

O-152-16

REGISTERED DESIGNS ACT 1949 (AS AMENDED)

CONSOLIDATED PROCEEDINGS

**IN THE MATTER OF REGISTERED DESIGN NOS 4019752 AND 4019267
IN THE NAME OF AHMET EROL**

AND

**THE REQUESTS TO INVALIDATE (NOS. 42/14 AND 43/14)
BY SUMAIRA JAVAID**

Background and pleadings

1. The registered designs which are the subject of this dispute are owned by Ahmet Erol and are shown below:

4019752

Filed 4 June 2011; granted 29 June 2011. The form of application states that the design is for 'hoodies, t shirts, umbrellas'.



4019267

Filed 18 March 2011; granted 5 April 2011. The form of application states that the design is for 'Tshirts, lady hoodies, men hoodies, baby hoodies'.



2. Sumaira Javaid has requested the invalidation of the design registrations under sections 1B(1) and 11ZA(2) of the Registered Designs Act 1949 (as amended) (“The Act”). Section 1B relates to the requirement that designs must be novel in comparison to others that have been made available to the public. Section 11ZA(2) relates to the proprietorship of registered designs.

3. Ms Javaid states that the designs are not new because she and many of the suppliers working in the London souvenir market have been selling similar designs for many years prior to the application for the registered designs. She states that they were already in the public domain; Mr Erol has not created the designs but, instead, has registered existing generic designs, hijacking the London souvenir market.

4. Mr Erol filed counterstatements, denying the grounds. Although he states that the designs digitally date to 2004, Mr Erol does not say if or when they were publically disclosed. Attached to the counterstatement for 4019752 is a CAD drawing of a cross with two diagonal intersecting stripes, in the manner of a Union Jack. Attached to the counterstatement for 4019267 is a similar CAD drawing, but with a space down the middle of the vertical stripe and with a small tick device on the left hand side of the horizontal stripe. Neither of these drawings depicts any type of garment.

5. Both parties filed evidence¹. The matter came to be heard before me on 19 January 2016. Mr Erol was represented in Newport by Ms Millie Balkan, of Mishcon de Reya LLP. Ms Javaid appeared in London, via video conference. As Ms Javaid’s command of English is limited, she requested that her husband, Malik Tanveer, make submissions on her behalf, which I allowed.

Evidence

6. Ms Javaid has filed some separate and some consolidated evidence.

Consolidated evidence

7. Ms Javaid provides what she states to be a two-page brochure for Global Fashion Links (Ms Javaid is a partner in this company) from 2003. She states that the brochure shows the subject designs Exhibit MT-1²). There is no information as to whether this brochure was ever sent to customers, or how many were printed. It is simply a range of pictures, with no product descriptions, no prices and no item reference numbers. The following pictures appear:

¹ Documents attached to a statement of case or a counterstatement constitute evidence in accordance with rule 21(1)(a) of the Registered Designs Rules 2006.

² The exhibits are called MT- because they also form part of the evidence in Malik Tanveer’s parallel design invalidation actions.



8. Ms Javaid states that she attaches three copies of “old & new pictures three different children who worn subject designs during 2005-07” (Exhibit MT-2). The pairs of pictures are said to be three individuals and are intended to show the same child, or teenager, several years older than the earlier picture in each pair: in the earlier pictures, they are wearing a hoody. However, the hoody has a half Union Jack and half crown device, which is not the same or even similar to the registered designs. Exhibit MT-3 is said to be a statement from a customer which shows that the customer has been buying the subject designs from Global Fashion Links. It is not a witness statement. It is almost identical to Annex 7-C, described below, save that it is signed by a Saeed Khan. It refers to the half Union Jack and half crown design.

4019752

9. Ms Javaid provides the following evidence:

- Annex 1. This is described as a purchase invoice dated 22.12.06 (for £4756.40), a purchase packing list, a remittance letter from Lloyds TSB, a bank statement showing a transaction of £4796.40, a Certificate of Origin from Pakistan dated 5 January 2007, shipping documents, insurance documents related to the invoice, a GSB certificate from the Government of Pakistan, and a bill of lading. There are no pictorial representations of the goods. The purchase invoice from Lahore Fashions (in Pakistan) gives descriptions, such as Ladies Hooded T Shirt I Love London Printed Pullover, but there are no item descriptions which would match a description of the registered design.
- Annex 1-A. This is a similar collection of items to Annex 1, dating from 2007. There are no pictorial representations of the goods and there are no item descriptions which would match a description of the registered design.
- Annex 1-B. This is described in similar terms to Annexes 1 and 1-A. These items date from 2003. There are no pictorial representations of the goods and

there are no item descriptions which would match a description of the registered design.

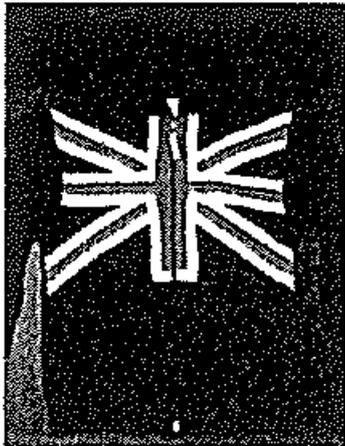
- Annex 2. This contains a photograph of a man wearing a zipped hoody. The design says LONDON ENGLAND with a small Union Jack to one side. This is not the same as or even similar to the registered design.
- Annex 2-B. This consists of loose photocopies of pages from what is said to be a Global Fashion Links brochure published in 2003. It looks as though it is the same document exhibited as an original in Exhibit MT-1, described above. Pages 2 and 3 bear representations, some of which look like photographs, some of which are drawings, of various items of clothing. Some carry Union Jacks, others variations on a 'London England' theme. At the top right of page 2 is a garment which resembles 4019752. Page 4 is what appears to be the final page of the brochure because it is largely blank, save for contact details at the bottom of the page. There is a copyright date of 2003 next to the printer's name and telephone number. At the hearing, Ms Balkan challenged the veracity of this document, submitting that because the format of the telephone numbers for Global Fashion Links and the printer differ, the document cannot be genuine: no printer would make that sort of formatting mistake. I will say more about challenges to the veracity of the evidence later in this decision. Page 5 (the last page of the exhibit) has a copyright date of 2005, so does not appear to be from the same brochure. There is no information about whether this brochure was ever sent to customers.
- Annex 3. This is described as five statements signed and verified by Ms Javid's customers who regularly buy from Global Fashion Links, including a witness statement which shows that Mr Erol is threatening these customers. There are actually six statements, all identical in composition. The witness statements reproduce pictures of various garments which have been bought since 2005. The text states:

"Below is my evidence/witness statement, the contents are true to the best of my knowledge.

This is to certify that we have been trading/buying following stuff with Global Fashion Links since [for example] 08/03/2006 on on and off basis satisfactorily.

I hereby confirm that Mr Ahmet Erol of M/s Nasline has been continuously insisting us that all souvenir designs of London Tourist Market like 'London England' & others are copyrighted by him. Therefore, he is continuously trying to sell us his alleged designs and threatening us, if we don't buy from him. Furthermore, Mr Ahmet Erol always frightened us that he will lodge complaint again [sic] us if we don't buy from him. It is clear understanding in London Tourist Market that those souvenirs' designs were well established for many years and cannot be copyrighted by anyone else."

