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Claim No. IL-2018-000218

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

INTELLECTUAL PROPERTY LIST (Ch D)

SHORTER TRIALS SCHEME

Before DEPUTY MASTER LINWOOD

17th June 2019

BETWEEN:

ISLESTARR HOLDINGS LTD

Claimant

-and-

ALDI STORES LTD

Defendant

Hearing: 5th June 2019

MS J. REID instructed by Kemp Little LLP appeared on behalf of the Claimant

MR M. EDENBOROUGH QC instructed by Freeths LLP appeared on behalf of the Defendant

**JUDGMENT
(AS APPROVED)**

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DEPUTY MASTER LINWOOD:

1. This is my judgment on two applications. The first is for summary judgment by the claimant, Islestarr Holdings Limited against the defendant, Aldi Stores Limited. In essence, Islestarr say that Aldi have infringed their copyright in two artistic works. First, what is called the Starburst Design, which decorated the lid of a package containing two makeup powders and secondly, the Powder Design, which is embossed into each of the two separate makeup powders in the package. The second application is Islestarr’s application for permission to re-amend its particulars of claim.

2. Islestarr says it launched the Charlotte Tilbury brand, including Filmstar Bronze and Glow, which includes those works in 2013. It claims its employees worked with a design company called Made Thought Limited to develop the designs for the packaging and out of those joint efforts, original artistic works, the subject of this claim, came into being. Islestarr say all intellectual property rights, which otherwise would be owned by Made Thought, have been assigned to it.

3. Islestarr also say both artistic works are incorporated in what they call the Filmstar Palette, which retails for about £49. Over the last five-and-a-half-years, Islestarr have sold £12.9 million of Filmstar Palettes. They allege Aldi saw the success of the Filmstar Palette and decided to copy features, so as to produce its own versions, as two variants were produced, of which one was actually sold, in circumstances I will come to. Aldi’s version retailed both online and in store for £6.99, reduced to £4.99, and some 20,248 units were sold. Accordingly sales were no more than approximately £140,000. Islestarr’s and Aldi’s palettes attracted substantial comment in printed and online media.

4. I set out below a table showing the party’s products.

Claimant's works embodied in Filmstar Palette	Defendant's Palettes
<p>The Starburst Design</p> 	<p>D's Second Palette</p> 
<p>The Powder Design</p> 	<p>D's First Palette^[1]</p> 

[1] D has not admitted that Annex 7 of the Re-AmPoC shows the First Infringing Palette. Accordingly, this image is taken from Annex 3 of the draft Defence [C/7/537].

5. Islestarr's Filmstar Palette was produced in court, as was Aldi's second palette but not its first. The picture of Aldi's first palette in 4 above, is insufficiently clear, as the words "shape" and "glow" do appear about midway in the left and right-hand powders, in between the rays of the Starburst Design.

6. Islestarr became aware of the interior of Aldi's first palette namely the powders, in July 2018, at a trade show. Islestarr's solicitors, Kemp Little wrote on 25th July 2018 to Aldi alleging infringement of copyright in the design on the top of each of the powders. Aldi's solicitors, Freeths, replied on the 7th August 2018. They rejected the allegations of passing off, which are not now proceeded with and copyright infringement and said there was no case to answer, but that "*our client is not in any event proceeding with the mock up of the product referred to in your letter.*"

7. Nothing happened until 21st November 2018 when Kemp Little wrote to Freeths. They said Islestarr had not seen the lid of the Aldi palette when they wrote their previous letter but subsequently had become aware of it. Kemp Little threatened proceedings for an interim injunction for a copyright infringement and passing off if undertakings were not given and the infringing product, namely Aldi's second palette, removed from sale. On 10 December 2018, Aldi removed the second palette from sale without admission of liability and upon Islestarr's cross undertaking in damages, pending resolution of Islestarr's claim.

The Procedural History

8. The claim form for infringement of copyright in first the Starburst Design - on the lid - and the Powder Design - inside the palette, and breach of undertakings was issued on 19 December 2018, together with particulars of claim.

9. Islestarr say Aldi incorporated infringing copies in their "*cheap lookalike product*" and then quoted Aldi's advertising slogan, "*Like brands, only cheaper*" which Islestarr say demonstrates Aldi's ethos of selling lookalike versions of well-known brands cheaply to encourage footfall in their stores.

10. Aldi on 3 January 2019 applied to transfer this claim to the Intellectual Property Enterprise Court and relied on the first witness statement by their solicitor, Mr Pattni, also dated 3 January. Islestarr applied on 11 January 2019 for summary judgment on liability and served the first witness statements of Rachel Barber, a partner in Kemp Little, dated 10 January 2019 and James Houston, director of special projects for Islestarr, and Demetra Pinsent, chief executive officer of Islestarr, both dated 11 January 2019.

11. On 22 January 2019, Master Teverson dismissed the transfer application and made directions for service of evidence for this summary judgment application. On 26 February 2019, Islestarr made a minor amendment to its particulars of claim. Mr Pattni made his second witness statement on 12 March 2019 to which he exhibited a full and detailed draft defence. Mr Pattni confirmed that, whilst the draft was not signed, that "*the defendant has authorised me to confirm that the factual matters asserted in the draft defence are true*". He did not then identify who within Aldi so authorised him, which I will turn to later.

12. Islestarr then served their evidence in reply consisting of the second witness statements by James Houston and Demetra Pinsent dated 10 and 11 April 2019 respectively, plus statements by Mr Wojcik, design director at Made Thought Design Limited dated 10 April 2019 and Mr Austin, director and founding partner of the group of companies trading at Made Thought.

13. On 9 April 2019, Islestarr accepted Aldi's Part 36 offer in respect of its claim for breach of undertakings. Then on 3 June 2019, Islestarr applied to re-amend its particulars of claim, the evidence being Ms Barber's third statement of the same date.

Preliminary Issues - Application to re-amend and admissibility of evidence in reply

14. The proposed re-amendment has two elements. First, it clarifies Islestarr's claim to copyright by reference to certain drawings which have been annexed to the particulars of claim since the outset. Secondly, and more importantly, it refers to a second assignment of intellectual property rights by Made Thought to Islestarr dated 11 April 2019 which is exhibited to the witness statement of Mr Austin.

15. Freeths, on 24 May 2019, said the proposed re-amendment amounted to new evidence which should have been filed at the reply stage of the evidence and therefore was inadmissible for the summary judgment application. Kemp Little responded that the re-amendment merely confirmed the evidence served.

