeks an injunction to restrain BCPL from infringing its copyright; recall of the Amore Products from channels of commerce, delivery up of infringing

articles, disclosure of BCPL's sources of supply. an inquiry as to damages or alternatively an account of profits, publication of this judgment, and costs.

8. BCPL avers that the Amore Products were independently designed and are not infringing copies of the Evangeline Design. It admits that it authorised the production of the Amore Products, imported them into the United Kingdom and has possessed, sold, offered for sale and distributed the Amore Products in the course of its business. However it denies that it or its freelance designer of the Amore Products, Ms Fiona Graham;
 - i) purchased or otherwise accessed the Evangeline Duvet Cover before the design of the Amore Products;
 - ii) copied the Evangeline Duvet Cover;
 - iii) directly or indirectly copied all or a substantial part of the Evangeline Design;
or
 - iv) issued any copies of the Evangeline Design to the public or had any other dealings with the Evangeline Design.
9. In addition BCPL denies that any similarities between the Amore Products and the Evangeline Duvet cover are relevant for the purposes of assessing copyright infringement of the Evangeline Design, as the Evangeline Duvet cover is not a faithful reproduction of the Evangeline Design. The proper comparison, it avers, is between the Amore Products and the Evangeline Design, and it sets out differences between the those at paragraph 9(c) and 9(cA) of the Amended Defence. I will come back to this.

THE ISSUES

10. HHJ Hacon identified a list of issues for determination at trial, at the Case Management Conference:
 - i) Whether copyright subsists in the copyright work. This is now accepted by BCPL so is no longer in issue;
 - ii) Whether BCPL's designer Fiona Graham copied the copyright work;
 - iii) If so, whether BCPL authorised that copying;
 - iv) Whether the Amore Products are infringing copies of the copyright work;
 - v) If so, whether BCPL knew or had reason to believe that the Amore Products are infringing copies of the copyright work;
 - vi) Whether, given the findings on issues (ii)-(v) above, in the circumstances set out in paragraph 9 of the Particulars of Claim and paragraph 17 of the Defence, BCPL has infringed Ashley Wilde's copyright;
 - vii) Whether any infringement found was flagrant or caused prejudice to Ashley Wilde.

THE LAW

Copyright

11. Section 16(1) CDPA provides that the owner of the copyright in an artistic work has the exclusive right to do certain acts restricted by the copyright which include, *inter alia*, copying it and issuing copies of the work to the public. 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 (section 16(2) CDPA): (a) in relation to the work as or any substantial part of it; and (b) directly or indirectly (section 16(3) CDPA).
12. The first step, therefore, is to establish whether there was direct or indirect copying, and the second step is to consider whether that copying was in relation to the whole of the copyright work or any part of it.
13. In this case there is no suggestion that BCPL or anyone involved in the design process of the Amore Products can have directly copied the Evangeline Design, and so the first step is for the court to determine whether there was indirect copying of the Evangeline Duvet Cover. If there was not, that is the end of the matter. It is only if the court finds that there was indirect copying that it will go onto the second step which, in the circumstances of this case, is to consider whether that copying was in relation to the whole or any substantial part of the Evangeline Design, *not* the Evangeline Duvet Cover. That is because the Evangeline Design is the copyright work which has allegedly been infringed, and there is no dispute that the Evangeline Duvet Cover is not an exact replica of the Evangeline Design.
14. Whether what has been copied amounts to a substantial part of a copyright work is a matter of quality rather than quantity (*Ladbroke (Football) Ltd. V William Hill (Football) Ltd.* [1964] 1 WLR 273). A part is substantial if it contains elements of the expression of the intellectual creation of the author of the copyright work (*Infopaq Internas A/S v Danske Dagblades Forening* [2009] ECR-I 6569). *Infopaq* is applicable because section 16 CDPA must be construed so far as possible in conformity with articles 2 and 3(s) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, as helpfully explained by Arnold J in *England & Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at [65].
15. Accordingly, what matters is whether the part taken contains elements which express the intellectual creation of the author. If it does, then it is a substantial part. If it does not, it is not.
16. Ms Edwards-Stuart submits that I should reverse these steps, and establish whether the Amore Products reproduce the whole or a substantial part of the Evangeline Design first, before going on to consider whether the reproduction of the substantial part of the Evangeline Design is the result of copying. However I consider that it is necessary to identify the part taken by copying first, before it is possible to assess whether that part taken is a substantial part of the copyright work.
17. When assessing what if anything has been taken, a *prima facie* case of copying will arise if there is substantial similarity between the copyright work and the allegedly

infringing copy, and proof of access to the copyright work (or the intermediate work in indirect copying) by the alleged infringers, per *Designers Guild v Russell Williams Textiles* [2000] UKHL 58, [2001] 1 All ER 700, [2000] 1 WLR 2416, at 2425. Lord Millet expressed the court's task as follows:

“The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying.”

