



Neutral Citation Number: [2021] EWHC 2632 (Ch)

Case No.IL-2018-000105

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

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

Date: 1 October 2021

**Before:**

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

**Between:**

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

**Claimants**

**- and -**

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

**Defendants**

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

**APPROVED JUDGMENT**

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

**Covid-19 Protocol: This judgment is to be handed down by the deputy judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 1 October 2021.**

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

1. By application notice dated 24 September 2021, the Defendants seek to vacate the damages inquiry currently listed for five days starting on 25 October 2021. Various other directions are also sought.
2. On 10 September 2021, I heard the Defendants’ application to compel the Claimants (by which I mean the First and Second Claimants, the Third Claimant being in liquidation and not currently playing an active role in proceedings) to answer a Request for Further Information (**RFI**). In their counsel’s skeleton argument for that hearing, the Defendants said: “Ds’ objective is not to adjourn the trial of this inquiry listed for October”. I granted the application in part, and the RFI was duly answered by the Claimants. No complaint is now made about those answers, other than that the Defendants now say that they are unable to prepare properly for the damages inquiry in time, and ask that it be vacated.
3. Following the service by email of the unstamped application notice, together with a draft order and an 11th witness statement of James Matthew Seadon of the Defendants’ solicitors (totalling 73 paragraphs over 17 pages excluding annexures), the parties agreed between them the following process for resolving this application:
  - (a) The Defendants would not file a skeleton argument but I should take their submissions in chief as being: (a) the Court has the power to make the orders sought, and (b) the Court should exercise its discretion to do so, taking into account the overriding objective and all the matters raised in Mr Seadon’s 11th witness statement.
  - (b) The Claimants would file and serve submissions in reply by 9.30am on Tuesday 28 September 2021.
  - (c) The Defendants would file any submissions in reply, limited to new points not covered by Mr Seadon’s 11th witness statement, by 9pm on Tuesday 28 September 2021.
  - (d) The application would then be determined by the court on the papers.
  - (e) The parties would be given an appropriate opportunity to seek permission to appeal the written decision.
4. Given the timetable, I was asked to deal with the matter as quickly as possible. I therefore circulated these reasons in draft on 30 September 2021.

**Background**

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

with the remaining 71 garments which had not then been adjudicated. I gave a short *ex tempore* judgment (which can be found at [2021] EWHC 836 (Ch)) on the Defendants' request for declarations of non-infringement. Also on 1 April 2021, I listed the matter for trial on 6 August 2021 to deal with any of the remaining 71 garments that may still be in dispute. I gave directions to prepare for that trial, together with directions for the Claimants' election of a damages inquiry or account of profits in relation to all infringements. I listed the result of that election to be heard over five days from 25 October 2021. Whilst the Defendants have expressed their concerns with the timetable on a number of occasions, no permission has been sought to appeal the listing decision, and the listing has been known to the parties since 1 April 2021.

6. An issue arose after the form of order hearing in relation to the various colourways of some of the seven infringing Selected Garments, and I dealt with that in a judgment which can be found at [2021] EWHC 953 (Ch). I dealt with a further issue relating to costs where a Part 36 offer has been made: that judgment can be found at [2021] EWHC 954 (Ch).
7. Following the Claimants' election of a damages inquiry in relation to the infringing Selected Garments, I heard a CMC on 24 June 2021. I allowed the Claimants to amend their pleadings for the reasons set out at [2021] EWHC 1848 (Ch). I refused permission to appeal, and permission was not requested from the Court of Appeal.
8. In the end, the additional trial listed for 6 August 2021 was not necessary, because the remaining disputes as to liability were resolved between the parties. The Claimants' Points of Claim were served on 20 August 2021. Points of Defence were served on 7 September 2021. As mentioned above, there was a hearing before me on 10 September 2021 at which I ordered the Claimants to provide responses to the Defendants' RFI dated 24 August 2021: that was duly done on 17 September 2021. Also on 10 September 2021, I refused the Defendants' request to institute the disclosure pilot and refused most of the Defendants' requests for specific disclosure. The Defendants have said that they do not intend to seek from me permission to appeal that decision but that they are in the process of approaching the Court of Appeal for permission. Factual witness statements were due to have been served on 24 September 2021, but service has not yet been effected.