16. Mr Edenborough submits there is no objection to the particulars of claim being amended in principle, but that only the amended particulars of claim could be used at this hearing. He further submitted that the purpose of evidence in reply, Islestarr's tranche of witness statements dated 10 and 11 April 2019, is to reply to new matters in Aldi's evidence in answer, so the scope is very narrow.

17. He emphasised with some force that much of Islestarr's evidence in reply is properly characterised as evidence-in-chief and could and should have been served back in January 2019 as it does not answer any new points in Aldi's evidence but endeavours to make good flaws as in particular pointed out by Aldi in its evidence-in-chief. Particular emphasis is placed by Mr Edenborough on the second assignment which he submits is an attempt to rectify Islestarr's title in copyright which has been in contention from the outset.

18. Likewise, he submits, Islestarr's evidence as to the development of the works, especially as to originality as is seen in Mr Houston's second statement and that of Mr Wojcik, should properly have been filed in-chief. I have to say I sympathise with his concerns and I agree with Mr Edenborough that, in particular, Mr Wojcik's evidence should have been submitted from the start.

19. Mr Edenborough in summary submits that (a) the new evidence is inadmissible as evidence in reply is a matter of law, (b) Aldi have had no opportunity to answer the new evidence and therefore any judgment would be fatally undermined as it would be based on the fundamental procedural irregularity and (c) the very fact Islestarr has filed substantial new evidence in reply (and again, I agree with his submission and it does seem certain matters of substance could and should have been served in evidence-in-chief) shows why the application for summary judgment should be dismissed.

20. Both counsel helpfully agreed that the best use of court time would be for me to determine these preliminary issues in my judgment as opposed to giving an *extempore* judgment and then, after that delay, proceeding with the application for summary judgment if necessary. As I have indicated, Mr Edenborough's points have substantial force and I would have been inclined to accept them save that Aldi have had Islestarr's reply evidence since approximately 11 April 2019 but no objection was made until Monday 3 June 2019. Likewise no application was made by Aldi for permission to adduce further evidence in reply to what they say is evidence-in-chief or, for that matter, strike out the evidence concerned.

21. Aldi have not in my judgment been ambushed in terms of evidence. They no doubt consciously decided to wait for this hearing before making these submissions, so they lost by their inaction the opportunity to put in evidence in reply. It must follow, as the main re-amendment is the pleading of the second notice of assignment which was created on 11 April 2019 and provided to Aldi almost immediately, to which no objection was then taken, that I will grant permission for short service of this application to re-amend and permit the re-amendment with service to be dispensed with.

Summary Judgment - the law

22. The principles are agreed by counsel and are well-known so I will just mention certain points briefly. They are set out in particular as Ms Reid submits, in *EasyAir Limited trading as Open Air v Opal Telecom Limited* [2009] EWHC 334 (Ch) at paragraph 15, as confirmed in paragraph 24 of *AC Ward and Son against Kaplan 5 Limited* [2009] EWCA (Civ) 1098. Mr Edenborough also referred me to paragraph 27 of Lord Justice Hamlin's judgment in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37:

“(i). The court must consider whether the case of the respondent to the application has a realistic as opposed to fanciful prospect of success. In this context, a realistic claim carries is one that carries some degree of conviction and is more than “merely arguable”.

(ii) The court must not conduct a “mini-trial” and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process.

(iii) If the application gives rise to a short point of law or construction, then if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should, “grasp the nettle and decide it”.

23. With further regard to not conducting a mini trial *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at paragraph 10 also provides that the court should not take at face value and without analysis all that a party says. There may be no real substance in factual assertions made, especially if contradicted by contemporaneous documents so that issues dependent on those assertions may be capable of disposal at an early stage to save costs and time.

24. Finally, whilst the burden of proof is on the applicant, if the applicant's evidence is credible the respondent is subject to the evidential burden of proving a real prospect of success or that there is some other compelling reason for trial.

Copyright

25. Again, the principles are not in dispute, so I will briefly summarise the law. Section 1(1)(a) of the Copyright Designs and Patents Act 1988 (“the Act”) provides that, “*Copyright is a property right which subsists in ... original literary, dramatic, musical or artistic works.*”

26. Section 4(1)(a) provides that “*artistic work*” means, “*graphic works, photographs, sculpture or collage, irrespective of artistic quality.*” A graphic work by subsection 2(a) and (b) includes works such as drawings, diagrams, charts, plans, engravings, etchings and similar works.

Originality

27. Originality requires the maker’s own intellectual creation or independent skill and effort - see *Infopaq International A/S v Danske Dagblades Forening* [2010] FSR 20 at paragraph 37. In addition, in *Sawkins v Hyperion Records* [2005] EWCA Civ 565 Mummery LJ said at paragraph 28:

“ The general policy of copyright is to prevent the unauthorised copying of certain material forms of expression (literary, dramatic, artistic and musical, for example) resulting from intellectual exertions of the human mind. The scope of protection available is subject to numerous qualifying conditions, restrictions, exceptions and defences, which are not relevant to this case.

29. The important point is that copyright can be used to prevent copying of a substantial part of the relevant form of expression, but it does not prevent use of the information, thoughts or emotions expressed in the copyright work. It does not prevent another person from coincidentally creating a similar work by his own independent efforts. It is not an intellectual property monopoly in the same sense as a patent or a registered design. There is no infringement of copyright in the absence of a direct or indirect causal link between the copyright work and the alleged copy.”

28. The maker may be influenced by or take inspiration from other works, but this is not a bar to originality as long as it was not slavishly copied:

“31. The policy of copyright prevention and its limited scope explain why the threshold requirement of an ‘original’ work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value. A work may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work need only be ‘original’ in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.”

Infringement

29. Section 16 of the Act sets out acts restricted by copyright in the work. Subsection (1) provides what the copyright owner can do, which includes, “(a) to copy the work” which refers to section 17. Section 16(2) states, “Copyright in a work is infringed by a person who without licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.”

30. Section 16(3) provides, “References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it - (a) in relation to the work as a whole or any substantial part of it; and (b) either directly or indirectly; and it is immaterial whether any intervening acts themselves infringe copyright.”

31. Section 17 provides:

“(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.

(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing work in any material form. This includes storing the work in any medium by electronic means.

(3) In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work.”