WITNESSES

18. I heard from four witnesses of fact at trial each of whom filed a witness statement and was cross-examined.
19. For Ashley Wilde, I heard from Ms Laura Spencer, who gave evidence in relation to the design of the Evangeline Design and Mr Charles Bennett, who gave evidence in relation to commercial matters. I found them to be perfectly straightforward witnesses of whom no material criticism is made by BCPL. I am satisfied they came to court to assist it to the best of their abilities and recollection. Ms Laura Spencer was candid in oral evidence about the limitations of her recollection of designing the Evangeline Design over seven years previously.
20. For BCPL, I heard from Ms Caprice Bourret, who gave evidence on commercial matters and her involvement in the process of the design of the Amore Products, and Ms Fiona Graham, who gave evidence in relation to the creation of the design of the Amore Products.
21. Mr Smith for Ashley Wilde criticises Ms Bourret as an unsatisfactory witness who provided over-elaborate and self-serving answers which, in a number of respects, lacked credibility. This included her evidence on the question of whether the BCH product line was ever carried by House of Fraser, and I will return to that. I do not agree with Mr Smith's characterisation. I found Ms Bourret keen to assist the court to the best of her ability and careful only to provide evidence within her personal experience and recollection. Although she produced an overly emotional reaction when Mr Smith properly put his client's case of copying to her, I assessed that reaction to be an honest one and not exaggerated. My overall impression of her was as a credible and reliable witness.

22. Mr Smith also criticised Ms Graham as unsatisfactory, saying that she gave limited detail of the design process she said had resulted in the Amore Products, was evasive about her design experience, exhibited elaborate and irrelevant prior art. I accept that she provided oral evidence about the design process which did not appear in her witness evidence, particularly her evidence that she had been to China and established the parameters of the design orally with Ms Tansy Wilson before finalising it by exchange of CAD designs. However I do not find what she said in oral evidence to contradict what she had set out in writing: rather it provided further clarification. I do not accept she was evasive about her design experience as in cross-examination she stated clearly that she was not a designer, but had design experience arising from her role as senior buyer. In relation to the prior art, I accept that some of it is irrelevant but some of it, in my judgment, is not. On balance I think she was a credible witness who tried to assist the court to the best of her recollection.
23. I also heard evidence from two experts in textile design.
24. For Ashley Wilde I heard from Mr Victor Alan Herbert, a design consultant with extensive experience in textiles and clothing design over more than forty years. He has acted as an expert witness in over fifty design right and copyright cases. His report is dated 8 February 2019.
25. For BCPL I heard from Professor Tom Cassidy, the Chair of Design at the University of Leeds, who has fifty years experience working in the textile and design industry and as an academic in the textile and design field. His academic work includes lecturing on intellectual property rights to design and textiles students at undergraduate and postgraduate levels. He has acted as an expert before but I understand this may have been the first case in which he was required to give evidence as an expert in court. His report is dated 15 April 2019.
26. I am satisfied that both experts have the experience and expertise to offer their opinions on textile design to assist to the court. There was no joint meeting of experts and there is no joint statement of areas of agreement and disagreement.
27. Although not called to give oral evidence at trial, I have also read a witness statement of Mr Anthony Catterall, a solicitor acting for Ashley Wilde, which deals with the circumstances in which Mr Herbert was instructed to act as an expert for Ashley Wilde in this case. This was prepared for the purposes of supporting an application, dated 8 February 2018, to adduce an expert report from Mr Herbert. BCPL consented to that application, which resulted in the vacation and relisting of the trial originally listed on 12 March 2019.

PROBLEMS WITH EXPERT EVIDENCE

28. Pursuant to CPR 35.3, an expert's overriding duty is to the court:

“(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.”

29. The Practice Direction to CPR Part 35 (“**PD35**”) sets out the following general requirements of an expert:
- “2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation
 - 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
 - 2.3 Experts should consider all material facts, including those which might detract from their opinions.”
30. Guidance as to the form and contents of an expert report is found in paragraph 3 of PD35:
- “3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions
 - 3.2 An expert's report must:
 - (1) give details of the expert's qualifications;
 - (2) give details of any literature or other material which has been relied on in making the report;
 - (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
 - (4) make clear which of the facts stated in the report are within the expert's own knowledge;
 - (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
 - ...
 - (9) contain a statement that the expert –
 - a) understands their duty to the court, and has complied with that duty; and
 - b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.”
31. Paragraph 1 to PD35 provides that “*Experts and those instructing them are expected to have regard to the guidance contained in the Guidance for the Instruction of Experts in Civil Claims 2014 at www.judiciary.gov.uk.*” (my emphasis). That Guidance sets out very clearly the circumstances when the Guidance applies (when an expert is appointed pursuant to Part 35) and when it does not (when an expert advises before proceedings are started which the parties do not intend to rely on in litigation, or where

after commencement of proceedings the expert is only instructed to advise and not prepare evidence for the proceedings, when the expert's role is that of an expert advisor). At paragraph 7, it is explicit that: "...*this guidance **does** apply if experts who were formerly instructed only to advise, are later instructed as an expert witness to prepare or give evidence in the proceedings*" (my emphasis).

32. The Guidance includes the following sections of particular relevance to this case:

"9. Experts always owe a duty to exercise reasonable care and skill to those instructing them, and to comply with any relevant professional code. However when they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise (CPR 35.3). This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them."

"11. Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of independence is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

"13. Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions..."