### **This Application**

9. On 22 September 2021, the Defendants wrote to the Claimants seeking consent to vacation of the damages inquiry and amendments to the timetable, which the Claimants refused. The Defendants then issued this application on 24 September 2021, seeking orders:
  - (a) adjourning the damages inquiry;
  - (b) allowing the Defendants to file an Amended Defence;
  - (c) extending the deadlines for a Reply, fact evidence and expert evidence; and
  - (d) granting permission to apply for still further disclosure arising from the Claimants' disclosure and RFI responses given pursuant to my order of 10 September 2021 and again following any Reply.

## The Law

10. The parties agreed on the applicable law. The adjournment of a trial whose date has already been fixed is “a last resort” (White Book at 29.5.1). The approach to be taken was explained by Coulson J (as he then was) in *Fitzroy Robinson Limited v Mentmore Towers Limited* [2009] EWHC 3070 (TCC):

“8. What are the relevant principles governing an application of this kind? It seems to me that the starting point is the overriding objective (CPR Part 1.1), the notes in the White Book at paragraph 3.1.3, and the decision of the Court of Appeal in *Boyd and Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516. Thus, the court must ensure that the parties are on an equal footing; that the case - in particular, here, the quantum trial - is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases.

9. More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:

- a) The parties’ conduct and the reason for the delays;
- b) The extent to which the consequences of the delays can be overcome before the trial;
- c) The extent to which a fair trial may have been jeopardised by the delays;
- d) Specific matters affecting the trial, such as illness of a critical witness and the like;
- e) The consequences of an adjournment for the claimant, the defendant, and the court.”

## The Defendants’ Basis for the Application

11. The Defendants’ counsel set out the basis for the adjournment application as follows:

“The late provision by Cs of a properly particularised case in this damages inquiry and the late provision of documents relied on, all of which could and should have been provided on 20 August 2021, has the consequences that (a) Ds need to serve an Amended Defence and (b) extensions are necessary to the deadlines for service of fact and expert evidence. ... the knock-on impact of the trial timetable makes an adjournment of the trial unavoidable.”

12. The Claimants reject this submission. They submitted that at the time of the request for answers to the RFI, there was no suggestion that the damages inquiry would need to be vacated – indeed, they referred to the Defendants’ skeleton argument in which the Defendants asserted that their “objective is not to adjourn the trial of this inquiry listed for October”. The Claimants submitted that the Defendants requested further information, the Court granted that order, the

Claimants complied, and it is therefore “rather surprising” that the Defendants should now seek to use the service of the RFI responses as the basis for adjourning the damages inquiry.

13. The Claimants submitted that to justify vacation of the damages inquiry on the basis of the RFI responses, the Defendants must demonstrate that:
  - (a) factual matters, which the Defendants had not previously anticipated were relevant, were raised in the RFI responses for the first time;
  - (b) it is appropriate for the Defendants to give factual evidence in relation to those matters; and
  - (c) it was not possible for the Defendants to prepare their factual evidence in relation to the matters raised in the period between 17 September 2021 and 30 September 2021.
14. The Defendants did not object to that analysis and I accept it. I turn now to apply that process to the RFI responses, which I have reviewed very carefully.
15. Mr Seadon submitted that the RFI responses “disclose a very substantial expansion of the Points of Claim”, but, in the course of his 73 paragraph 11th witness statement, he did not explain how. To the contrary, the Claimants said that there is little in the way of disputable fact in the RFI responses. Many are findings I made in the Main Judgment, or are derived from the Defendants’ own documents and evidence. The Claimants’ skeleton argument examined the RFI responses in some detail, and noted that Mr Seadon’s witness statement did not identify any factual matter raised for the first time on which it is appropriate for the Defendants to give factual evidence, other than some comments about response 1(b). In his skeleton argument in reply, counsel for the Defendants highlighted responses 1(b) and 6A through 7A as new material requiring evidence in response. It is therefore appropriate to look at those responses in more detail.
16. Response 1(b) states as follows:

“The Defendants selected the Claimant’s Garments to copy because they were “on trend” designs produced by a hugely successful competitor brand.”
17. The Defendants contest this, and say that they need time to prepare evidence in response. The Claimants refute that, suggesting that they do not see how the statement could “seriously” be in dispute because of findings in the Main Judgment. Counsel for the Claimants noted the following (House of CB is the Claimants’ brand, Oh Polly is the Defendants’ brand):
  - (a) paragraph 35 of the Main Judgment, quoting the Second Defendant’s evidence explaining how her design process might begin with the identification of a garment “which [had] started to trend”;
  - (b) paragraphs 53 to 55 of the Main Judgment, in which I held that in every instance before me “[the Second Defendant] identified at least one garment (being a House of CB garment or a third party garment), an image of which she emailed to Dr Branney and/or Mr Henderson or otherwise provided directly to the factory”;
  - (c) paragraph 488 of the Main Judgment, where I found that the Defendants “closely monitored the House of CB website and social media”; and

(d) paragraph 491 of the Main Judgment, where I concluded that the Second Defendant “set out to emulate House of CB, and directed Oh Polly staff to hire the same models, rent the same locations, adopt similar hair and makeup, adopt similar flatlays, follow the House of CB packaging from bright pink to softer pink, adopt a similar website etc. She herself copied some House of CB garments, as I have found above, albeit that she also copied garments of other designers as well.”

18. The Claimants ask, perhaps rhetorically, “[w]hy else, other than the fact that the designs were on trend produced by a successful competitor brand, would [the Second Defendant] have selected them as candidates for copying?” I do not need to reach a concluded view on this submission at this time and it would be inappropriate to do so – it is sufficient to conclude that there was, in my judgment, nothing new in response 1(b). The Defendants have not given any evidence that they could not have anticipated response 1(b), nor have they set out the sort of evidence they wish to file to rebut it, or why it is not possible to do so in the current time allowed. If the Second Defendant wishes to give evidence on this point, it is entirely within her knowledge, and has already been canvassed at length in her written and oral testimony in the liability trial. Should she wish, the Second Defendant can readily, quickly and efficiently give a short witness statement on how she selected which of the Claimants’ garments to copy. I therefore agree with the Claimants that this is not a reason, let alone a sufficient reason, to vacate the damages inquiry.
19. The Defendants set out for the first time in their submissions in reply that they also wish to adduce evidence in relation to responses 6A to 7A. These responses are more lengthy, and so I do not set them out here. They relate to the approaches to the calculation of licensing royalties which two reasonable parties in the position of these parties would have been able to agree. Again, I have read these responses carefully. Again, the Defendants have not said why these statements could not previously have been anticipated, what sort of evidence they wish to give, and/or why it has not been possible to obtain that evidence within the existing timetable. Rather, I have before me the assertion “[t]hose facts clearly require (a) pleading back to and (b) covering in the factual evidence.”
20. The RFI responses set out at paragraph 6A to 7A are the usual sorts of issues relied on in a damages inquiry. None of this should have surprised the Defendants. I accept that the Defendants may wish to plead back to these statements, but that is not a complex task. I struggle to see what sort of evidence the Defendants may wish to file: they have not said what that evidence would be, nor explained why that could not be done in the allotted time. I therefore also reject this ground.
21. It follows that I do not accept the Defendants’ declared position that the RFI responses they have identified are such as to meet the test set out above at paragraph 13. They are standard responses, in the case of 1(b) based almost entirely on findings I have already made, and in the case of 6A to 7A are standard issues in a damages inquiry. In any event, the Defendants have also failed to indicate what sorts of evidence they would wish to adduce in relation to those matters, and have failed to address why that evidence could not be adduced in accordance with the current timetable.
22. I am not prepared to take the “last resort” of vacating the listing for the damages inquiry on the basis of undetailed assertions. I therefore reject the Defendants’ declared bases for seeking to vacate the damages inquiry.

### ***Fitzroy Robinson Factors***

23. If that is not sufficient to dispose of the application, I turn now to consider the *Fitzroy Robinson* factors, on which both sides addressed me in detailed written submissions.