32. Ms Reid submitted that the approach that must be taken when assessing an allegation of infringement of artistic copyright was set out by Lord Millet in *Designers Guild Ltd v Russell Williams (Textiles Limited)* [2001] FSR 11, where differentiating copyright protection from passing off, he stated at paragraph 38:

*“ An action for infringement of artistic copyright, however, is very different. It is not concerned with the appearance of the defendant’s work but with its derivation. The copyright owner does not complain that the defendant’s work resembles his. His complaint is that the defendant has copied all or a substantial part of the copyright work. The reproduction may be exact or it may introduce deliberate variations involving altered copying or colourable imitation as it is sometimes called. Even where the copying is exact, the defendant may incorporate the copied features into a larger work much and perhaps most of which is original or derived from other sources. But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant’s work - see *Warwick Film Producers Ltd v Eisinger* [1969] Ch 508. Thus, the overall appearance of the defendant’s work may be very different from the copyright work, but it does not follow that the defendant’s work does not infringe the plaintiff’s copyright.”*

33. Paragraph 39.

“39. 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 of 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.”

34. Paragraph 40:

“40. Even at this stage, therefore, the enquiry 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, but differences in the overall appearance of the two works due to the presence of features of the defendant’s work about which no complaint is made are not material.”

35. Paragraph 41:

*“41. Once the judge has found that the defendant’s design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of the impression for whether the part taken as substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendant’s work, as I have already pointed out. The (inaudible) part is considered on its own - see *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 293 per Pearce L. and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose.”*

36. I was also referred to Lord Scott’s judgment at paragraphs 61 to 65, as to substantiality and also, recently, the decision of Melissa Clarke HHJ, in *ATB Sales Ltd v Rich Energy*, [2019], EWHC 1207, IPEC, where she said at paragraph 14:

“Accordingly, when considering whether a substantial part of a copyright work has been taken for the purposes of section 16(3), CDPA 88, what matters is the extent to which that part contains elements which express the intellectual creation of the author. If it contains elements which express the intellectual creation of the author, then it is a substantial part. If it does not, it is not.”

And further, at paragraph 15:

“It is common ground that an essential part of proving copying is an unbroken causal connection between the original work and infringing copy. That causal connection can be either direct or indirect pursuant to section 16(3) B, CDPA 1988. A prima facie case of copying may arise if there is substantial similarity and proof of access to the original work by the alleged infringers.”

And then paragraph 39 of *Designer’s Guild* is quoted.

The Issues

37. Subject to meeting the test for summary judgment, the current issues as set out in paragraph 2 of the particulars of claim are:

- (a) Ownership by the claimant of the copyright works.
- (b) Whether the alleged infringing designs were indirectly derived from the copyright works.
- (c) Whether the alleged infringing designs reproduce a substantial part of the copyright works.

Then (d) relates to undertakings and (e) to entitlement to enhanced compensation due to flagrancy claimed under section 97(2) of the Act and what was alleged as a cynical breach of the undertakings.

38. The draft defence admits the issues at (a), (c), (d) and (e). As to indirect copying, issue (b), at paragraph 4(2), it states

“Issue (b) also rises, save it is admitted that the designers of the designs on the defendant’s products were aware of the packaging of the claimant’s Filmstar Palette product at the time that those designs were created. As to which, see further, below.”

39. With further regard to the state of mind of Aldi’s designers, paragraph 44(2) states:

“It is admitted that the designers of the designs on the powders of the first palette, and on the lid of the second palette were aware of the packaging of the claimant’s Filmstar Palette product at the time those designs were created.”

And 44(3):

“It is denied that there was any intention to infringe the copyright in any of the claimant’s packaging or that such copyright has been infringed.”

40. Further, Aldi rightly raise as an issue in paragraph 4(3) of the draft defence, subsection 1: *“Subsistence of the copyright in each of the alleged copyright works.”*

Fixation and Copyright

41. Mr Edenborough submits that there is a point of law as to whether copyright can subsist in the powder design as that is ephemeral in nature. The draft defence at paragraph 13(1) says:

“It is denied that copyright can subsist in such a transitory medium as the top surface of a powder as the purported copyright work is not thereby fixed.”

42. Mr Edenborough submits that the powder design is debossed, i.e. consists of impressed markings in the two trays of the powder itself. He relies on *Merchandising Corporation of America Inc v Harpbond Ltd, [1983], FSR 32*, where the facial makeup of the musician, Adam Ant, was found not to be protectable as there was no medium in which it was fixed. Mr Edenborough submits therefore, that no copyright can subsist in the powder design, as it is merely ephemeral depressions in the powder itself, which, when used, will disappear.

43. Miss Reed submits that this must be wrong as there is no basis for denying copyright protection to the artistic work embodied in the surface of the powder as what matters is that the work can be identified from the drawing and reproduced in the powder. She further submits that this is recorded in various photographs.

44. I have included a photograph of Islestarr’s powder design in paragraph 4 above, opposite Aldi’s version. Below, I reproduce annex 4 to the particulars of claim. I would add that hereafter, all references to annexes are to those in the amended particulars of claim.

BRONZER & HIGHLIGHTER 'FILM STAR BRONZE & GLOW'

PRODUCT EXAMPLE



DESIGN IN SAMPLING – WAITING FOR CONFIRMATION



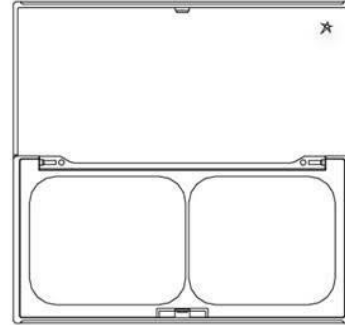
- Primary Decoration-
- Top plate is to be produced in Rose Gold (to match Luxor 255). This is a separate component. Pattern, monogram, diamond and seam motif to be debossed.
 - Compact to match a Rose Gold colour (Luxor 255). Top plate and product colour need to match.
 - Inner insert to be metallized to match Rose Gold, please refer to Luxor 255.
 - Star signature to be silk screened on mirror in clear matt .

ARTWORK

TOP PLATE DESIGNS



INSIDE DETAILING (MIRROR ONLY)



- Product Artwork-
- Please refer to supplied artwork files for exact measurements, positioning and any further details (supplied separately).
 - These corresponding files are print ready and only these files are to be used for production.