Mr Herbert

33. Ms Edwards-Stuart submits, and I accept, that there are significant difficulties with the way in which Mr Herbert's expert report was prepared. Mr Catterall's witness statement provides the background. HHJ Hacon made no direction permitting expert evidence at the original CMC, but after reading the witness evidence which was served in November 2018, Mr Catterall had a meeting with his clients. He said "*I recommended to the Claimant that it would be appropriate to ask for an opinion from an independent expert who could review the respective products and **provide an opinion on the similarities between the designs and on the question whether the Defendant's "Amore" product was manufactured from the Cad design purporting to represent the Defendant's artwork***" (my emphasis). His clients agreed.
34. On 21 December 2018 he sent instructions for an expert opinion to Mr Herbert, which are in the bundle. As Mr Catterall correctly identified in his witness statement, and as can be seen on the face of those instructions, they asked Mr Herbert to **identify evidence supporting Ashley Wilde's case**. Mr Herbert confirmed in cross-examination that he was only asked to look at similarities which were supportive of Ashley Wilde's case of copying, and not differences which might undermine that case and/or support BCPL's case of independent design.
35. Mr Herbert produced that initial opinion, and then at the end of January he met with Mr Catterall, clients and counsel at a round table meeting to discuss it. That prompted Ashley Wilde's application of 8 February 2019 to be permitted to adduce expert evidence.

36. In cross-examination, Mr Herbert confirmed he turned his informal opinion into a formal expert's report, which is the report I have before me. He put the same findings from his informal opinion into his formal report. He said that he was not asked to look at any differences between the two designs or carry out any additional measurements. However, he said he had already done a forensic job on measurements for the informal opinion, and had taken many more measurements than appeared in it or the report, so additional measurements were not necessary. There was then the following exchange:

Ms Edwards-Stuart: I understand, so how did you decide which measurements to put in the report?

Mr Herbert: Just the ones that seemed relevant to narrow it down to those elements which I thought contributed to the - - what I might assume were similarities, and I also understand very clearly what the differences are also.

Q: But you haven't identified any of those differences in your report?

A: They are hidden within the report in the diagrams because I measured everything, and those, despite what was said, those measurements are included in the accurate drawings which I did, so I had to measure them, yes.

Q: So if I want to find the differences I will have to go through your diagrams but if I want to find the similarities I can look for those in your report?

A: The differences are paramountly obvious.

Q: Well, the differences are paramountly obvious, I agree, but what I'm trying to explore with you is what material you have chosen to contain in the language of your report and I understand you to be confirming that you just focus on the similarities.

A: No, I didn't just focus on that. I was well aware of the differences.

Q: But you don't report any in your report?

A: If the diagrams are part of the report they were reported.

37. Ms Edwards-Stuart described reference to "*hiding the differences in the report*" as "*unsatisfactory*", and I agree.
38. I accept her submission that Mr Herbert should have recognised the difficulties of moving from a role in which he was specifically asked to identify evidence which supported Ashley Wilde's case, to a role as a court-appointed independent expert with requirements of impartiality and objectivity, and either started his analysis afresh, or at the very least highlighted the differences between the Amore Products and the Evangeline Duvet Cover as well as the similarities, and reconsidered his opinions objectively and fairly in the light of those differences. That would have established his compliance with his duties to the court pursuant to CPR part 35 and also established that he had complied with the Guidance, particularly the obligation in paragraph 13 to take into account all material facts. It is surprising that he did not do so given his undoubtedly extensive experience as an expert witness. Ms Edwards-

Stuart submits that those instructing Mr Herbert should also take some responsibility, as they too have obligations to comply with the Guidance. I accept that submission.

39. Mr Smith submits that Mr Herbert was a satisfactory witness, and asks me to take into account that the exercise in establishing copyright infringement is in identifying similarities. He submits that Ms Edwards-Stuart put to Mr Herbert no differences which would have made a difference to his assessment. I do not accept this submission. Differences between the designs are material facts, and have relevance when considering there an inference of copying has been rebutted in the first stage of the assessment of copying, as Lord Millett made clear in *Designers Guild*. As material facts, Mr Herbert undoubtedly should have taken them into account. Mr Herbert stated in oral evidence that he believed he had complied with the requirements set out in paragraph 2.2 of CPR part 35, but I am not satisfied that he has.
40. I should make clear that I do not doubt Mr Herbert's bona fides or professionalism. I believe that he came to court to express his honestly held opinion about the case. However he came to it initially in a role which specifically required him **not** to approach his assessment objectively and impartially (and I do not criticise him for this – he was specifically hired to produce advice to support Ashley Wilde's case) and did not amend his approach when his role changed to that of an expert with the duty to be independent, objective and impartial. That is where, I fear, he went wrong, and I consider that he has, perhaps without realising it, maintained a partial approach which has caused him to identify too closely with his client's case. In my judgment this can be seen in his report. An example is seen at paragraph 8 where he states "*...the arrangement of the crescent motifs is the same on both [the Evangeline Duvet Cover and the Amore Products]:- 3, 2 and 1 albeit the Defendants have added extras across the width*". This is a very odd way of saying that the Evangeline Duvet Cover has 6 pleated scallops in three rows arranged 3, 2, 1 and the Amore Products have 10 full and 4 half scallops arranged 3, 4, 3 with half scallops at each end of the top and bottom rows. In my judgment it shows a lack of objectivity and impartiality.
41. The court requires independence, objectivity and impartiality of CPR part 35 experts so that it can trust as reliable the opinions which, as experts, they are uniquely permitted to offer to the court. That does not mean that the court has to accept those opinions, and of course there can be a range of opinions offered by independent, objective and impartial experts. The manner in which Mr Herbert has approached the production of his expert report means that I cannot accept that his opinions are reliable, as the opinions he offers now are the same as the opinions he reached when he was carrying out a purely partisan exercise to support Ashley Wilde's case, and he has not addressed the differences and shown the court why they do not affect that initial assessment, as the Guidance requires him to do.
42. In my judgment, for those reasons, I cannot place any weight upon the opinions that Mr Herbert expresses in his reports, although I do not doubt the factual accuracy of his measurements and observations.