#### *The parties' conduct and the reason for the delays*

24. Each side blames the other for the current state of the proceedings. On a number of occasions, I have urged the parties to litigate this matter proportionately. There has been a tendency for both sides to take points that they might have chosen not to, and both sides have noted the serious delays in the early days of the proceedings. As the Defendants submitted, what is relevant for the purposes of this application is what has happened since the Main Judgment, including what has happened since 1 April 2021 when the damages inquiry was listed for 25 October 2021. I have given five judgments in that time – that may give an indication of the number of issues on which the parties, unable to agree, have required the court's decision. I do not consider that failure to agree is the fault of only one side – both sides are culpable.
25. The Defendants say that the late provision of the information in the RFI responses puts them at a material disadvantage. Whilst it is clear that that information could and should have been provided earlier (as I said at paragraphs 13 to 15 of my judgment on 10 September 2021), now that that information has been provided, there is nothing in it which is surprising or, in many cases, new. I have already rejected the Defendants' submissions in relation to responses 1(b) and 6A through 7A and no other issues were specifically raised by them. I therefore consider this factor to be neutral – it does not point towards or against an adjournment.

#### *The extent to which the consequences of the delays can be overcome before the trial*

26. Mr Seadon has set out the disadvantages he says the Defendants now face in preparing for the damages inquiry. I have carefully reviewed Mr Seadon's witness statement. The Defendants were content for this to stand as their skeleton argument, and that is perhaps a more accurate description of what this document contains. I have also read carefully the Defendants' counsel's skeleton argument in reply. In my judgment, both documents exaggerate the difficulties of preparing this matter for trial. Very few specific examples of difficulties are given – and I consider some of the assertions to be overblown. The Defendants are supported by a large team at a highly ranked law firm, and have been using two specialist IP barristers, one of whom has stepped in for the other from time to time. Large sums of money have been spent to date defending the action, and there is no evidence that those resources are dwindling. Indeed, the Defendants aver that they are good for the Claimants' damages and costs, a bill which, at its highest, could well exceed two million pounds – although obviously I make no findings at all in this regard at this stage. None of the difficulties raised seems insurmountable. It remains possible to have a fair trial, with the parties on an equal footing. I therefore do not consider that this factor weighs, or weighs heavily, in favour of an adjournment.

#### *The extent to which a fair trial may have been jeopardised by the delays*

27. As set out above, I do not accept that the Defendants cannot prepare properly in time for the damages inquiry. This factor therefore does not weigh in favour of adjournment.

#### *Specific matters affecting the trial, such as illness of a critical witness or the like*

28. The Defendants also point to the following matters which they say “make it impossible to comply with the current timetable”:

- (a) the court vacation has meant that various members of the Defendants’ legal team have been on annual leave;
- (b) the lead associate on the Defendants’ team left for the bar on 17 September 2021; and
- (c) one of the Defendants’ counsel continues to recover from a traffic accident.

I do not wish to downplay the significance of (c) to those involved, but I do not consider that these factors weigh heavily towards an adjournment of the damages inquiry.

*The consequences of an adjournment for the claimant, the defendant, and the court*

- 29. Both sides say they wish to draw a line under this litigation. Additionally, the Claimants resist an adjournment because of the further costs and delay occasioned. In terms of costs, it is, in my judgment, inevitable that an adjournment would lead to still further costs. As noted at paragraph 28 of my judgment of 10 September 2021, between them the parties are likely to spend on legal fees two or even three times the current maximum monetary value of the claim. That is already grossly disproportionate, and a factor which lies heavily in the balance on this application. No offer has been made by the Defendants to pay the Claimants’ costs of the adjournment.
- 30. The further delay also weighs heavily in the balance. The Claimants have said that their counsel are now not available for a one week inquiry until July 2022 at the earliest. I do not accept the Defendants’ answer which is to submit that the Defendants “have already had to instruct additional counsel (with no prior knowledge of proceedings) to deal with matters in the timetable set by the court”. If either party has to instruct additional counsel at this stage, that will drive up costs still further. It is also the reason why I fixed the damages inquiry for October back in April 2021 – because counsel’s availability quickly becomes challenging unless hearings are fixed. It is not an answer to say either that this matter is not urgent, or that injunctions are currently in place to prevent further infringing. The Claimants have proved infringement. The Defendants acknowledge that there will be some damages to pay. No offer has been made to pay monies on account in the meantime. The Claimants ought not to be shut out of their damages for a further nine to twelve months (and possibly longer) without good reason.
- 31. Both sides also raise the issue of the potential award of costs. For the reasons set out at [2021] EWHC 954 (Ch), because of a Part 36 offer made by the Defendants, I was unable to make a costs award following the Main Judgment. So any costs to be awarded in relation to the liability trial over eight days (the costs of which were significant on both sides) are currently reserved. That cannot go on indefinitely.
- 32. In my judgment, these factors weigh very heavily against adjourning the damages inquiry.