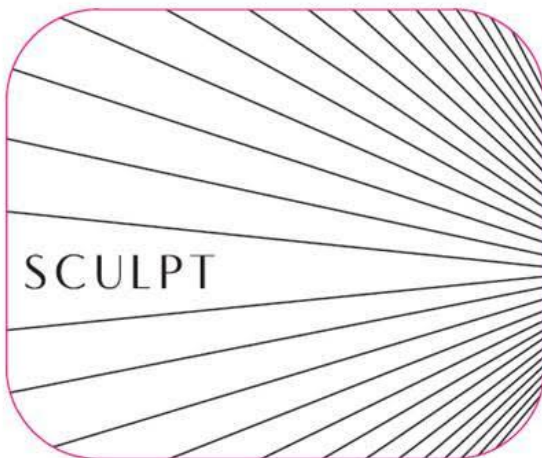
PROJECT ISLESTARR – BRONZER AND HIGHLIGHTER PAN DECORATION

DIMENSIONS: (LEFT PAN) W 54.2 x H45.2, (RIGHT PAN) W 51 x H45.2

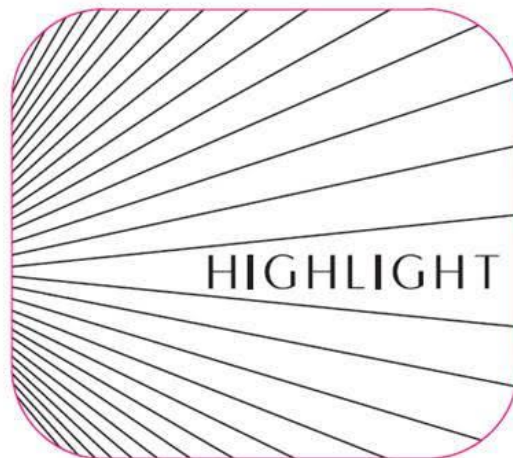
DECORATION: All graphics and text to be debossed into the formula

● 100% Black denotes deboss artwork

— 100% Magenta Keyline denotes pan dimensions



LEFT PAN



RIGHT PAN

45. The drawing of the two pans is the artistic work concerned, and refers to the graphics - the rays - and the text - the words “*to be debossed into the formula,*” i.e. the powder.

46. Miss Reed referred me to the judgment of HHJ Birss QC, as he then was, in *Abraham Moon and Sons v Thornber*, [2012], EWPC 37. That was an action for copyright infringement related to a design of woollen plaid fabric called Sky Sage, which was contained in what was called the Sky Ticket Stamp. At paragraph 102, HHJ Birss said:

“The Sky Ticket stamp is not a drawing of the Sky Sage fabric, and if a layman looks at the Sky Ticket stamp, all they see are two pages of words and numbers. However, Mr Aviard and Mr Wellings gave clear evidence which shows in my judgment, that to an experienced fabric designer, the ticket has real visual significance. Mr Wellings said that he could look at a weaving ticket and visualise what the fabric looks like. Mr Aviard said he visualised the design and then recorded it in the ticket. Thus, it seems to me that to those people, the ticket has a visual significance. I do not see why it matters that the visual significance is only apparent to some people.”

47. And also, at paragraph 104:

“Fixation is an important aspect of literary and artistic copyright cf article 2, Berne Convention. Although article 3(2) of the 1988 Act only refers to literary, dramatic and musical work, and section 4 has no corresponding provision, I presume that is just because it is assumed section 4(1) inevitably requires a record of the work in a material form. If the image of Sky Sage had not been fixed, that would be a different matter, but the ticket acts as a record of the image.”

Then at 106:

“Artistic copyright must relate to the content of the work of the artist and not the medium in which it is recorded. It is, or should be, a content copyright and not a signal copyright. The visual image of Sky Sage, if it was fixed in a material form as a drawing, would be protected by artistic copyright. It seems to me that to deny artistic copyright in this case, despite the fact the visual image is indeed, fixed in a material form, is to confuse the medium with the message.”

It was therefore found to be an artistic work within section 4 of the Act.

48. I am in no doubt that the design embossed into the powders can be subject to copyright protection in principle. Otherwise, artistic works by, for example, persons who make sculptures out of sand at low water on a tidal beach, which are then washed away, could have no claim to copyright in, say, a pre-construction sketch or photograph of the completed work. Likewise, I can see no reason why the creator of a bespoke wedding cake could not claim copyright in his or her work. The fact that the design in the powders disappears by being

rubbed away by the user, does not, in my judgment, affect or remove the copyright protection to which such an artistic work is entitled, as that is as set out as a visual record in Annex 4. In other words, the powders are a three-dimensional reproduction of the two-dimensional object, namely the drawing.

49. Mr Edenborough also submits that no copyright exists in single words see *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch. 119 and *Coppinger* (17th Edition) at paragraph 3.231 to 232. Therefore, he submits, there cannot be literary copyright in the words embossed, namely “*sculpt*” and “*highlight*”. That must be right, but I think in principle, it is not the actual word or words in which copyright subsists, but their presence as part of the overall artistic work.

50. I therefore do not accept Mr Edenborough’s submissions that copyright cannot subsist in the Powder Design, including the words, in principle. I now turn to the issues as they apply to the Starburst and Powder Designs.

The Facts: Ownership

51. Aldi does not admit subsistence of copyright and ownership of each of the works and, further, as to whether, as alleged, it has copied a substantial part of either or both works. Aldi do – at paragraph 21.1 of the draft defence - admit that the Starburst and Powder Designs were developed by employees of Made Thought or others, and that such legal beings are a joint author with others.

52. Islestarr claim at paragraph 8 of the particulars of claim: “*the Starburst design was developed from an initial concept drawing created by James Houston, in or around October 2012, in the course of his employment by the claimant as Head of Operations. Mr Houston was, at all material times, a qualifying person within section 153(1)(a) and 154(1) of the Act, being a British citizen, domiciled and/or resident in the United Kingdom. A copy of the initial concept drawing is at Annex 2*”

53. Further, by paragraph 9, “*The powder design was also created by James Houston in the course of his employment by the claimant between about December 2012-January 2013. It was developed from the same initial concept drawing at annex 2, in the manner recorded in the PowerPoint at Annex 3*”

54. And then, in paragraph 10, “*the Starburst and powder designs were developed in conjunction with the claimant’s design agency, Made Thought Limited. The initial design evolved, as shown in the artwork overview and pan-decoration design, the pan-decoration design in annex 4, which were then provided to the manufacturers, who, with the claimant, developed them further for the purpose of production of the Filmstar Palette*”.