Mr Cassidy

43. Mr Smith criticises Mr Cassidy, saying that his report was inadequate because he did not comply with CPR part 35 paragraph 3.2(v), as although he identified in his report that various examinations, measurements, and experiments set out were carried out by

members of his team and not him personally, he does not identify the specific team member(s), does not give the qualifications of those persons, and does not state whether or not that work was carried out under his own supervision. Mr Cassidy accepted in cross-examination that he did not, but stated that they were all trusted members of his department, with at least undergraduate degrees, and he was present and supervised them when they carried out the tasks he describes in his report. Ms Edwards-Stuart submits that it is not clear what relevant qualifications he could provide in the context of carrying out measurements by ruler, which does not require technical expertise to carry them out, and that it was not suggested to Mr Cassidy that any of the measurements were incorrect. She described it as a criticism without any bite. I accept her submissions. I find Mr Cassidy's evidence to be of assistance to the court.

44. Mr Herbert's opinion at paragraph 16 of his report is that the Amore Products are a copy of the Evangeline Duvet Cover, made up of pleated scalloped elements directly copied from a pleated scalloped element of the Evangeline Duvet cover using either a photocopier or scanning device, but scaled down somewhat in size. He opines that "*Clearly, the Defendant's Amore duvet cover is of inferior quality to the Claimant's Evangeline*". In his opinion "*the similarities to 'Evangeline' in the construction of the 'Amore' product that I have identified, coupled with its inferior quality, all point to 'Amore' being a cheaper copy of 'Evangeline'*" (para 18).
45. Another example is in paragraph 15, where he acknowledges that the Amore Products have fewer pleats per scallop than in the Evangeline Duvet Cover, but states "*I believe that the arrangement of only 18 pleats on the Defendant's duvet was arrived at by filling in the appropriate number of pleats to make the Claimant's Evangeline's 10 pleats*". It is very difficult to understand what he means by this, and there is no evidence to support this supposition.
46. For those reasons I prefer the evidence of Professor Cassidy. His report is, in my view, more rigorous. Professor Cassidy has checked the measurements and figures provided by Mr Herbert to support his opinion that the Amore Products copy the Evangeline Duvet Cover, and has found many of them inaccurate when compared with his cover, but I bear in mind they were not using the same samples and there are inevitably differences arising from manufacture.

EVIDENCE

Laura Spencer – design of Evangeline Design

47. Ms Spencer's evidence was that she had an idea for a duvet cover with a design of pleated scallops or crescents. On 2 July 2012 she experimented with paper, but then moved to fabric. She cut out crescent-shaped pieces of fabric, pressed pleats into them, and sewed them to a flat piece of fabric. That was the Evangeline Design. She said that she didn't sketch the design first as pleats are difficult to sketch and interpret, and she wanted to explore how the pleats would fold. She chose to use a symmetrical pleat across the crescents with a box pleat in the centre, rather than the fairly standard concertina pleat.
48. Ms Spencer said that she had not seen any pleated scallop design similar to the Evangeline Design before 2 July 2012. She accepted in cross-examination that "pleats

are always commonplace” in interior products, but said “It’s the way you pleat them and the way you position those pleats and the shapes you make with them I think which give it the difference”. She did not accept that pleated scallops or crescents were commonplace, saying that she was not familiar with that combination.

49. Ms Spencer said that after creating the Evangeline Design, she took a photograph of it, and from that created a computer-aided design (“CAD”). A copy of this is in the trial bundle. She printed out the CAD, and annotated it in manuscript. A copy of this is also in the trial bundle. She sent the CAD, the physical fabric sample and the annotated CAD printout to the factory in China. The physical sample cannot be located and so all that remains of it is the photograph.
50. Ms Spencer’s manuscript annotations on the CAD printout included adding a measurement of 50cm from the top of the pleated motif to the top of the duvet. She explained in cross-examination that this was a standard measurement in duvet design which ensured that the design was not obscured by the placement of pillows on top of the duvet. She said that she tried to make the scallops in the Evangeline true to life or to the scale she wanted to see in the finished product, and so she accepted that the CAD was a fair indication of the dimensions of the Evangeline Design.
51. Given that admission, It was put to her that by extrapolating that 50cm measurement to the rest of the CAD, it suggested that:
 - i) the distance from the far left to far right of the top row of the Evangeline Design was about 1m or slightly over. She agreed;
 - ii) therefore each scallop was likely to be about 33-35cm from tip to tip. She agreed that was about right, but said she didn’t measure them;
 - iii) the depth of the Evangeline Design from highest to lowest point was about 42cm, so that the crescents were each about 14cm in depth. She thought they were probably bigger, but she couldn’t recall.
52. Ms Spencer confirmed that the motif and elements of the Evangeline Design as rendered into the Evangeline Duvet Cover were the same size, irrespective of the size of the duvet cover.
53. Ms Spencer agreed that in the context of textile production:
 - i) converting two dimensional CADs into physical products is not an exact science;
 - ii) CADs are open to a degree of interpretation;
 - iii) approving a final physical product may involve an iterative process by which samples are sent, changes requested, further samples sent etc., before they are finally approved; and
 - iv) for those reasons, differences between CAD and commercial production products are common.