**Conclusion on the *Fitzroy Robinson* Factors**

- 33. Stepping back, I remind myself again that adjourning a trial date which has already been fixed (and in this case, fixed for many months) is a matter of “last resort”. I have rejected the Defendants’ submissions on why they cannot be ready in time. I have also rejected the Defendants’ submissions on whether a fair trial is still possible – I do not consider that the parties will be on an unequal footing. There are no specific matters, such as illness of a critical witness, that suggest the trial should be adjourned. Against this, I weigh the need, as Coulson J said, to deal with the damages inquiry “proportionately, expeditiously and fairly”. In my



judgment, that is done best if done in October. Forcing the Claimants to change counsel or holding the enquiry after July 2022 would significantly drive up costs, and delay the payment of a sum of damages which the Defendants accept they have to pay.

34. For these reasons, the adjournment application is dismissed.

### **Amended Defence**

35. As set out above, in addition to the adjournment application, the Defendants seek a number of other orders which I will deal with briefly. First, the Defendants seek an order granting them permission to file an Amended Defence to the Points of Claim “in which any amendments are consequential on the Claimants’ Disclosure and/or the further information provided in the Claimants’ Part 18 response, such Amended Defence to be filed and served by 4pm on 4 October 2021”.

36. This rather puts the cart before the horse. The usual approach would be for the Defendants to prepare a draft and share it with the Claimants to see if they are willing to consent. If not, the draft should accompany the application notice. Despite its length, Mr Seadon’s witness statement does not set out even in a broad brush way what the amendments would relate to, despite the Defendants having had the RFI responses for a week at the time this application was filed.

37. It is not appropriate for the court to give permission for an amendment at this stage without knowing what it is. This part of the application is therefore refused. That does not shut the Defendants out from their planned amendments, but they should follow the usual process, and first try to reach agreement before seeking an order.

### **Further Disclosure Applications**

38. The Defendants seek orders for permission to apply for further disclosure. This appears to be justified on two bases:

(a) First, the Defendants seek disclosure in relation to an allegation raised in paragraph 11F(b) of the RFI responses – however, the Claimants have responded by saying they will not rely on that allegation “solely in the interest of shutting down another satellite dispute”, so that point goes away; and

(b) Second, the Defendants assert that the accounts of the Second Claimant must be available. The Claimants say no such documents exist, and that the Second Claimant has never owned or licensed any relevant design rights to the First Claimant – it was a party to the litigation only because it owned trade marks relevant to the passing off claim. It therefore seems to me that this issue goes away as well.

39. I dealt with the Defendants’ last disclosure request in my judgment of 10 September 2021. I do not wish to encourage further broad applications of that nature – the parties will recall that the last broad request was largely unsuccessful. However, I do not wish to shut the Defendants out of specific requests for specific documents or small classes of documents which they say they need to prepare their case. But the requests must be specific. I will therefore give the Defendants permission to apply for further disclosure arising from the documents provided by the Claimants on 13 September 2021 and the RFI response, and would urge the parties to try to reach agreement. If agreement cannot be reached, any application should be issued prior to 4pm on 4 October 2021, and dealt with by me on the papers. The parties are reminded of

their continuing obligation to disclose known adverse documents. I reject the Defendants' request for permission to apply for still yet further disclosure following any Reply to any Amended Defence.

### **Costs**

40. Nearly all aspects of the Defendants' application have failed. The Claimants are therefore entitled to their costs. A costs schedule was filed and served in the usual way – the total costs claimed for this application are very modest in the context of this litigation. They are proportionate and reasonable, and the Defendants have made no submission to the contrary. I summarily assess the Claimants' costs of this application at £4,110, to be paid by the Defendants.

### **Orders**

41. The Claimants filed their own draft order, providing for the dismissal of the Adjournment Application, and for the parties to file and offer their factual evidence for exchange on 30 September 2021. Since circulation of these reasons in draft, the parties have agreed that the deadline for exchange of fact evidence should be 4pm on 4 October 2021.