55. There is no challenge to Mr Houston as a qualifying person. In his first statement, he initially describes the normal design process. He then sets out the history of the creation of the Starburst and Powder Designs. At paragraph 16 he says:

“*My inspiration for the Starburst design was combining the overall art-deco theme of Charlotte Tilbury Beauty with sunshine rays, colours of rose gold, faceted surface treatments, reeded glass, antique mirrors and vintage cigarette cases.*”

56. And then, at paragraph 17:

“I created the first concept drawing when I was Head of Operations, on or around October 2012. Designing products and packaging was an element of my role as Head of Operations. The initial concept drawing I created is at annex 2 to the particulars of claim. I then worked in conjunction with Made Thought Limited to develop this initial design into the artwork overview, at page 1 of annex 4 to the particulars of claim.”

57. As to the powder design, he says, at paragraph 22:

“The powder design was also based around the overall art-deco theme that Charlotte Tilbury Beauty was trying to achieve, along with the sunshine rays which were a play on the diamond and scene concept. Art-deco era and the embossed wording on the powder design was to emphasise the brand’s easy to use ethos.

And then at 23:

“I developed it from the same initial concept drawing at annex 2 to the particulars of claim and, as recorded, in the PowerPoint document at annex 3 to the particulars of claim. That document records my creative design and thought process and the different artistic works IHL considered for the Filmstar Palette, which resulted in IHL choosing the powder design.”

58. He concludes, at paragraph 25, by saying:

“I believe the powder design is an original design. I did not rely on any other specific documents or designs for my inspiration which I describe above.

59. He summarises by confirming that it was the intent of himself, Charlotte Tilbury, Islestarr and Made Thought that Islestarr would own the intellectual property rights in everything that Made Thought worked on for Islestarr. Ms Pinsent explains how Islestarr is the exclusive licensee of the Charlotte Tilbury trademark and logo. She exhibits, she says to perfect Islestarr’s title to intellectual property in the Filmstar Palette, a confirmatory deed of assignment, dated 27 November 2018, which I will call the First Assignment, which was made between Made Thought and Islestarr.

60. The First Assignment states that Made Thought provided design services between June 2012 and June 2016, under an oral agreement to provide the works, in consideration of fees paid to Made Thought and ownership of the intellectual property rights to Islestarr. The works are referred to as set out in schedule 1, which is the Starburst Design and all other works created by Made Thought for Islestarr, including Charlotte Tilbury.

61. The draft defence criticises this First Assignment as it merely confirms that the assignment had taken place and that schedule 1 is different to the starburst design as to colour and edging. In particular, at paragraph 22(2), Aldi point out a contradiction in Islestarr’s case, as by paragraph 3.1(a) Made Thought warrant that they were the sole legal and beneficial owner of the rights and, by 3.1(d), that works and all intellectual property rights were their original work. The latter clearly is contrary to Islestarr’s case and the evidence of Mr Houston.

62. As a result of these and other criticisms by Aldi, a further deed of assignment, dated 11 April 2019, was entered into between Made Thought and Islestarr, which I will call the Second Assignment. The date of the design services was extended to between late 2011 and June 2016. Schedule 1 now includes annex 4. Clause 3.1 has been amended to exclude any rights jointly owned with Islestarr. Further, it assigns all rights to the extent they were not so previously assigned.

63. This Second Assignment was exhibited to Mr Austin's witness statement. At paragraph 8 he confirms that it was always Made Thought's understanding and intention that Islestarr would own the intellectual property rights in everything created on Islestarr's behalf.

64. Mr Austin states that, as a result, he signed the Second Assignment. He refers to the fact that Made Thought worked for Islestarr from December 2011 and, specifically, that Made Thought has no claim to ownership of intellectual property rights in the Starburst and Powder Designs. Finally, he confirms that all individuals that worked on any projects for Islestarr up to 1 January 2015 were employees of Made Thought.

65. As Mr Edenborough submits, proving title to copyright works is a technical but essential point, especially here, where, as final relief is sought, the beneficial and legal title must vest in the claimant. The oral agreement between Islestarr and Made Thought cannot transfer a legal title which must be in writing – s.90(3) of the Act.

66. Mr Edenborough rightly submits that there was no evidence-in-chief as to any oral agreement to pass title - such as the individuals concerned, the date, what was sold and so on. He emphasises that fees paid are past consideration, ie, no consideration so that the assignment is ineffective. Miss Reid's response to that point is that, as these are deeds, no consideration is necessary for them to be effective which I consider must be correct. Further, without more detailed evidence, Mr Edenborough submits Islestarr is in a contractual mess and that the oral agreement needs further investigation including evidence from Miss Tilbury, who is referred to personally having works created for her by Made Thought.

67. Mr Edenborough queries first whether title could still vest in Mr Houston or Mr Wojcik and secondly, what title to the contributions made by La France Corporation vest in Islestarr. As such, final relief, he submits, cannot be ordered.

68. As to La France, exhibited to Mr Houston's first statement is a drawing by "Clive" of the Starburst Design dated 19 November 2012, save that there is a darkened border around the diamond which is not in the final production version. Mr Houston has noted his approval on the drawing in manuscript on 20 December 2012 but with certain amendments referring to a 3D drawing. He explains in his statement that this was the final "*top plate proof*".

69. In his second statement, Mr Houston expands on this explanation. He says that he did not deal directly with La France but via a company known as HCP who he had approached to produce the palette packaging and that HCP used La France to produce the top plate proof. He explains the darkened border was not part of the design that was approved by him and was a limitation of the drawing itself.

70. Further, Mr Houston exhibits the 3D drawing he refers to in his manuscript note on the top plate proof. That 3D drawing is the Sunburst Design. Most importantly he states that none of Clive, La France nor HCP had any involvement in the design process and accordingly, cannot be joint authors. Mr Houston then explains how HCP produced the proof

for the entire palette case on 26 December 2012 which he marked as approved on 3 January 2013.

71. This drawing also had the darkened emphasis but he explains that, like La France, this was a limitation in their manufacturing drawings as the key design issue for him was that the engraved sun rays would not converge when meeting the diamond and seam, combined with those rays finishing the correct place to create a clean edge.