Mr Charles Bennett – Production and sale of Evangeline range

54. Mr Bennett's evidence was that the process of ordering textiles from the factory they used for manufacture in China was that he would raise a purchase order, the ordered products would be made and shipped, on receipt they would be checked, only those of sufficient quality would be accepted, and the Chinese factor would then send an invoice for those items which had been accepted.
55. He accepted in cross-examination that in order to accurately calculate the number of bed linen products made to the Evangeline Design which were put on the market in the UK, which he had stated in the Reply to Defence was 5652 units, he should have used the numbers shown on the invoices rather than the purchase orders. He also accepted that he included within those figures the numbers of both standard housewife and square pillowcases, even though each had only a single pleated scallop on them, and not the whole Evangeline Design.
56. In terms of the time that the Evangeline Duvet Cover was on the market, his evidence was that items from the first production order raised in September 2012 would have been in the shops in around April 2013 and items from the second production order of early May 2013 would have been in the shops at the end of 2013. He described that they would be sent to retailers such as House of Fraser in a number of deliveries, not all at once, and the last despatch was in Summer 2014. He was unable to say for how long those units may have remained on the shelves for sale to the public, but speculated that it could have been until early 2015, depending on sales.

Ms Caprice Bourret

57. Ms Bourret explained that she began her retail business in 2000, originally focussed on lingerie. She incorporated BCPL in 2005. She entered into a licensing agreement in 2010 with Shop Direct, the company which owns the very.co.uk and Littlewoods brands, for BCH which continued until 2015. In 2015 she left the Shop Direct licensing arrangements to supply her products to retail outlets directly. BCPL has recently entered into another licensing agreement with another third party, but nothing turns on that.
58. Ms Bourret described her home brand, BCH, as being well known nationally and internationally, being stocked by large retailers in the UK including Dunelm, Next, Shop Direct, Wayfair and Grattans.
59. Ms Bourret's evidence is that she met Ms Graham when Ms Graham was working for Shop Direct as senior buyer. Ms Graham left Shop Direct in 2015 and Ms Bourret asked her to help source factories and produce designs for BCPL's various ranges. Ms Bourret said that she would provide Ms Graham with her critical timeline of when she needed designs to meet delivery times for new season collections, and Ms Graham would email her when she had a design to share with her for approval or comment. Once approved at the initial design phase, Ms Graham would ask the Chinese factory they used, Beijing Shanghai Textiles ("BCT") to send the finished sample to Ms Bourret for approval or comment.
60. In cross-examination Ms Bourret said that BCPL produced four ranges of bed linen per season, and either three or four seasons per year. The Amore Products were designed for the Spring/Summer 2017 season. They arose out of an initial CAD design which Ms Graham emailed to Ms Bourret on 10 March 2016. The heading was SS17

Caprice 2016-078 Ruffle and the body of the email simply said “*Hi – Taupe colour. :)*”. Ms Bourret replied within the hour and in the next 30 minutes or so there was the following email conversation:

CB: Wow babes gorg ... Should we add a runner????

FG: Would be better to use some product to match that are [sic] cross co-ordinate. We need to dress but can we try and utilize some existing accs to get moq [minimum order quotas] up?? Or do you want new? X

CB: Defo runner that is used with other ranges as well would the sequins one work????

FG: Yes or we cold [sic] do an all over scalloped runner like the top section?? Should we sample after you see the duvet sample then make a decision...??

CB: Sounds gorg don't think we will have probs with MOQ on that if this is the only range we use the runner on

FG: Yes I agree... will cad up :)xx

CB: Awesome babes yay xxx

FG: When is your SS17 meetings with retailers?

FG: I think we have 4 so far being sampled for SS17 so working on a few more this week...

CB: 3 weeks X

FG: Gosh that's early... So will you show them cads? I will push what sampling I can. Speak soon xxx

61. The next day Ms Graham sent an email entitled SS17 Ruffle Runner which attached a CAD and said “*Hi. Ruffle runner 220cm x 75cm to get 3 rows of ruffles in*”.
62. Ms Bourret agreed in cross-examination that the email thread suggests that she was in a rush to get sampling done in time for meetings with retailers in three weeks time, but she said that she also may have put in place an artificial timetable to push Ms Graham. She was asked about the paucity of the email conversation: Mr Smith put it to her that she had approved a design with no evidence of a design brief, no discussion of costings, no questions about how it was made (or even if it was a three dimensional or printed design), and no physical sample. She said that she had worked with Ms Graham for some time who knew her cost points, her design style and her minimum order quantities and would not send her a CAD of a design if it didn't broadly meet those issues. Costings would be analysed only if and when she approved a physical sample. She said “*That's why I asked to sample*”. She said “*I don't know about design, I just say “Gorg, get me a sample”. I need to see it in real life to make a true comment*”. She said that she didn't ask any questions about how it would be made because she had to see the sample, but did understand that she was being shown a three-dimensional and not a printed design.

63. Ms Bourret says that she remembered receiving physical samples for the Amore Products and approving them. They then went into production and BCPL launched the Amore Products in April 2017. She says that she was not aware of the KMAH Evangeline range at the time the Amore Products were designed. Mr Smith put to her that she was familiar with the Evangeline Duvet Cover and had asked Ms Graham to copy it, perhaps because she was under time constraints to get new designs done to show suppliers, and she vehemently denied it. Her evidence is that she had no reason to believe that Ms Graham had copied the design, and if she had known it was copied (which of course she, Ms Graham and BCPL deny) she would not have approved them.
64. I accept all of Ms Bourret's evidence. I think she was being entirely candid and truthful with the court.