One of the garments appears with a Union Jack design across the front:

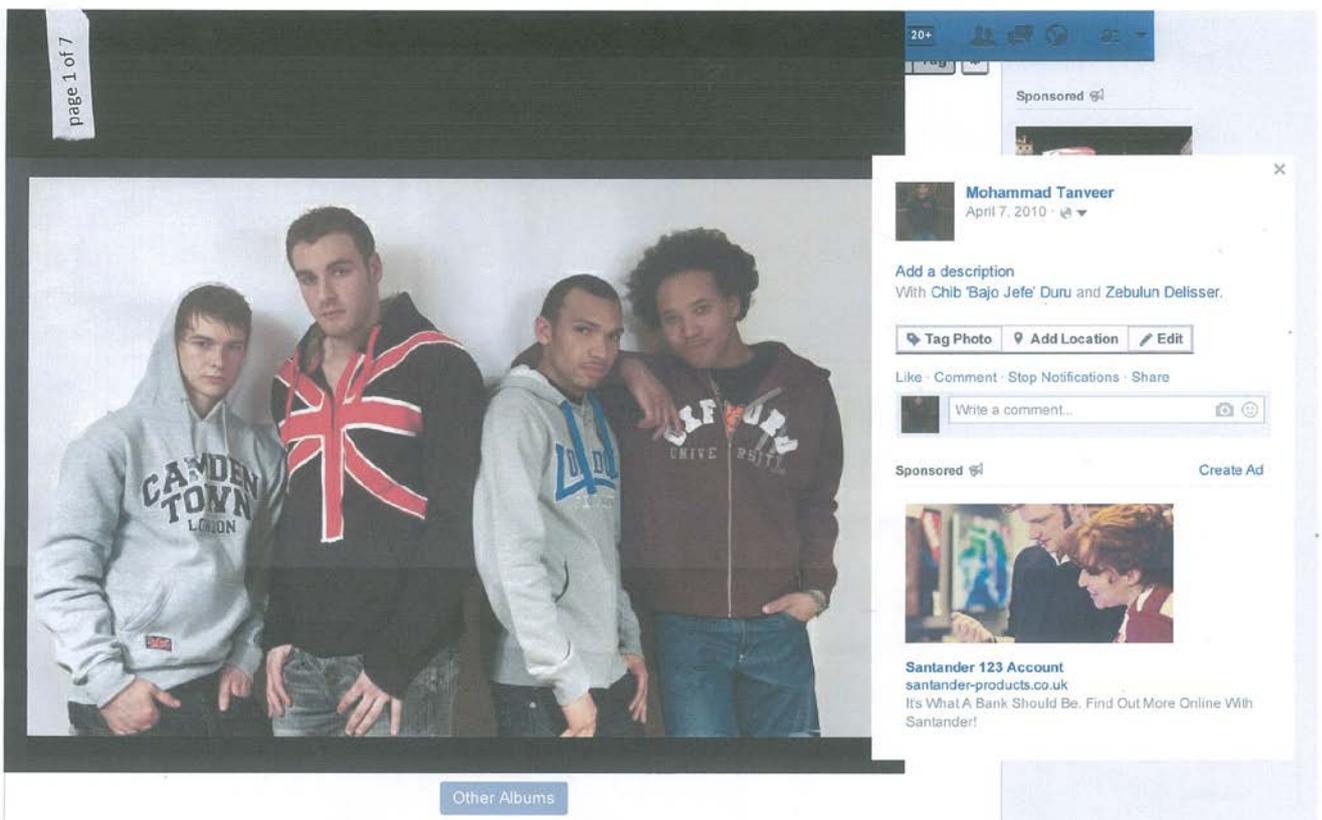


Buying Since 2006

- The first statement is undated and it is impossible to read the name of the signatory (who works for Camden Accessories Ltd). The second witness statement is dated 5 January 2015 and comes from Nasar Ahmed of Camden Craft Ltd. One of the garments appears with a Union Jack design across the front. The third witness statement comes from Waleed Azami, of Decent Choice, in Camden High Street, and is undated. One of the garments appears with a Union Jack design across the front. The fourth witness statement comes from T. Piratheepan, of City Souvenirs, and is dated 3 January 2015. The text below all the pictures says “Buying since 2005”. One of the garments appears with a Union Jack design across the front. The fifth witness statement is undated and is from ‘Tamim’. The text below all the pictures says “Buying since 2005”. One of the garments appears with a Union Jack design across the front. The sixth witness statement is from Arif Asef of Camden Lock Gifts, dated 5 January 2015. The “Buying since...” text has not been filled in beneath the pictures of the garments. One of the garments appears with a Union Jack design across the front.
- Annex 4. This is described as a witness statement from Ms Javaid’s designer. It is not a witness statement. It is a photocopy of a letter on Global Fashion Links headed paper, entitled “To whom it my [sic] concern”, from Brian Reed. Mr Reed says that he has been the designer from Global Fashion Links LTD since 2008 and has a BA in Graphic Design. He refers to a design called “half Union Jack and Crown” he designed in 2008. There are no pictures of this.
- Annex 5. This contains a copy of a witness statement from the managing director of Lahore Fashions, Kashif Zia, dated 19 December 2014. He states that his company supplied Ms Javaid’s company between 2002 and 2008 with the following designs: I Love London Hoodie (2002 to 2008); London England Union Jack Pullover Hoodie (2003 to 2008); London England Union Jack Zipper Hoodie (2003 to 2008); and Half Union Jack & Crown Embroidered Zipper

(2006 to 2008). No representations are provided. Mr Erol contacted the company in Spring 2008, requesting the supply of the same designs as Lahore Fashions supplied to Ms Javaid's company. This was against Lahore Fashion's policy and was refused. The other document in Annex 5 is an email from Mr Zia to Mr Tanveer at Global Fashion Links, explaining that he was sending his witness statement as an attachment and also some old order sheets along with design packs to help in the dispute with Mr Erol (it is not clear which dispute, and the order sheets and design packs are not exhibited).

- Annex 6. This is described as a photo shoot conducted by Global Fashion Links placed on Facebook in 2010. One of the pages in this exhibit is as follows:



- Annex 6-A. This is described as copies of Facebook pictures of family and friends wearing 'the designs'. The registered design does not appear in the single photograph in the exhibit, or anything similar.
- Annex 6-B. This is described as copies of photographs from a school party in Pakistan sponsored by Ms Javaid's supplier, Global Enterprise, in which pupils and teachers wore the designs. The representations are poor and it is not possible to see the registered design, or anything similar, being worn. The photographs are dated 18 January 2005.
- Annex 6-C. This is described as sales invoices and related cheques from 2007. The item descriptions are "Mens union jack crown embroidery baseball jacket",

'Ladies London England embroidery zipper', 'Union jack crown hoodie jacket', 'London England Embroidery zipper', 'Union jack polo', 'Union Jack Patch work zipper', 'Union Jack Embroidery zipper', and 'I love London (printed) suite'.

- Annex 7. This is described as Global Fashion Links' brochure purchase order, t-shirt design pack, purchase order, along with 'design pack', commercial invoice, packing list and 'specs sheets'. The description of the garment in the purchase order, dated 10 March 2009, is for a ladies hood zipper sweatshirt. A picture of a shirt resembling the registered design appears at the top of a purchase order dated 15 March 2004 to Global Enterprises in Pakistan. The items are all described as Ladies Polo Shirt Full Union Jack, in various colours, code GFL-155. The purchase order says "Countersamples are required, without countersamples Order is considered as NOT CONFIRMED!" Design drawings and specifications show the measurements of the different section of the garment coded GFL-155, with a photograph of the polo shirt. The 'commercial invoice' from Global Enterprises is dated 24 May 2004. The style numbers include "GFL-155 Ladies Polo Full Union Jack" (504 pieces at a cost of £730.00).
- Annex 7-A is described as the AHMED Textiles Ltd catalogue, a supplier also providing clothing with Union Jack designs. Ms Javaid states that it dates from 2003, but there is no dating and no pricing on the exhibit.