72. Mr Edenborough criticises the Starburst Design drawings, emphasising the differences and in particular, the lack of evidence from La France, especially in view of the drawing I have described and the reference in paragraph 10 of the particulars of claim to both Starburst and Powder Designs being developed with Made Thought. Then there is reference to the drawing in Annexe 4 being “*provided to the manufacturers who, with the claimant, developed them further for the purpose of production of the Filmstar Palette*”.

73. So there is a contradiction between the development work by the manufacturers such as La France - which on the face of it, indicates further joint authorship- as appears in paragraph 10 of the particulars of claim and the second tranche of Islestarr’s evidence. Mr Edenborough submits that all these matters are questionable and deserve a full explanation which can only be explored at trial.

74. Miss Reid submits - as appears in the second tranche of evidence - that the manufacturers have no involvement in the creative process and so were only responsible for reproducing both designs on the Filmstar palette. That part of paragraph 10 caused me some considerable concern in terms of this application for summary judgment.

75. However, my concerns, and Mr Edenborough’s criticisms, are in my judgment answered by that second tranche of evidence. I accept, in particular, that the designs were fixed by October 2012 as can be seen by Mr Houston’s work and the options he produced for the Powder Design at Annex 3 and likewise the drawings of both designs in Annex 4.

76. I now, with further regard to title, turn to the evidence of Mr Wojcik. Mr Edenborough criticises his evidence as he does not expressly say that he was actually employed by Made Thought Limited where he was senior designer from July 2011 until he became a design director between February and December 2014. Following the restructuring since 2015, he has been design director at Made Thought Design Limited.

77. At paragraph 33, Mr Wojcik explains as an employee of Made Thought, which he defines as both the above companies that “*it never occurred to me that anyone other than my employer or client would own the intellectual property rights in everything I created for Made Thought and the client*”. He confirms his understanding he could not personally retain any intellectual property rights. As I have mentioned, Mr Austin has confirmed all individuals on Islestarr’s project for Islestarr up to 1 January 2015 were employees of Made Thought Limited.

78. Mr Wojcik sets out in his statement how within Made Thought he had carriage of the design role and that he mainly worked with Mr Houston on primary packaging - the palette - and secondary packaging - the outer- being the cardboard box. Mr Edenborough submits that Mr Wojcik was not mentioned in the particulars of claim although Made Thought are credited with joint development with Mr Houston of the designs in paragraph 10 of that pleading.

79. Mr Edenborough further submits that nowhere in any of the witness statements of Islestarr's witnesses is there any direct statement that Mr Houston was an employee at the material time. He says Mr Houston stated that he was a director and that he worked for Islestarr, but that could mean he was a director without a contract of employment. However, as Miss Reid submits, paragraph 8 of the particulars of claim which has a statement of truth signed by Ms Pinsent as chief executive officer, refers to him being employed by Islestarr. I accept that submission and find that he was employed by Islestarr.

80. In summary, as to title, notwithstanding Mr Edenborough's trenchant and far-reaching criticisms, I am satisfied on the balance of probabilities that:

- (i) Mr Houston was employed by Islestarr at the material time;
- (ii) Mr Wojcik was employed by Made Thought at the material time;
- (iii), Made Thought validly transferred such title as they had in the starburst and powder designs to Islestarr by the first and second assignments;
- (iv) No manufacturer or other legal being brought in at any other phase of the development of the designs, whether Clive, La France or HCP or others, and any joint authorship rights in respect of either or both designs.

81. Accordingly, Islestarr have established title to the Starburst and Powder Designs for the purpose of this application and Islestarr has established ownership.

Originality

82. The next issue raised by Aldi in its defence is the question of whether copyright subsists in each of the works. Mr Edenborough submits that Aldi question what is original the two works and that this is of especial importance as it determines the scope of any rights Islestarr may have. In particular, Islestarr can only claim a narrow scope of protection in what he describes as a crowded field so as to not wrongly take the intellectual property rights of others.

83. In that respect, he submits that, taking a mere generic idea is permissible - see Coppinger 17th ed, paragraphs 7-100 to 102, 104 to 107 and 109. As a result, an investigation of what Islestarr and others on its behalf looked at when producing the designs is necessary combined with prior art. Then regard must be had to what elements of the original designs, if any, appear in the Aldi versions as liability only arises if all or a substantial part has been copied. Islestarr must have good title to that part or parts. Likewise non-original elements can be copied freely.

84. The Starburst Design is defined in the particulars of claim at paragraph 5 as the "*decorative design embossed onto the lid of the packaging*". Colour is irrelevant. This design consists of three elements, the diamond and seam motif, the Charlotte Tilbury monogram within the diamond and sun rays emanating from the diamond.

85. Messrs Houston and Wojcik worked together to arrive at the "primary pack graphics" being the first page of Annex 4 containing the artwork for the lid. This, they developed, from Mr Houston's original sketch at Annex 1. Mr Houston explains in his second statement how the diamond and seam had been pretty much finalised by the time he started work at Islestarr in May 2012.

86. Mr Houston also explains how earlier, around February 2012, he attended a meeting before formally joining Islestarr at which Made Thought presented some visual options

which he thinks was the brand identity presentation exhibited to Mr Wojcik's statement and the Brand Investigation Report. He explains how, with Mr Wojcik, they both developed his pencil sketch into the design found in Annex 4, which became a starburst instead of a chevron design.

87. Mr Wojcik in his statement sets out how the brand investigation report was developed by him and Paul Austin for Islestarr. His responsibility was design ideas for the new brand, which appear in section 4. This included specifically linear patterns and sunburst motifs.

88. This work was approved by Islestarr and so Mr Wojcik worked with them on ideas for the core brand, which resulted in the brand identity presentation, dated 20 February 2012. Islestarr preferred the geometric glamour concept which resulted in the Brand Development Summary of 21 May 2012. Thereafter, he worked with Mr Houston, leading to the finalisation of the primary packaging for the Filmstar Palette which was intended to be one of the flagship products of the Charlotte Tilbury range.

89. Then, in late October 2012, Mr Wojcik with Mr Houston took elements of the Starburst designs and produced a Primary Pack Graphics and Artwork Overview which included a 3D render of the Starburst Design.

The Powder Design

90. Mr Wojcik also says he assisted Mr Houston in formalising the Powder Design. Mr Houston explains how the development of this design was far more straightforward as the debossed pressed powder pattern was not as complex as incorporating the Starburst Design into a metal top plate.