Fiona Graham

65. Ms Graham is currently the head of buying at Liwa stores in Abu Dhabi. She discloses a twenty-year career history in the homewares business as product development buyer, senior buyer and merchandiser and business manager for large organisations including Shop Direct, Littlewoods, Edinburgh Woollen Mill and Coloroll. She worked at Shop Direct from February 2009 to the end of 2015 as a senior buyer for the Home & Living division, mainly responsible for textiles, managing a team of 40 people. Ms Graham accepted in cross-examination that at all times when she was working for Shop Direct, it carried the KMAH range.
66. Mr Smith put to her that although she said in her witness statement that she had developed with professional designers "*hundreds of thousands of ranges*", she was not a designer at all but a buyer. She said that her main role at Shop Direct was as a buyer but she had a background in fabrics, and whilst she was not a designer, she was still very much involved in the design process.
67. She accepted in cross-examination that a good buyer:
- i) knows what is likely to sell to the end customer
 - ii) knows what is on trend
 - iii) has an idea of what is on the market
 - iv) knows what competitors are doing
 - v) keeps a close eye on lines available in major retailers including online, High Street and department stores
 - vi) needs to know what is selling well in her own organisation, although she said a buyer couldn't know what is selling well elsewhere.
68. Ms Graham left Shop Direct in 2015. She said that was when Ms Bourret asked her to help in realising her ambition to become the sole supplier for the BCH business, which coincided with Ms Graham's move to the Middle East for her husband's role. Ms Graham said that she introduced BCPL to BST in China, who she had worked with for many years.

69. Ms Graham said in her witness statement that her design of the Amore Bedding came in early March 2016 when she discussed with Tansy Wilson “*an idea utilising scallop pleats which Tansy would design for Caprice. They have been very popular on bedding for a long time and are very popular in the Chinese market/showrooms and marketplace. There are lots of examples of bedding with top border/full bed pleats in scalloped, straight and wavy designs... The pleat Tansy Wilson designed is a very common pleat that has been used for many years... We were also inspired by fashion trends at the time and the catwalk. Ruffles/pleats and scallops were very popular on the runway and on the High Street, both in clothing and in homeware, and we wanted a design which would be in keeping with those themes...*”. She exhibits prior art which she says demonstrates these contentions.
70. Ms Graham said that on 10 March 2016 Tansy Wilson emailed her a ruffle design for BCH as a result of their discussions, and this was the CAD which Ms Graham forwarded to Ms Bourret. She said “*The technical folded pleat used in this design is a modified scaled up version of an existing pleat design, designed in 2010 by BST. The ruffled edge of the pleat was replaced with a raw edge and scallops were added to the three lines of pleats...*” She explained that three rows of a design feature was a common number as it provided good design value, giving visual impact without the cost of replicating the feature across the whole duvet cover.
71. In cross-examination, Ms Graham provided further evidence about the design process leading up to the production of the first CAD. Mr Smith asked her whether she had sent any images to Tansy Wilson as design inspiration for the Amore Design. She said she did not, because she had gone to China and discussed the design with her there. She said “*I had been to China prior to that and actually seen the ruffle that we had done, so the design had already been decided on, we just needed a layout and that’s what Tansy did, a layout. This [CAD] isn’t the design. The design was selected in China*”. Ms Graham had not mentioned in her written evidence that these previous discussions with Tansy Wilson had taken place in person in China.
72. Ms Graham in oral evidence further expanded on the discussions with Tansy Wilson in China. She said that she had gone to the BST factory and showrooms within the factory. She said “*They have thousands of samples on a bed, showing different techniques, and you just take a reference number of the one you like*”. This is the pleat she referred to in her written evidence being a modified scaled up version of a pleat used by BST for many years. There is a photograph of that pleat in the bundle, but it is not in a scallop shape. She said that shape was achieved through laser cutting. She said that after she chose the pleat, and she and Tansy discussed what she wanted and she returned to the Middle East, Tansy drew the design up on CAD for layout purposes only.
73. Professor Cassidy in oral evidence said Ms Graham’s evidence about attending showrooms, choosing a ‘technique’ as she called it, and having a CAD design drawn up for layout purposes only accorded with his understanding of how textile products were commonly designed in China. I also note that on Ms Spencer’s annotated CAD drawing for Evangeline, she noted that the CAD was for layout purposes only.
74. Ms Wilson’s email to Ms Graham attaching the CAD for Amore says “*...Please find attached ruffle design for Caprice. Base fabric Matt satin? Shiny heavy weight taffeta for the ruffle? Do you think that we should keep the ruffles same shade as the ground*

or have a contrast? Let me know your thoughts". On balance, I do not think this is consistent with Ms Wilson simply having been asked to copy the Evangeline Duvet Cover.

75. After sending the CAD to Ms Bourret, and agreeing with her to add a runner, Ms Graham says she asked Tansy to produce the design for the runner. Tansy produced another CAD which she also forwarded to Ms Bourret for approval. The CADs were returned to BST for sampling. There is in the bundle an email from Tansy Wilson to someone called 'Selphie' at BST on 11 March 2016, asking to sample the 'SS17 – Glamour Ruffle' for Caprice. Ms Wilson provides clear instructions: "*Please can you have a look at the attached images and arrange samples for Caprice. Can you sample this in Taupe, same shade I gave you yesterday, the main body is matt satin, self piped, the ruffles are shiny heavy quality satin in the same shade, reverse to be ivory TC. Please keep the scale as per my layout and start the ruffle pattern 35cm from the top of the bed...*". Again, I do not think this is consistent with Ms Wilson copying the Evangeline Duvet Cover as it would be easier for her to send over the physical copy with the CAD, if she had it. Ms Bourret approved the physical samples, and the Amore range went into production.
76. I have no evidence from Tansy Wilson, who from Ms Graham's written evidence seems to have been largely responsible for the design of the Amore Products. Mr Smith criticises BCPL for that, and submits that even if proportionality meant that she was not able to fly in from China, she should have been asked to produce a witness statement. I agree that would have been helpful, but in light of the evidence that I do have, including contemporaneous emails and documents and the evidence of Ms Graham, I do not draw the inference which he asks me to draw, namely that evidence has not been obtained from Ms Wilson because it would not support BCPL's case of independent design. Neither Ms Bourret nor Ms Graham were copied into the email from Tansy to Selphie and it is not clear how it was obtained. Ms Bourret was asked how she obtained it to disclose it in proceedings and she said that Ms Graham had given it to her. Ms Graham was asked how she obtained it but was unable to provide a response.

SUBMISSIONS

Issue (ii) – Did BCPL's designer copy the Evangeline Duvet Cover?

Prima facie case of copying?

77. Per *Designers Guild*, the first step is a visual comparison of the Evangeline Duvet Cover and the Amore Products, noting similarities and differences. Ashley Wilde relies upon four similarities:
- i) **The choice of using a repeating pattern of scallop-style pleats in repeating horizontal rows.** Ms Edwards-Stuart submits there is no repeating pattern in repeating horizontal rows in the Evangeline Duvet Cover; there is a single repeated motif in horizontal rows, but the horizontal rows do not repeat as there are different numbers of the motif in each row. I accept that. I consider that the similarities are that they both contain a repeating pleated crescent-shaped scallop motif applied in an offset pattern in horizontal rows.

- ii) **The relative size of each scallop-style pleat.** The question is relative to what? Ms Spencer was asked this in cross-examination and she said relative to the size of the duvet cover. I accept that the pleated scallops on each duvet cover are broadly similar in size to each other, but I put it no higher than that. As the experts agree, the pleated scallops on the Amore Products are smaller by width and height than those on the Evangeline Duvet Cover.
- iii) **The relative spacing between each scallop-style pleat. Again, the question is relative to what?** Ms Spencer in cross-examination confirmed that she meant that on both duvet covers the pleated scallops were placed tip to tip horizontally. Again, this could be said to be broadly true, but only at a high level of generality. As Ms Edwards-Stuart submits, the pleated scallops on the Amore Products have squared-off ends which are placed so they overlap each other and on the Evangeline Duvet Cover they have pointed tips placed together without overlapping. I accept they are similar in that the pleated scallops are placed adjacent to each other and touching.
- iv) **The relative spacing between each horizontal row of scallop-style pleats.** This was the subject of some discussion during the experts' oral evidence. Mr Herbert's evidence was that he measured the distance from the sewing line at the end or tip of one pleated scallop to the sewing line of the pleated scallop immediately below on each duvet cover (see diagrams at 303 and 304 of the trial bundle) and the distance was 24.5cm in both duvet covers. Professor Cassidy's evidence is that it is unusual to measure from sewing lines of applied pieces as opposed to their edges, because when carrying out a visual assessment of similarities, the eye assesses what it can actually see, which is the pleated scallop and not the sewing line of the pleated scallop. I accept that point.

Professor Cassidy is also of the opinion that the measurements vary depending on which crescent pieces you measure. I don't understand that to be controversial. He says that he found that the spacing in the Evangeline measured in this way varied between 25cm and 24cm, and in the Amore duvet cover there was more variation with five measurements falling between 25.1 and 25.7cm, and only one measuring 24.5cm. In cross-examination Mr Herbert agreed that he had measured variations in height in the Amore Products. Of course I remind myself that the experts each had different sample duvet covers and the experts and witnesses with design expertise all accepted there was an element of variation in physical textile products not seen in a CAD because of variability introduced in the manufacturing process. Accordingly I accept Evangeline Duvet Cover and Amore Products have broadly similar but not identical spacing between horizontal rows, but again I consider this is at a relatively high level of generality.

78. The differences include:

- i) **The method of pleating the scallops.** Those in the Amore Products are simple knife pleats of equal width running the full length of the scallop from left to right. Those in the Evangeline Duvet Cover are more complex, and consist of a wide central box pleat with knife pleats of narrower but equal width on either side: those to the right of the box running to the right and those to the left of the box running to the left.

- ii) **The number of pleats in the pleated scallops.** The pleated scallops in the Evangeline Duvet Cover have a central box pleat with four pleats on either side. The full scallops in the Amore Duvet Cover have 17 equal knife pleats.
 - iii) **The size of the pleated scallops.** Those in the Evangeline Duvet Cover are all about 59.5cm in length (tip to tip) and 11.8cm in depth, and the full scallops in the Amore vary but range between 50cm and 52.6cm in length and are about 9.3cm in depth.
 - iv) **The shape of the pleated scallops.** As mentioned, those in the Evangeline Duvet Cover are true crescents with pointed tips. Those in the Amore Products are not, with squared off ends.
 - v) **The positioning of the rows of pleats.** Those in the Evangeline Duvet Cover are positioned vertically with the ends of each pleat in the middle and bottom rows are positioned underneath the middle of the pleat in the row above such that the ends are obscured from view. In the Amore Products the rows of pleats are positioned vertically such that the ends of each pleat in the middle and bottom rows are visible in their entirety and not obscured by the pleats in the row above. This is in part a feature which arises from the narrower depth of fabric used for the pleated scallops in the Amore Products compared to the Evangeline Duvet Cover.
 - vi) **The number of repeated scallop motifs.** The Evangeline Duvet Cover has six, positioned in three rows of 3-2- and 1 motif in each row in a pyramid shape placed at the centre of the fabric, whereas the Amore Products feature three rows of pleats extending the entire width of the Amore duvet cover.
 - vii) **The use of incomplete scallop motifs.** The Evangeline Duvet Cover uses only full pleated scallops, unlike the Amore, which has incomplete pleats at the end of the top and bottom rows.
79. In relation to the latter two points, I accept Mr Smith's submission that, per *Designers Guild*, what matters is what is taken, not what is added. I remind myself that per *Designers Guild*, the inquiry is directed to the similarities rather than the differences, and when considering whether the similarities relied on are sufficiently close, numerous or extensive to be more likely the result of copying than coincidence, the court must discard what is commonplace or unoriginal or consists merely of general ideas.
80. I accept Professor Cassidy's evidence that scallops, pleats and scalloped pleats have been widely used in textiles for centuries. I also accept BCPLs evidence that the use of scallops and knife pleats was having 'a moment' in the fashion and interior design industries in early 2016. The combination of scallops and pleats was well known in high fashion, as can be seen in couture collections a few years earlier. Professor Cassidy shows images from Marchesa's Spring 2012 ready-to-wear, Worth's Spring 2012 couture and Dior's Fall 2011 couture collections, all of which are full of pleated fan and scalloped shapes.
81. In textiles the combination of pleats and scallops can be seen in images exhibited to Ms Graham's witness statement. These include: (i) the Star by Julien Macdonald

duvet cover on page 258 of the bundle (product name indecipherable), which contains two rows of knife-pleated deep scallops placed adjacent to each other and touching in the row and in an offset pattern between the rows, although these are of a smaller scale and of a different shape than the pleated scallops we are concerned with, as being less obviously crescent-shaped and closer to half circles; (ii) the Safia duvet cover by Star by Julien Macdonald on page 259 which has very large, layered pleated arcs producing a quite different effect; and (iii) the Star by Julien Macdonald ivory pleated frill sequin cushion on the same page, which (although the image is somewhat indistinct) appears to have has three rows of knife pleated scallops on either side of a central sequined band, the pleated scallops being placed adjacent to each other and touching and the rows arranged in an offset pattern. Again, the scale and shape of the pleated scallops are different to those in the present case, being smaller and closer to half circles rather than crescents.

82. Accordingly I discard the general idea of a pleated scallop as a decorative motif on a duvet cover as commonplace, although I retain crescent-shaped pleated scallops. I also discard as commonplace pleated scallops positioned in rows so they are touching those adjacent, and positioned in rows in an offset pattern. What is left of the features alleged to be copied in this case are (i) the crescent shape of the pleated scallops; (ii) the broadly similar size of the pleated scallops; and (iii) the broadly similar spacing between horizontal rows of the pleated scallop motifs. In my judgment (iii) really is connected with (ii), as the broadly similar spacing is a feature of the broadly similar size of pleated crescent-shaped scallops placed, in a commonplace way, adjacent to each other and in an offset pattern.
83. Having considered these carefully, I do not consider that those similarities are sufficiently close, numerous or extensive to be more likely the result of copying than coincidence and I decline to draw an inference of copying from them. If I then cast my mind over the differences I have identified in paragraph 78 (i) – (iv) above, which are extensive and, I consider, material, I consider they do indicate an independent source and so rebut any inference of copying.
84. That is sufficient to dispose of the claim.
85. If I am wrong about that first step, and the similarities are sufficiently close, numerous or extensive to be more likely the result of copying than coincidence, then I would be satisfied that there was a sufficient possibility that Ms Graham had accessed the Evangeline Duvet Cover during the course of her work at Shop Direct in order to move the burden to BCPL to show that the similarities in the Amore Products were the result of copying rather than coincidence. However on considering all of the evidence about independent design, I would have determined on the balance of probabilities that the Amore Products were independently designed and not copied. That is because in all of the contemporaneous documentation and communications between Ms Bourret, Ms Graham, Ms Wilson and Selphie there is no hint that all or any of them have seen or are looking at and copying the Evangeline Duvet Cover; the differences between the Amore Products and the Evangeline Duvet Cover are extensive and militate against copying; although Mr Herbert identifies similarities in relation to the width of the unpleated elements of both the Evangeline and the Amore motifs which he suggests show that the Evangeline element was unpicked, photocopied and mechanically scaled down to produce the Amore element, he cannot

explain to my satisfaction why any copyist would go to the trouble of doing that only to pleat it to a different size and in a different manner to the Evangeline motif.

Issue (iv) - Are the Amore Products infringing copies of the copyright work?

86. For the reasons I have given I am satisfied that they are not.

SUMMARY

87. The claim is dismissed.