4019267

10. Ms Javaid provides the following evidence:

- Annex 1. This is described as a purchase invoice dated 22.12.06 (for £4756.40), a purchase packing list, a remittance letter from Lloyds TSB, a bank statement showing a transaction of £4796.40, a Certificate of Origin from Pakistan dated 5 January 2007, shipping documents, insurance documents related to the invoice, a GSPO certificate from the Government of Pakistan, and a bill of lading. There are no pictorial representations of the goods. The purchase invoice from Lahore Fashions (in Pakistan) gives descriptions, such as Ladies Hooded T Shirt I Love London Printed Pullover, but there are no item descriptions which would match a description of the registered design.
- Annex 1-A. This is a similar collection of items to Annex 1, dating from 2007. There are no pictorial representations of the goods and there are no item descriptions which would match a description of the registered design.
- Annex 1-B. This is described in similar terms to Annexes 1 and 1-A. These items date from 2003. There are no pictorial representations of the goods and there are no item descriptions which would match a description of the registered design.
- Annex 2. This consists of a photograph of a man wearing a zipped hoody. The design says LONDON ENGLAND with a small Union Jack to one side. This is not the same as or even similar to the registered design. Copies of pages from what is said to be a brochure published in 2005 are shown in this exhibit. There

is a copyright date of 2005 on the page which looks like a front cover. Another page has pictures of garments. They all feature the word London, except for one picture which is poorly represented, but which may resemble a Union Jack.

- Annex 2-B. This consists of loose photocopies of pages from what is said to be a Global Fashion Links brochure published in 2003. It looks as though it is the same document exhibited as an original in Exhibit MT-1, described above. Pages 2 and 3 bear representations, some of which look like photographs, some of which are drawings, of various items of clothing. Some carry Union Jacks, others variations on a 'London England' theme. At the bottom left of page 3 is a garment resembling 4019267. Page 4 is what appears to be the final page of the brochure because it is largely blank, save for contact details at the bottom of the page. There is a copyright date of 2003 next to the printer's name and telephone number. At the hearing, Ms Balkan challenged the veracity of this document, submitting that because the format of the telephone numbers for Global Fashion Links and the printer differ, the document cannot be genuine: no printer would make that sort of formatting mistake. Page 5 (the last page of the exhibit) has a copyright date of 2005, so does not appear to be from the same brochure. There is no information about whether this brochure was ever sent to customers.
- Annex 3. This is described as five statements signed and verified by Ms Javaid's customers who regularly buy from Global Fashion Links, including a witness statement which shows that Mr Erol is threatening these customers. There are actually six statements, all identical in composition. The statements reproduce pictures of various garments which have been bought since 2006. One of the garments appears with a Union Jack design across the front. The text is:

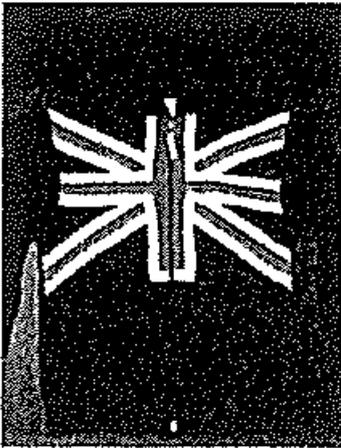
"Below is my evidence/witness statement, the contents are true to the best of my knowledge.

This is to certify that we have been trading/buying following stuff with Global Fashion Links since [for example] 08/03/2006 on on and off basis satisfactorily.

I hereby confirm that Mr Ahmet Erol of M/s Nasline has been continuously insisting us that all souvenir designs of London Tourist Market like 'London England' & others are copyrighted by him. Therefore, he is continuously trying to sell us his alleged designs and threatening us, if we don't buy from him. Furthermore, Mr Ahmet Erol always frightened us that he will lodge complaint again [sic] us if we don't buy from him. It is clear understanding in London Tourist Market that those souvenirs' designs were well established for many years and cannot be copyrighted by anyone else."

- The statement is undated and it is impossible to read the name of the signatory (who works for Camden Accessories Ltd). This is dated 5 January 2015 and comes from Nasar Ahmed of Camden Craft Ltd. One of the garments appears with a Union Jack design across the front. A third witness statement comes

from Waleed Azami, of Decent Choice, in Camden High Street, and is undated. One of the garments appears with a Union Jack design across the front. A fourth witness statement comes from T. Piratheepan, of City Souvenirs, and is dated 3 January 2015. The text below all the pictures says “Buying since 2005”. One of the garments appears with a Union Jack design across the front. A fifth witness statement is undated and is from ‘Tamim’. The text below all the pictures says “Buying since 2005”. One of the garments appears with a Union Jack design across the front. A sixth witness statement is from Arif Asef of Camden Lock Gifts, dated 5 January 2015. The “Buying since...” text has not been filled in beneath the pictures of the garments. One of the garments appears with a Union Jack design across the front. This picture is the same in all the statements and is shown below:



Buying Since 2006

- Annex 4. This is described as a witness statement from Ms Javid’s designer. It is not a witness statement. It is a photocopy of a letter on Global Fashion Links headed paper, entitled “To whom it my [sic] concern”, from Brian Reed. Mr Reed says that he has been the designer from Global Fashion Links LTD since 2008 and has a BA in Graphic Design. He refers to a design called “half Union Jack and Crown” he designed in 2008. There are no pictures of this.
- Annex 5. This contains a copy of a witness statement from the managing director of Lahore Fashions, Kashif Zia, dated 19 December 2014. He states that his company supplied Ms Javid’s company between 2002 and 2008 with the following designs: I Love London Hoodie (2002 to 2008); London England Union Jack Pullover Hoodie (2003 to 2008); London England Union Jack Zipper Hoodie (2003 to 2008); and Half Union Jack & Crown Embroidered Zipper (2006 to 2008). None of these descriptions resemble the registered design. Mr Erol contacted the company in Spring 2008, requesting the supply of the same designs as Lahore Fashions supplied to Ms Javid’s company. This was against Lahore Fashion’s policy and was refused. The other document in Annex 5 is an email from Mr Zia to Mr Tanveer at Global Fashion Links, explaining that he was sending his witness statement as an attachment and also some old order sheets along with design packs to help in the dispute with

Mr Erol (it is not clear which dispute, and the order sheets and design packs are not exhibited).

- Annex 6. This is described as a photo shoot conducted by Global Fashion Links placed on Facebook in 2010, which includes the following page (the same as for Annex 6 in 4019752, which is a much clearer representation).



- Annex 6-A. This is described as copies of Facebook pictures of family and friends wearing 'the designs'. The registered design does not appear in the single photograph in the exhibit.
- Annex 6-B. This is described as copies of photographs from a school party in Pakistan sponsored by Ms Javaid's supplier, Global Enterprise, in which pupils and teachers wore the designs. The representations are poor and it is not possible to see the registered design being worn. The photographs are dated 18 January 2005.
- Annex 6-C. This is described as sales invoices and related cheques from 2007. The item descriptions are "Mens union jack crown embroidery baseball jacket", 'Ladies London England embroidery zipper', 'Union jack crown hoodie jacket', 'London England Embroidery zipper', 'Union jack polo', 'Union Jack Patch work zipper', 'Union Jack Embroidery zipper', and 'I love London (printed) suite'.

- Annex 7. This is described as a purchase order, 'design pack', commercial invoice, packing list and 'specs sheets'. The purchase order is dated 15 March 2004 to Global Enterprises in Pakistan. A picture of a hoody resembling the registered design appears at the top of the page. The items are all described as Ladies Hood Jacket Full Union Jack Embroidery, in various colours, code GFL-158. The purchase order says "Countersamples are required, without countersamples Order is considered as NOT CONFIRMED!" Design drawings and specifications show the measurements of the different section of the garment coded GFL-158, with a photograph of the CAD drawing of the hoody. The 'commercial invoice' from Global Enterprises is dated 24 May 2004. The style numbers include "GFL-158 Ladies Hood Jacket Full Union Jack Embroidery" (288 pieces at a cost of £959.04).
- Annex 7-C (there are no exhibits marked 7-A or 7-B) is described as a witness statement from one of Ms Javaid's buyer's in which he confirms that "he's trading the design from 2006". This is not a witness statement; it is a 'To whom it may concern' letter, dated 18 November 2014, from Anthony Whiteway. It refers to a design called the Half Union Jack Crown Zipper, with a photograph of a man wearing a hoody with half a Union Jack on one side of the zip and a crown on the other side. This is not the same as or similar to the registered design.
- Annex 8. This is described as an email conversation between one of Ms Javaid's employees and a supplier, discussing the purchase order of 384 pieces. This appears to relate to a garment with a design description of Half Union Jack Applique and Embroidery, with a picture matching the photograph in Annex 7-C. This is not the same as or similar to the registered design.

11. Mr Erol has filed consolidated evidence. Much of it consists of challenges to the probity of Ms Javaid's evidence. For example:

- Mr Erol attacks Annex 1 as containing an invoice which has been edited on 'Photoshop' because the 'description of goods' part has been edited and added. I cannot see why this should be so, but, in any event, it is not material, as I shall later explain.
- Mr Erol exhibits (AE7) a statement from Waleed Azami (one of the signatories to the six statements exhibited by Ms Javaid) in which Mr Azami states that he was not trading in 2006. Exhibit AE7 is not a witness statement. It is a handwritten, signed note, saying that Waleed Azami was not trading in 2006.
- Mr Erol exhibits, at AE6, a letter from Saeed Khan stating that he did not sign the letter exhibited as MT-3 by Ms Javaid.
- Mr Erol says that one of the pairs of 'then and now' children shows different individuals.
- Mr Erol states that the photographs of children at a party at Namil United School in Pakistan, were not taken in 2005 because the school did not exist until 2014.

He maintains that the party was actually held on 18 January 2015. As I shall explain below, the evidence from both parties about the school is not material.

- Mr Erol cannot find any evidence that Global Enterprises exists, including the MINT database which covers about 150 million global companies. Exhibit AE17 is an email from Adeel Mustafa from the Lahore Chamber of Commerce and Industry. Mr Mustafa says that there are no records of Global Enterprises. To export from Pakistan, companies must be registered with the Lahore Chamber of Commerce and Industry.
- There are no entries in the VAT columns for the Global Enterprise invoices; Mr Erol submits this is because the orders never took place, and VAT returns to prove they did cannot be provided.

Mr Erol states:

“35. It must also be noted that IPO does not take use outside the UK in relation to a UK registered design, meaning that all evidence originating from Pakistan be disregarded.”

12. Ms Javaid filed a statement in reply. I will summarise it as far as it is relevant to the issues. Ms Javaid denies that any of her documents are false, including the six statements from customers and states that they can be verified, (for example, the invoices with HMRC). Ms Javaid states that she has contacted the owner of Global Enterprises, Dr Mazhar Ali Azhar, who has confirmed that Global Enterprises was registered with the Lahore Chamber of Commerce and Industry. She exhibits, at Annex B 7, copies of certificates showing this to be the case.

Preliminary points at the hearing

13. At the hearing, I struck out Ms Javaid’s section 11ZA(2) ground because the whole thrust of her s.1B claim and her evidence is that Mr Erol’s designs have been around for a long time and nobody can claim ownership of them.

14. Ms Javaid made a request, the day before the hearing, to file further evidence, consisting of a CD which had lately come to light. The CD was said to contain Global Fashion Links’ designs with dates. I refused permission to admit the evidence because it was extremely late and because it was unlikely to be material. A CD containing designs and artwork does not prove that the designs were ever disclosed.

Decision

15. Section 11ZA of the Act provides the capacity for a registered design to be invalidated on the ground (section 1B) that it was not new or that it did not have individual character. Section 1B reads:

“(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.

- (2) For the purposes of subsection (1) above, a design is new if no identical design whose features differ only in immaterial details has been made available to the public before the relevant date.
- (3) For the purposes of subsection (1) above, a design has individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date.
- (4) In determining the extent to which a design has individual character, the degree of freedom of the author in creating the design shall be taken into consideration.
- (5) For the purposes of this section, a design has been made available to the public before the relevant date if-
 - (a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and
 - (b) the disclosure does not fall within subsection (6) below.
- (6) A disclosure falls within this subsection if-
 - (a) it could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned;
 - (b) it was made to a person other than the designer, or any successor in title of his, under condition of confidentiality (whether express or implied);
 - (c) it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date;
 - (d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or
 - (e) it was made during the 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his.
- (7) In subsections (2), (3), (5) and (6) above “the relevant date” means the date on which the application for the registration of the design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.
- (8)

(9)”.

16. According to section 1B(7) of the Act, prior art can only be relied upon to invalidate a registered design if it has been disclosed to the public prior to the application date of the registered design being attacked. This means that the relevant dates for my assessment are 4 June 2011 for 4019752 and 18 March 2011 for 4019267. Any prior art must have been made available to the public prior to this date unless the exceptions in subsection (6) apply.

17. In *Magmatic Limited v PMS International Limited* [2013] EWHC 1925 (Pat), Arnold J considered the operation of the exceptions³ (my emphasis):

“33 *Article 7(1)*. By virtue of Articles 4, 5 and 6 of the Regulation, a Community registered design must be novel and have individual character having regard to any design "which has been made available to the public". Article 7(1) sets out the ways in which a design may have been made available to the public. In short, any disclosure which makes the design public in any part of the world will suffice. This is subject to two exceptions, however. These may conveniently be labelled "obscure disclosures" and "confidential disclosures". Only the first of these is relevant for present purposes. This applies where "these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community".

34 Although it was not directly in issue, the obscure disclosures exception was considered by the Court of Appeal in *Green Lane Products Ltd v PMS International Group Plc* [2008] EWCA Civ 358, [2008] FSR 28. Jacob LJ, with whom Ward and Rimer LJJ agreed, said:

"66. ... How then did the exception to absolute novelty come about? The *travaux* are clear about this. It came about by reason of a specific piece of lobbying by the textile industry. It was a concern about counterfeiting and nothing to do with an intention that prior art, obscure in the field of intended use, should be discounted.

67. The Economic and Social Committee opinion of 1994 said this when considering the novelty provision:

'3.1.2 This provision, as worded, would be difficult to apply in many fields, and particularly in the textiles industry. Sellers of counterfeit products often obtain false certification stating that the disputed design had already been created in a third country.

3.1.3 In these circumstances, the aim should be dissemination to interested parties within the European Community before the date of reference.

³ In the parallel context of the Council Regulation 6/2002/EC of 12 December 2001 on Community designs.

3.1.4 In the light of the above considerations, article 5(2) might be worded as follows: "A design shall be deemed to have been made available to the public if it has been published following registration, exhibited, used in trade or otherwise disclosed, unless this could not reasonably be known to specialist circles in the sector in question operating within the Community before the date of reference."

68. This is clearly the forerunner of the exception in article 7. The Economic and Social Committee's suggestion was taken up, extended also to the individual character test and became the law. It is worthwhile quoting the Commission's explanation for the proposed exception contained in its 1966 amended proposal:

'... article [6] has furthermore been amended in accordance with the wishes of the European Parliament and the Economic and Social Committee through the introduction of what is commonly known as the "safeguard clause". Its aim is to protect the design industry from claims that a design right is not valid because there was an earlier design in use somewhere in the world where the European industry could not possibly have been aware of it. The intention of this provision is to avoid the situation where design rights can be invalidated by infringers claiming that antecedents can be found in remote places or museums.'

69. As Mr Hacon observes, for the exception to work as intended the sector concerned had to be that of the cited prior art. His example demonstrates this:

'If the registered Community design was in respect of a design for, say, teapots and the alleged prior art was for Columbian textiles, it would be the textiles circles in Europe who would be in a position to know whether the "certification" was genuine. *Ex hypothesi* the teapot circles would never know.'

70. Moreover the exception was clearly conceived as narrow - it was aimed at obscure prior art only: it meant that forging this would not help an infringer.

71. Although there were further *travaux* before the ultimate Regulation, there was no significant relevant further change."

35 There is a helpful discussion of this exception, which includes references to some more recent case law elsewhere in Europe, in Stone, *European Union Design Law: A Practitioners' Guide* (OUP) at §§9.22-9.66. As the author comments, the wording of the exception gives rise to a number of questions of interpretation which may require resolution by the Court of Justice of the European Union. In Case C-479/12 *H. Gautzsch Grosshandel GmbH v. Münchener Boulevard Möbel Joseph Duna GmbH* the Bundesgerichtshof has referred a question concerning the interpretation of the exception to the CJEU, but neither side suggested that I should defer judgment in the present case until after the CJEU has given its judgment. Nor was it suggested that I should refer

questions myself. Accordingly, I must interpret the exception as best I can in the light of the guidance that is currently available. There are a number of points to consider.

36 First, the exception refers to "these events". The "events" are the events constituting disclosure referred to earlier in the first sentence of Article 7(1) – publication, exhibition, etc. Counsel for PMS submitted that the exception did not apply if the relevant event could reasonably have become known, even if the design itself could not reasonably have become known as a result of that event. I do not accept that submission. The purpose of the exception is to prevent obscure designs from being relied upon to attack the novelty and individual character of a Community registered design. If a design could not reasonably have become known, it cannot matter that the event could have become known. In most cases, of course, one will follow from the other.

37 Secondly, what is "the sector concerned"? In *Green Lane* the Court of Appeal held that it was the sector from which the prior design came, not the sector from which the registered design came. The Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) came to the opposite conclusion in Case R 84/2007-3 *Ferrari SpA v Dansk Supermarked A/S* (unreported, 25 January 2008) and Case R 9/2008-3 *Crocs Inc v Holey Soles Holdings Ltd* [2010] ECDR 11. An appeal to the General Court in the latter case was not pursued. In those circumstances, I am bound by the Court of Appeal's decision in *Green Lane*. Furthermore, I agree with it.

38 Thirdly, who are "the circles specialised in" that sector? In *Green Lane* Lewison J (as he then was) held at first instance that this comprised all individuals who conducted trade in relation to products in that sector, including those who designed, made, advertised, marketed, distributed and sold such products in the Community ([2007] EWHC 1712 (Pat), [2008] FSR 1 at [34]-[35]). This point was not addressed by the Court of Appeal. In Case R 552/2008-3 *Harron SA v THD Acoustics Ltd* (25 July 2009, unreported) the Board of Appeal held that the circles included experts and all businesses involved in the trade including importers. Thus it seems clear that the words are to be broadly interpreted.

39 Fourthly, the test is whether the events "could not reasonably have become known in the normal course of business". It is common ground that this is an objective test. Counsel for PMS emphasised that the question was whether the events *could not* have become known, not whether the events *would not* have become known. I accept that, but subject to the qualification that the test is whether the events could not *reasonably* have become known *in the normal course of business*. The wording must be interpreted as a composite whole.

40 It is common ground that the events in question must have occurred prior to the filing or priority date of the registered design. Counsel for PMS accepted that it was theoretically possible for a design to have become sufficiently obscure as a result of the passage of time that it could not reasonably have become known in the normal course of business at the filing or priority date

even if it could have become known at the date of the event, although he submitted that this was unlikely to occur in practice.

41 Fifthly, who bears the burden of proof? Counsel for PMS submitted that the burden of proving that the exception applied rested on the party who relied on it, here Magmatic. He argued that this interpretation was supported by both the wording and purpose of the exception and by the case law of the Board of Appeal, in particular Case R 1516/2007-3 *Normanplast snc v Castrol Ltd* (unreported, 7 July 2008) at [9]. Counsel for Magmatic submitted that the burden of proving that the disclosure was made available to the public rested on the party challenging the validity of the registered design, and that included proof that the design could reasonably have become known as result of the event relied on. In the alternative he submitted that, if the burden of proof lay on the proprietor of the design, nevertheless the evidential onus could shift if on its face the disclosure was an obscure one. In support of these submissions, he relied on the decision of the Board of Appeal in Case R 1482/2009-3 *Termo Organika Sp. z.o.o. v Austrotherm GmbH* (unreported, 22 March 2012) at [38]-[44]. As counsel for PMS submitted, however, there is no indication in that decision that the question of burden of proof was argued or that the Board of Appeal was addressing its mind to the question. In my judgment the burden of proving that the exception applies rests on the party relying on the exception. I accept, however, that the evidential onus may shift to the other party once it is shown that the disclosure relied on appears to be an obscure one."

18. The exceptions are defences available to a registered proprietor. They must be expressly relied upon. There are two evidential issues in these proceedings where the exceptions have relevance. These are (i) the evidence relating to the school party in Pakistan; and (ii) the photograph of a group of people on 'Mohammed Tanveer's' Facebook page, reproduced in paragraphs 9 and 10 of this decision. In neither case has Mr Erol expressly stated that they do not count as disclosure because they "could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned". I do not think that Mr Erol's statement, in relation to the school evidence, that "It must also be noted that IPO does not take use outside the UK in relation to a UK registered design, meaning that all evidence originating from Pakistan be disregarded" can be regarded as a reliance on the exception. Evidence outside the UK may be, and frequently is, relevant in establishing disclosure in design law. I will, therefore, take these two pieces of evidence as I find them.

19. The photographs of the school party in Pakistan do not show either of the attacked designs. The evidence is, therefore, not relevant.

20. The photo shoot posted on Mr Tanveer's Facebook page in 2010 is relevant.

Scope of the registered designs

21. Mr Erol's design application forms state that the products for which the design applications were made included t shirts, hoodies (and umbrellas). The design was applied for as part of a multiple design application, which also includes hoodies and umbrellas. These are all different items. It is clear that the design the subject of these

proceedings is a Union Jack flag applied to the top half of a garment. Secondly, the attachments to the counterstatements, intended to support Mr Erol's claim to have originated the designs, show Union Jacks without depicting any garments. The tick/swoosh is present in the attachment to the counterstatement for 4019267, but not the letters NAS. The scope of the design registrations is therefore:

4019752: a Union flag applied to the top half of a garment;

4019267: a Union flag including a tick/swoosh applied to the top half of a garment.

The letters NAS at the bottom of the jacket in 4019267 do not form part of the design, either as attached to the counterstatements, or in the scope of the design as applied for.

Decision in relation to 4019752

22. The evidence in relation to this registered design suffers from a lack of pictorial representation either of any design, or, where there are pictures, they are not of a design which is comparable to the registered design. The written descriptions of garments also do not resemble a reasonable description of the registered design and none of the codes in the invoices match the code in the purchase order in Annex 7, which is the only piece of evidence to contain both a code and a picture which resembles the registered design.

23. The potentially relevant evidence comprises:

- (i) The 2003 brochure, Exhibit MT-1, referred to in paragraph 7 of this decision. This was also filed as Annex 2-B.
- (ii) The six customer statements.
- (iii) The photo shoot posted on Mohammed Tanveer's Facebook page on 7 April 2010.
- (iv) Annex 6-C. This is described as sales invoices and related cheques from 2007. The items include 'Union jack polo'.
- (v) Annex 7: the purchase order dated 15 March 2004 to Global Enterprises in Pakistan, coded GFL-155, carrying a picture of a T-shirt resembling the registered design.

24. At the hearing, Ms Balkan attacked the brochure, in its Annex 2-B form, submitting that the format of the telephone numbers for Global Fashion Links and the printer differ, showing that the document is not genuine. This particular submission was not raised earlier in the proceedings against the two registered designs. It is unacceptable for a party to leave it until the hearing to ask that the hearing officer to disbelieve what is not obviously incredible evidence⁴. If challenges are to be made to the veracity of the evidence, these should be made during the evidence rounds. It is wrong to hijack both the party and the decision-taker at the hearing, when there is no opportunity to

⁴ See, for instance, Tribunal Practice Notice 5/2007.

address the challenge in evidence. Mr Erol made no request to cross-examine Ms Javaid. I do not accept Ms Balkan's point.

25. That said, a party must still file evidence sufficient to prove its claim. I am not bound to accept everything said by a witness without analysing what it amounts to. The brochure is brief: just two pages. It consists entirely of pictures of garments. There are no descriptions, no sizes, no reference codes, no prices and no order forms. There is no explanation as to whom the brochure was sent or given. The brochure cannot be used to corroborate other pieces of evidence since there is no information contained within it.

26. The sales invoices at Annex 6-C do not show any pictures. There is a description of a 'Union jack polo', which could be relevant. However, without a picture or some other piece of evidence which could be corroborative, it is impossible to say. Further, the invoice carries a completely different code (GFL-1036) to the purchase order in Annex 7 which does show a picture resembling the registered design and which carries the code GFL-155.

27. The purchase order (Annex 7) contains the caution "Countersamples are required, without countersamples Order is considered as NOT CONFIRMED!" There is no information as to whether the order was ever confirmed and delivered to Ms Javaid from Pakistan. There is no bill of lading. In any event, I am doubtful whether the import of a product by a business from the product's manufacturer represents public disclosure; and there is nothing to show that the design was ever made available to the public.

28. The six statements from customers (Annex 3) carry little, if any weight. Three of them are undated, so are not acceptable witness statements. One of them is signed illegibly and another simply "Tamim". These are also not acceptable witness statements. Another has not filled in the 'Buying since...' information beneath each garment picture. The statements all bear the look of an identical pro forma. In *Re Christiansen's Trade Mark* [1885] 3 RPC 54, Lord Esher M.R. said at 60:

"Now, to my mind, when you have evidence given upon affidavit, and you find a dozen people, or twenty people, all swearing to exactly the same stereotyped affidavit, if I am called to act upon their evidence, it immediately makes me suspect that the affidavits are then not their own views of things and that they have adopted the view of somebody who has drawn the whole lot of affidavits, and they adopt that view as a whole and say 'I think that affidavit right' and they put their names to the bottom."

29. The statements of Nasar Ahmed and T. Piratheepan carry some weight because they are signed and dated. The other statements are hearsay in pro forma format, solicited for the proceedings, and those where it is impossible to say who has signed them carry no weight at all. I will, therefore, go on to compare the design in the statements of Messrs Ahmed and Piratheepan because they are signed and dated (although bearing in mind the comments from *Christiansen's Trade Mark*, above) and count as public disclosure. I will also compare the design shown in the photo shoot, posted on Mohammed Tanveer's Facebook page on 7 April 2010.

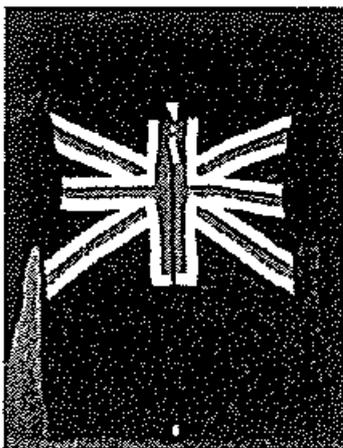
30. The relevant question is whether an identical design, or one which creates the same overall impression as the registered design, was made available to the public before 4 June 2011.

31. The representations of the alleged prior art and the registered design are shown below:

Registered design:

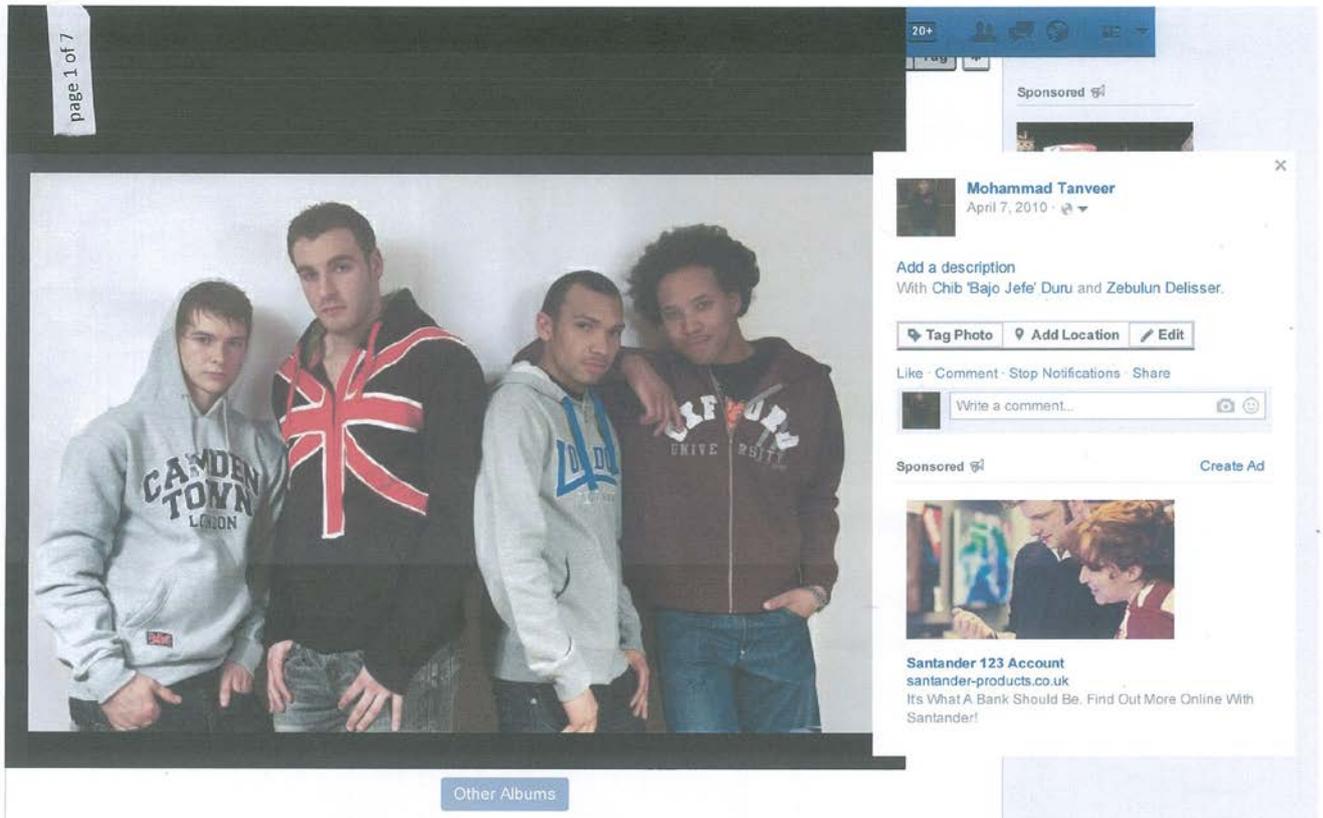


Alleged prior art:



Buying Since 2006

Alleged prior art:



Does the registered design create a different overall impression to the prior art?

32. For economy of process, the focus will be on whether the registered design has individual character (rather than whether it was new; if it does not have individual character, it cannot be new). The relevant case law in this respect was conveniently set out by Birss J. in paragraphs 31 to 59 of his judgment in *Samsung v Apple* [2012] EWHC 1882 (Pat). The parts which are most relevant to these proceedings are reproduced below.

“The informed user

33. The designs are assessed from the perspective of the informed user. The identity and attributes of the informed user have been discussed by the Court of Justice of the European Union in *PepsiCo v Grupo Promer* (C-281/10P) [2012] FSR 5 at paragraphs 53 to 59 and also in *Grupo Promer v OHIM* [2010] ECDR 7, (in the General Court from which *PepsiCo* was an appeal) and in *Shenzhen Taiden v OHIM*, case T-153/08, BAILII: [2010] EUECJ T-153/08 , 22 June 2010.

34. Samsung submitted that the following summary characterises the informed user. I accept it and have added cross-references to the cases mentioned:

- i) He (or she) is a user of the product in which the design is intended to be incorporated, not a designer, technical expert, manufacturer or seller

(*PepsiCo* paragraph 54 referring to *Grupo Promer* paragraph 62; *Shenzen* paragraph 46).

ii) However, unlike the average consumer of trade mark law, he is particularly observant (*PepsiCo* paragraph 53);

iii) He has knowledge of the design corpus and of the design features normally included in the designs existing in the sector concerned (*PepsiCo* paragraph 59 and also paragraph 54 referring to *Grupo Promer* paragraph 62);

iv) He is interested in the products concerned and shows a relatively high degree of attention when he uses them (*PepsiCo* paragraph 59);

v) He conducts a direct comparison of the designs in issue unless there are specific circumstances or the devices have certain characteristics which make it impractical or uncommon to do so (*PepsiCo* paragraph 55).

35. I would add that the informed user neither (a) merely perceives the designs as a whole and does not analyse details, nor (b) observes in detail minimal differences which may exist (*PepsiCo* paragraph 59).

Design freedom

40. In *Grupo Promer* the General Court addressed design freedom in paragraphs 67-70. In *Dyson* Arnold J summarised that passage from *Grupo Promer* as follows:

"design freedom may be constrained by (i) the technical function of the product or an element thereof, (ii) the need to incorporate features common to such products and/or (iii) economic considerations (e. g. the need for the item to be inexpensive)."

Effect of differences between the registered design and design corpus

51. Apple drew my attention to paragraph 74 of the judgment of the General Court in *Grupo Promer* in which the Court agreed with the ruling of the Board of Appeal that:

"as regards the assessment of the overall impression produced by the designs at issue on the informed user, the latter will automatically disregard elements 'that are totally banal and common to all examples of the type of product in issue' and will concentrate on features 'that are arbitrary or different from the norm'."

52. Apple submitted that this showed that a design feature need not be unique to be relevant. It is only disregarded if it is totally banal. Thus, Apple submitted, for a feature to be relevant it merely needs to differ from the norm and by logical

extension, the greater the difference from the norm, the more weight to be attached to it. The point of this submission is to challenge the manner in which Apple contended Samsung was advancing its case. I do not think Apple's characterisation of Samsung's case was entirely accurate but in any case I accept Apple's submission on the law at least as follows. The degree to which a feature is common in the design corpus is a relevant consideration. At one extreme will be a unique feature not in the prior art at all, at the other extreme will be a banal feature found in every example of the type. In between there will be features which are fairly common but not ubiquitous or quite rare but not unheard of. These considerations go to the weight to be attached to the feature, always bearing in mind that the issue is all about what the items look like and that the appearance of features falling within a given descriptive phrase may well vary.

The correct approach, overall

57. The point of design protection must be to reward and encourage good product design by protecting the skill, creativity and labour of product designers. This effort is different from the work of artists. The difference between a work of art and a work of design is that design is concerned with both form and function. However design law is not seeking to reward advances in function. That is the sphere of patents. Function imposes constraints on a designer's freedom which do not apply to an artist. Things which look the same because they do the same thing are not examples of infringement of design right.

58. How similar does the alleged infringement have to be to infringe? Community design rights are not simply concerned with anti-counterfeiting. One could imagine a design registration system which was intended only to allow for protection against counterfeits. In that system only identical or nearly identical products would infringe. The test of "different overall impression" is clearly wider than that. The scope of protection of a Community registered design clearly can include products which can be distinguished to some degree from the registration. On the other hand the fact that the informed user is particularly observant and the fact that designs will often be considered side by side are both clearly intended to narrow the scope of design protection. Although no doubt minute scrutiny by the informed user is not the right approach, attention to detail matters."

33. The informed user of clothing is a consumer as opposed to an actual designer or some other expert in the field. However, the informed user is not an average or standard consumer, it is instead someone who is likely to have an interest in clothing design. Such a person is, therefore, likely to have a keen eye in relation to the design attributes of a particular item of clothing. They will not, however, make a forensic analysis of each and every detail.

34. The designer of clothing has a very free hand in what design is actually used in terms of patterning. There is a wide degree of design freedom.

35. There is no evidence about design corpus. It would be wrong to speculate. This factor has a neutral influence on the findings I make.

36. The registered design is a Union flag applied to the top half of a garment. The identified prior art also comprises a Union flag applied to the top half of a garment. In the registered design, there is an opening bisecting the top part of the vertical stripe. This is absent from the 2006 prior art, but is present in the garment worn by the tallest of the models in the 2010 photo shoot. The stripes in the 2006 version are narrower than the stripes in the registered design, and the central stripes in the 2010 version are broad. The central stripes in the registered design are also broader than the white stripes, and are slightly rougher looking than in the 2010 picture. Both show the outside white borders as narrower than the central strips. In the registered design and the 2010 picture, the bottom diagonals appear to wrap around the side of the garment. This is also the case with the top diagonals in the 2010 picture, but not in the registered design, where the stripes end at the shoulders in a sort of point. In all three cases, the dark part of the Union Jack (the blue part of a Union Jack flag) is formed by the red and white stripes being positioned on the dark coloured background.

37. The differences between the registered design and the 2010 photo shoot picture boil down to slightly rougher looking stripes and stripes which end at the shoulders. However, although attention to detail matters, "minute scrutiny by the informed user is not the right approach". These differences border on the forensic because the overwhelming overall impression is of Union Jacks applied to the top half of garments, with an opening at the top (where the neck is). The registered design does not have individual character because it does not create a different overall impression compared to the 2010 photo shoot, which shows an earlier design which was made available to the public before the relevant date.

Outcome for 4019752

38. The registration of the design is invalid because, at the date of application, it was not new and/or lacked individual character.

39. Registered design 4019752 is hereby declared invalid.

Decision in relation to 4019267

40. The evidence in relation to this registered design suffers from the same defects as identified in paragraph 22, above. The written descriptions of garments also do not resemble a reasonable description of the registered design and none of the codes in the invoices match the code in the purchase order in Annex 7, which is the only piece of evidence to contain both a code and a picture which may resemble the registered design. The pieces of evidence which are potentially relevant are:

- (i) The 2003 brochure, Exhibit MT-1, referred to in paragraph 7 of this decision. This was also filed as Annex 2-B.
- (ii) The six customer statements.
- (iii) The photo shoot posted on Mohammed Tanveer's Facebook page on 7 April 2010.

- (iv) Annex 6-C. This is described as sales invoices and related cheques from 2007. The item descriptions include 'Union Jack Embroidery zipper'.
- (v) Annex 7: the purchase order dated 15 March 2004 to Global Enterprises in Pakistan.

41. My comments above about the 2003 brochure apply equally in relation to the subject design. The sales invoices at Annex 6-C do not show any pictures. There is a description of a 'Union Jack Embroidery zipper' which could be relevant. However, without a picture or some other piece of evidence which could be corroborative, it is impossible to say. Further, the invoice carries a completely different code (GFL-1037B) to the purchase order in Annex 7 which does show a picture resembling the registered design and which carries the code GFL-158.

42. The purchase order (Annex 7) contains the caution "Countersamples are required, without countersamples Order is considered as NOT CONFIRMED!" There is no information as to whether the order was ever confirmed and delivered to Ms Javaid from Pakistan. There is no bill of lading. In any event, I am doubtful whether the import of a product by a business from the product's manufacturer represents public disclosure; and there is nothing to show that the ladies' hooded jacket was ever made available to the public.

43. My comments in paragraph 29 about the six customer statements also apply here. I will however, go on to compare the design in the statements of Messrs Ahmed and Piratheepan. I will also compare the design shown in the photo shoot, posted on Mohammed Tanveer's Facebook page on 7 April 2010.

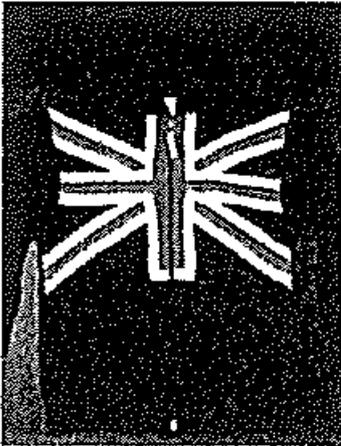
44. The relevant question is whether an identical design, or one which creates the same overall impression as the registered design, was made available to the public before 18 March 2011.

45. The representations of the registered design and the alleged prior art are shown below:

Registered design:



Alleged prior art:



Buying Since 2006

Alleged prior art:



Does the registered design create a different overall impression to the prior art?

46. As before, for economy of process, the focus will be on whether the registered design has individual character. I have already set out the relevant case law and my findings in relation to the informed user, design freedom and the design corpus, which apply equally here.

47. The registered design is a Union flag including a tick/swoosh applied to the top half of a garment. The identified prior art also comprises a Union flag applied to the top half of a garment. In the registered design, there is a white zip bisecting the design vertically. A dark zip in a similar position is also visible in the 2006 prior art, but it is not visibly present in the garment worn by the tallest of the models in the 2010 photo shoot. The diagonal and horizontal stripes in the 2006 version are narrower than the stripes in the registered design. The proportions of the stripes in the 2010 version are almost identical to those in the registered design, save that the vertical stripe in the registered design is possibly shorter than in the 2010 picture. In the registered design and the 2010 picture, the bottom diagonals appear to wrap around the side of the garment, but only in the 2010 picture do the diagonal stripes radiating to the shoulder appear to extend over the shoulder. There is a small white tick on the right side superimposed upon the horizontal stripe of the Union Jack. In all three cases, the dark part of the Union Jack (the blue part of a Union Jack flag) is formed by the red and white stripes being positioned on the dark coloured background.

48. In weighing the differences and similarities, I am mindful of the case law which states that whilst attention to detail matters, “minute scrutiny by the informed user is not the right approach”. The small differences, including the tick, do not prevent the overwhelming overall impressions being of Union Jacks applied to the top half of garments. The registered design does not have individual character because it does not create a different overall impression compared to earlier designs which were made available to the public before the relevant date.

Outcome for 4019267

49. The registration of the design is invalid because, at the date of application, it was not new and/or lacked individual character.

Overall outcome

50. Registered designs 4019752 and 4019267 are hereby declared invalid.

Costs

51. Ms Javaid has been successful and is entitled to a contribution to her costs. Although the registrar has a wide discretion in relation to costs, he nevertheless works from a published scale (Tribunal Practice Notice 4/2007). I mention here a Case Management Conference (“CMC”) which I held on 10 June 2015. The CMC was held because Mr Erol disputed whether Ms Javaid had posted her evidence to him at the time it was filed at the Registry. Mr Erol contended that the application should be struck out for want of evidence (because it had not been sent to him at the time it was filed, rule 16(4)(b) of The Registered Designs Rules 2006). My decision, given by letter on 12 June 2016, is reproduced below:

“You claim that the applicants’ attempts to prove that they posted the evidence to you by recorded delivery do not stand up because there is no receipt provided by Royal Mail. They responded that they have a system installed by Royal Mail whereby a postman collects parcels and documents and that they did post their evidence to you.

I am of the view that, whether or not the applicants did in fact send to you their evidence, as was required, there is a public interest in allowing these proceedings to continue so that the substantive issue may be decided. There have been several rounds of litigation in the Registry, and the parties have also met in IPEC. To avoid a multiplicity of proceedings and to keep a sense of proportion in this case, I do not intend to strike out the application on the technical point you raise. You are in possession of the evidence because the Registry has sent it to you. Therefore, in exercising discretion via rule 19(3), I will allow the Registry’s decision to admit the applicants’ evidence to stand.

You now have two months from the date of this letter to file evidence and/or submissions. If evidence is filed, the applicants will have a month to say whether they wish to file evidence in reply; if they do, they will then have a further month to file that evidence. All parties are reminded that evidence

should be properly paginated and must be filed on time and sent to the other side at the same time as it is sent to the Registry."

52. I asked Ms Javaid (via Mr Tanveer) at the conclusion of the main hearing whether, if she was successful, she wished to be awarded costs on the scale. The reply was that no costs were sought ("We do not think there will be any money"). In the circumstances, there is no cost award.

Dated this 23rd day of March 2016

**Judi Pike
For the Registrar,
The Comptroller-General**