91. He says he created a number of potential designs and recorded them in a slide on 20 December 2012, which appears at Annex 3. After a discussion with Miss Tilbury, a decision to proceed with the two designs at the top of the page, was made incorporating the words "*sculpt*" and "*highlight*."

92. Then, with Mr Wojcik, they worked to refine the design into the final version at Annex 4 - the left and right pans - which included the words "*sculpt*" and "*highlight*" respectively, with starburst rays. This is confirmed by Mr Wojcik, who refers to the final design as a natural extension of the Starburst Design.

93. Mr Houston states both designs draw heavily from the art deco era and that he formed an inspiration mood board, which Mr Edenborough criticises for its non-production. Mr Houston states in his first statement he did not rely on any other specific documents or designs for his inspiration, although in his second statement he confirms he did see the Brand Investigation Report. Mr Edenborough submits that this is a substantial discrepancy in his evidence, especially as the initial impression by Mr Houston was that he was responsible for all aspects of the Starburst Design. This, Mr Edenborough submits, is a fundamental omission as Mr Wojcik did not give any evidence-in-chief.

94. There is some force in these submissions as to the way in which the evidence has developed but not, in my judgment, such as to warrant dismissal of this evidence on the basis that it should be explored orally at a trial, or that there appears to be a need for full disclosure. In my judgment, whilst the development of the evidence in various respects can

be criticised, I do not consider there was an intention to mislead. The key element as to inspiration is that both Messrs Wojcik and Houston looked to art deco.

95. Mr Pattni exhibits at annex 2 to the defence 26 items, such as cigarette cases, lighters and so on, of prior art. Five of these were manufactured by Faberge over the period 1899 to 1917, 19 manufactured by the Evans Case Company over the period 1920 to 1960, when Evans went out of business, and two were made by Cartier in the 1930s. Many incorporate faceted surface treatment, raised central diamond devices, and sun rays emanating from the centre.

96. Mr Pattni submits in his evidence that Mr Houston was in all likelihood aware of these pieces of prior art and so neither design was original to him and so no copyright can rise.

97. Messrs Houston and Wojciech say they have no recollection of ever seeing the specific prior art examples, including other exhibited creations by the Evans Case Company.

98. Miss Reed submits that it is notable that all these examples of prior art were found by Aldi's solicitors, or agents appointed by them on their behalf and are not put forward by Aldi themselves.

99. Messrs Houston and Wojcik rightly acknowledge the art deco inspiration. There is no copyright in such generic ideas. Mr Edenborough submits Islestarr's sunrays are just generic components. Miss Reed submits that the approach of Mr Edenborough in dissecting Islestarr's designs into individual elements which can all be found in art deco ray motifs is wrong, as it appears to require some form of innovation. I agree.

100. When each design is looked at as a whole, I consider there is no element of "*slavish copying*," see *Sawkins*, in any of the 26 pieces of prior art or design that are said to be identical to those of Islestarr.

101. On that basis, I turn to whether the designs are the original work of their author's own intellectual creation. The second tranche of evidence explains the development of each design and documents it. In my judgment, both Messrs Houston and Wojciech made their own and/or joint intellectual choices in the creation of both the starburst and powder designs, see info pack. I therefore find that each design is original and copyright subsists in them.

Infringement

102. The sum of my above findings is that Islestarr has title to the Starburst Design and the Powder Design in that those designs were created by original thought of two qualifying persons employed by Islestarr and Made Thought and Made Thought have validly assigned their intellectual property rights to Islestarr. I now turn to consider whether Islestarr's copyright has been infringed by Aldi's first and/or second palettes.

103. The draft defence sets out a general denial of infringement at paragraph 29(1). At paragraph 4(2) Aldi admit the designers of the designs on its products were aware of Islestarr's packaging when Aldi's designs were created. At paragraph 48(1), Aldi admit they were aware of the Filmstar Palette, "*at the time it designed or approved they designed the first and second palettes.*"

104. First I must undertake a visual comparison of the four designs - *Designer's Guild* at paragraph 39 - and note the similarities and differences.

105. As to Islestarr's powder design and Aldi's first palette, the similarities are:

- (1) the overall effect is one of similarity.
- (2) rays are debossed onto the surface of each of the two powders which are contained in shallow trays.
- (3) those rays emanate from the centre of the vertical line in the packaging which divides the trays containing each of the powders.
- (4) the shapes of the trays for each powder are symmetrical in each palette, with rounded corners.
- (5) the use of a single word in capital letters in each of the left hand trays.
- (6) the imprinting and position at the outer edge, of each tray of those words in the powders and
- (7) the trays are of square-ish design.

106. As to Islestarr's Starburst Design and Aldi's second palette, the similarities are:

- (1) the use of a starburst design in which, the rays emanate from a diamond.
- (2) a similar number of thin, straight rays.
- (3) each is a rectangle of similar dimensions and proportions.
- (4) the vertical axis of each diamond is central in that it divides the two halves of the rectangle symmetrically.

107. The differences between Islestarr's Powder Design and Aldi's first palette are:

- (1) the different words used.
- (2) there appear to be very slightly more rays in the Aldi first palette.
- (3) the colours of the powders are different.
- (4) the material dividing the trays in the Aldi palette is very slightly wider than that in the powder design.

108. The differences between Islestarr's starburst design and Aldi's second palette are:

- (1) the second palette does not incorporate the diamond and seam motif which in any event, was not claimed to be an original copyright work developed by Mr Houston.
- (2) the second palette does not have a monogram, whether of the Charlotte Tilbury initials or any initials but its brand name Lacura.
- (3) the second palette uses a diamond to surround Lacura, but it is larger, elongated horizontally and placed in the very middle of the lid as opposed to just below the middle.
- (4) the corners of the lid of the second palette are rounded whereas those of the Starburst design are square.
- (5) as to the rays themselves, on the second palette they emanate from the centre of the lid, are evenly spaced, have rounded edges and do not extend to the exact corners, albeit they are rounded.
- (6) the overall visual effect is slightly blurred in the Starburst Design compared to the second palette.

109. The similarities I identify above in 105 and 106 are not matters of design which are

commonplace, unoriginal or amount to general ideas. In my judgment, the significant features in the Islestarr lid which appear in the Aldi one are all of the four features I have set out in 106 above and the significant features in the Powder Design which appear in the second palette are 105.2 to 6 inclusive.

110. The similarities are substantial, both from a quantitative as well as a qualitative perspective. Aldi admit that the designers of their products were at the time their designs were created aware of Islestarr's works. In short, Aldi had prior access. The burden therefore passes to Aldi to satisfy me that those similarities did not result from copying.

111. As to that, Aldi refers to the differences between their second palette and the Starburst Design, including in particular the differences in the way the rays emanate from the diamond, the variant ray motif seen at 108(5) above, but that is not the correct approach - see *Designers Guild* at paragraph 39.

112. Aldi also carefully separate out in their draft defence the variant ray motif which they say is either copied from a prior design or else is sufficiently different so that no substantial copying can be established or, if it is entitled to protection, then that protection should be very narrow.

113. I disagree. I find the variant ray motive is part of Islestarr's Starburst design. The evidential burden has shifted to Aldi and nothing in their draft defence or evidence persuades me that they have discharged that burden.

114. I find that both the Starburst Design and the Powder Design contain creative choices made by their authors which are the intellectual creation of those authors. The similarities I have identified amount to a substantial part of those designs and, accordingly, I find Aldi has no real prospect of successfully defending Islestarr's claim for copyright infringement of each design.

No Other Compelling Reason

115. Mr Edenborough submits that flagrancy goes to the whole merit of Aldi's case in that the state of mind of those within Aldi responsible for the allegedly infringing designs requires examination of what was before them and what they intended to do. Further, to assess flagrancy the court must look at what has been taken in the context of why.

116. All this, he submits, harks back to what is protectable, which goes to the very core of substantiality which depends on originality. Accordingly, oral examination of witnesses is necessary which is a compelling reason to proceed to trial.

117. Ms Reid submits there is no connection between originality and flagrancy as there is no connection between the state of mind of Aldi's employees who copied and originality in the design, originality being relevant to when the designs were created. I accept Ms Reid's submissions. Further, I do not consider that the issue of flagrancy in effect trumps my finding that Aldi has no real prospect of successfully defending this claim - see Arden LJ in *Burnson v Tate* [2015] EWCA Civ 101 at paragraph 6.

Other Matters

118. A number of other matters were raised in submissions and in the skeleton arguments,

plus there are two points I should mention which I set out by subheadings below.

Submissions as to List

119. As I have set out above, Aldi applied to transfer this claim from the shorter trial scheme into the intellectual property list of this division to the intellectual property enterprise court, that application being refused by Master Teverson. In the evidence filed by Islestarr, the need for “*substantial witness evidence*,” “*cross-examination of multiple witnesses*” and “*extensive disclosure*” were cited to defeat Aldi’s application. Aldi, quite understandably, now say that the very reasons Islestarr relied upon to avoid transfer evidence how complicated this matter is and why summary judgment is inappropriate.

120. There appears to me to be an element of exaggeration in Islestarr’s defence to Aldi’s transfer application. However, at the same time, Mr Pattni in his first statement in support of Aldi’s application at paragraph 8 said the claim was not factually nor legally complex and at paragraph 8.7 that those issues were “*considered simple*.”

121. More importantly, Mr Pattni had not set out Aldi’s position that it was aware of Islestarr’s packaging when it created its designs at that time in these proceedings. That acceptance or admission of prior access by Aldi reduces the factual complexity considerably. I therefore do not consider Islestarr’s earlier submissions in those circumstances bind it to a full trial.

Other Relief

122. Mr Edenborough submits that Islestarr’s requests for orders relating to secondary infringement, as it appears at paragraph 16(d) and (e) of the re-amended particulars of claim, of themselves necessitate a trial as they are secondary acts and require guilty knowledge. Ms Reid replied that if I found for her on primary infringement she would not proceed as to secondary infringement. Those subparagraphs are therefore abandoned by Islestarr.

The Failure of Mr Pattni to give his sources of Information and Belief

123. No submissions were made on this during the hearing but it caused me some concern. In particular, practice direction CPR 32 provides at paragraph 18(2): “*A witness statement must indicate: (2) the source for any matters of information and belief.*”

124. That means where the source is a person they must be properly identified, certainly by name and their position, so as to permit proper investigation and consideration by the recipient of the witness statement - see *Masri v Consolidated Contractors International* [2011] EWCA Civ 21 No. 2. This also accords with the overriding objective at CPR 1.1.(2) and also appears in the Chancery Guide.

125. There is no mention in either of Mr Pattni’s witness statements as to who he received instructions from within Aldi. The same applied to who gave him the information as to who designed the Aldi products and also as to the sales figures and costings.

126. Further, the draft defence is likewise silent and does not include a statement of truth by a named individual. As to that, in his second statement Mr Pattni did confirm at paragraph 12 that “*the defendant has authorised me to confirm that the factual matters asserted in the draft defence are true.*”

127. Nor is there any explanation as to why the source or sources are kept confidential. In the absence of such an explanation, I can only conclude there is no such concern here.

128. Generally, where evidence is given in factual disputes by solicitors, there may arise a concern that that party, for reasons to suit themselves, wish to keep their powder dry so as to limit potentially damaging cross-examination in the future. That, without agreement or explanation, should be avoided.

129. I put my concerns to counsel by email after the hearing and requested short submissions. Aldi served and filed the third witness statement of Mr Pattni to correct these omissions. Ms Reid criticises this approach. As the point is not determinative in these applications, I do not think I need in the circumstances of Mr Pattni's disclosure of his sources to consider it further.

Oral Evidence and Disclosure Cross-check.

130. I have approached Islestarr's evidence with the caution appropriate in view of the substantive relief sought, namely a final injunction. As part of my consideration, I have had regard as to whether the evidence of Messrs Houston and Wojcik could be overturned or so brought into question so as to render my decision wrong.

131. In my judgment, there is no material before me impugning the evidence of Messrs Houston and Wojcik as to how they created the two designs so that a trial with oral evidence would appear necessary. The like applies to the documentary evidence before me.

132. Similarly, Mr Edenborough has with, if I may say so, considerable skill put Islestarr to proof at every stage of the chain of causation and tested in all possible respects their claims. The corollary to his persuasive and forceful submissions is that I am satisfied that all such matters have been fully aired and considered in this hearing and that it is just to grant summary judgment.

Conclusion

133. I am grateful to both counsel for their most helpful and comprehensive skeleton arguments and submissions and to the alacrity of their responses as to Mr Pattni's evidence when requested by me. I will hear now submissions as to the terms of the order and costs.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge