

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE CHANCERY DIVISION**  
**THE HON MR JUSTICE EHERTON**  
**HC 02 C0050**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/07/2004

**Before :**

**LORD JUSTICE SEDLEY**  
**LORD JUSTICE MANCE**  
and  
**LORD JUSTICE JACOB**

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**Between :**

**LAMBRETTA CLOTHING COMPANY LIMITED**

**Claimant/**  
**Appellant**

**- and -**

**(1) TEDDY SMITH (UK) LIMITED**  
**(2) NEXT RETAIL PLC**

**Defendant/**  
**Respondent**

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Roger Wyand QC and Michael Edenborough (instructed by Gosschalks) for the  
Claimant/Appellant  
Richard Arnold QC (instructed by Briffa) for the  
Defendant/Respondent

Hearing dates : 26-28 April 2004  
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**Judgment**

**Jacob LJ :**

*Introduction*

1. In June 2000 Mr Robert Harmer of Lambretta (the appellants) designed a tracktop. This is his main design drawing:



2. Although it is perhaps not immediately self-evident, the drawing shows two white stripes along the arms (consider the elbows). Beneath the drawing were the words:

“Red as FP [which means Fred Perry] tracksuit

White = White

Blue = Navy attached”

3. A supplementary sheet added some details in writing. Of these it is only necessary to mention some. There was an instruction: “Fabric: Knit as yr tracksuit supplied.” Other instructions were that there should be vertical welt pockets, that the stripes were to be 1cm wide and 2cm apart, that the zip should be white “as yr sample”.
4. The shape (including the panelling) of the garment owes nothing to Mr Harmer. His contribution was the choice of colours (particularly blue for the body, red for the arms and white for the zip), the white stripes, and the size and positioning of the “Lambretta” logo – small on the front and large on the back. The shape of the garment itself was old and indeed Mr Harmer had an all-white sample supplied by the manufacturers when he did his work.
5. The design has a “retro-vintage” theme – recalling the sportswear of the 1970s and early 1980s. The very name “Lambretta” (to which the appellants have exclusive rights) brings to mind the 60s and 70s because of the well-known scooter of those times. The colours chosen were based on those in the Union flag.
6. Track-tops of this design were first shown by Lambretta at the Earls Court Fashion Trade Exhibition of August 2000. They were sold from December 2000 onwards. Sales were said to be very successful. Certainly sales figures were given in evidence (20,000 to February 2002) but I do not think the claimants are entitled to rely upon any commercial success. The claimants also sold the garment in other colourways (although the red, blue and white came first) and one has no idea whether those were as successful as the particular first colourways used. The claimants’ solicitors had, before trial, refused disclosure of sales of the garment in other colourways expressly on the basis that commercial success was not relied upon.
7. There are three other points here. Firstly without some idea of the size of leisure track top market as a whole it is not really possible to say whether the sales figures are large or not. Nor is it possible to assess the importance of the particular colourway without knowing the sales of other colourways both by Lambretta and others. Finally it is in any event impossible to say how important to sales the colourways as such were – after all the garment has a clear “Lambretta” front logo and the logo emblazoned across the full width of the back. The logo must surely have played a significant part of any decision to buy.
8. In February 2002 Mr Harmer learned of what he considered to be copies of the garment being sold by Next and Teddy Smith. In due course Lambretta sued them both, alleging infringement of unregistered design right (“UDR”) or alternatively infringement of artistic copyright.
9. Etherton J held ([2003] RPC 41) that as a matter of law UDR could not subsist in the design and that there was a defence to the claim for infringement of artistic copyright provided by s.51 of the Copyright, Designs and Patents Act 1988 (“the

Act”). On the facts he found that Teddy Smith’s tracktop (designed by a M. Sansat) was copied from Lambretta’s but that Next’s was not. With the leave of the Judge Lambretta appeal the findings of law. There is no appeal in respect of the finding that Next did not copy – and since both forms of right invoked require proof of copying, they are not parties to this appeal.

10. Teddy Smith support Etherton J’s findings of law. But, by permission of Aldous LJ, they also challenge a number of other issues decided against them. Most importantly they wish to challenge the decision that M. Sansat copied. For convenience I set out all the issues still alive:

- i) Can UDR subsist in a juxtaposition of colourways – are they “an aspect of shape or configuration of the whole or part of an article?” (s.213(2)).
- ii) Are the colourways “surface decoration?” (s.213(3)(c))
- iii) Does s.51 provide a defence in respect of artistic copyright?
- iv) Is the design “commonplace in the design field in question,” (s.213(4))?
- v) Should the judge’s finding that M. Sansat copied be upheld? Or should there be a retrial of this issue? This involves consideration of a two sub-issues – admissibility of fresh evidence on the so-called “French rib” point and on the quality of the interpretation of his evidence.
- vi) If there is UDR in Mr Harmer’s design, is the Teddy Smith garment made exactly or substantially to it, (s.226(1) and (2))?
- vii) If artistic copyright is enforceable in Mr Harmer’s drawing, does the Teddy Smith garment substantially reproduce it or a substantial part of it (s.17(1) in combination with s.16(3))?
- viii) Even if the Judge was right in all his findings, was his decision on costs (that Teddy Smith should only have 40% of its costs) right or at least not shown to be clearly wrong?

There was a further issue, about whether Teddy Smith (UK) had the requisite knowledge for the purposes of s.22. Following the hearing, Mr Arnold QC for Teddy Smith accepted that s.18(1) would be a complete way round this point and accordingly abandoned it.

### *The nature of UDR*

11. The key provision concerning subsistence of UDR with which this case is concerned is s.213. So far as is material this reads:

“s.213(1) Design right is a property right which subsists in accordance with this Part in an original design.

(2) In this Part “design” means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article.

(3) Design right does not subsist in –

(a) a method or principle of construction,

(b) features of shape or configuration of an article which–

(i) enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function, or

(ii) are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part, or

(c) surface decoration.

(4) A design is not “original” for the purposes of this Part if it is commonplace in the design field in question at the time of its creation.

(5) ...”

12. It is settled (see *Farmers Build v Carrier* [1993] RPC 461) that, subject to subsection (4), “original” has the same meaning as in ordinary copyright – that is to say the design must be the creation of the designer, not copied from another. It does not mean “new” in the sense of patent or registered design law, i.e. absolutely new, irrespective of whether the designer by his own creative work made something which, by coincidence, is the same as the work of an earlier designer. Subsection (4) to adds this, however, that even if the design was the original work of its designer, the design will not qualify for UDR protection, if it is “commonplace in the design field in question.” Such a qualification is not placed on ordinary copyright works such as artistic or literary works.
13. The nature and duration of the right is also more limited than that of many other intellectual property rights. Unlike patents or registered designs no true monopoly is conferred – infringement depends upon copying (see, s.236(1) and (2)). The period of protection is limited too – 10 years from first marketing (with a licence of right for the last 5 years) and in any event 15 years from the end of the first recording of the design (whether marketed or not), see s.216. By contrast the period for patents is 20 years, for registered designs 25 years, for artistic and literary works 70 years from the year of death of the author and so on. Of particular interest here is the 25-year from first marketing period provided by s.52 for artistic works which consist of designs for artistic works (see ss. 51-52 referred to below). Only the European Union unregistered design right provides for a lesser term namely 3 years from when the design was first made available within the EU (see Reg. 6/2002 Art.11).

*Issue (i): Shape or configuration of an article?*

14. I turn to the questions which arise under s.213. First is whether Mr Harmer's selection of colourways for a pre-existing design of tracktop are "the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article." It was common ground that this is the right question, even though it involves ignoring what a real designer would regard as significant features of Mr Harmer's actual design work. These are, of course, the two white stripes on the arms, and the size, colour and positioning of the Lambretta logo on front and back. The reason the law requires these features of the real-world design to be ignored is that they are purely "features of surface decoration", and hence within the exclusion provided in s.213(3)(c). Although there is a dispute as to whether this exception also covers the colourways as such, there is no dispute that these additional features are surface decoration.
15. What then does the Act mean when it refers to "shape or configuration"? Is "configuration" wider than "shape" and if so how? Before us, Mr Wyand QC for Lambretta (who did not appear below) abandoned an argument which had been advanced below. This was to the effect that "shape or configuration" had a different meaning in s.213 from that which it has in the definition of "design" for the purposes of registered designs. Mr Wyand was right to abandon the point. In 1988 the Registered Designs Act 1949 was extensively amended by the Act – so much so that in Schedule 4 it was thought sensible (as indeed it was) to set out the whole of the Act as amended. So in the selfsame Act that created the UDR, the law of registered designs was under extensive consideration. It is impossible to think that the draftsman had in mind two distinct meanings for the phrase "shape or configuration", one for UDR and one for registered designs. Moreover the very phrase "shape or configuration" has an antique ring about it – precisely because it is an antique phrase (see the next paragraph). Finally the law of designs is complex enough already, without subtle shades of difference in meaning for the same phrase depending on whether one is concerned with registered or unregistered designs.
16. The use of the phrase in the statutory definition of the kind of design which can be registered is very old. I do not set out all these forms over the ages – it is sufficient to set out its form in 1988 after amendment by the Act and that in the Patents, Trade Marks and Designs Act 1883. The 1988 Act amended the definition to read:

"1(1) in this Act "design means features of shape, configuration, pattern or ornament applied to an article by any industrial process, being features which in the finished article appeal to and are judged by the eye, but does not include –

  - (a) a method or principle of construction, or
  - (b) features of shape or configuration of an article which

–

- i) are dictated solely by the function which the article has to perform, or
- ii) are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part.”

Section 60 of the 1883 Act defined design as meaning any design “applicable to any article ... whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes.”

17. From time to time over many years intellectual property lawyers have wondered whether “configuration” adds anything to “shape.” In *Kestos v Kempat* (1934) 53 RPC 139 at 152, Luxmoore J said:

“It remains, therefore, to consider whether the Design is new or original. Before attempting to answer this question it is necessary to determine which of the four features is sought to be protected. Is it shape, configuration, pattern or ornament? Shape and configuration are for all practical purposes considered as synonymous (see *Bayer’s Design, ubi supra*, at page 80). Each signifies something in three dimensions; the form in which the article itself is fashioned. “Pattern” and “ornament” can, I think, in the majority of cases be treated as practically synonymous. It is something which is placed on an article for its decoration. It is substantially in two as opposed to three dimensions. An article can exist without any pattern or ornament upon it, whereas it can have no existence at all apart from its shape or configuration”.

18. It is worth noting why Luxmoore J considered the question at all. It is because under the law of registered designs, the designer had to state in what respect he claimed novelty – was it shape, configuration pattern or ornament? The validity of the design registration was judged by what was claimed to be novel. In *Kestos* it seems clear that novelty was claimed in shape or configuration of the brassière the subject of the registration. It is also worth noting that nothing turned in the *Kestos* case on any alleged difference in meaning between the two words, indeed none was contended for.

19. In *Cow v Cannon* [1959] RPC 344 at p. 350 Lord Evershed MR said:

“It is quite true that in some earlier cases (and I mention, without taking time to recite, Lindley LJ’s language in *re Clarke’s Design*, (1896) 13 RPC at pp. 358-361, “shape” and “configuration” have been regarded as something like synonymous terms, used in contradistinction to “pattern” on the one hand or “ornament” on the other. But I do not think it right to say that the division between “shape and configuration” and “pattern or ornament” on the other is at

all rigid; and applying what I hope is a common sense test to this hot water bottle, I would have thought it right to say that the ribbing is so marked a feature of the bottle as a whole to be entitled to be described as a feature of its configuration. It may not be “shape” but I think it is “configuration.””

20. But again that passage does not really assist here and was not vital in that case. For that case was concerned with the provision of ribbing all over an article. What mattered was whether there was any difference between “shape or configuration” on the one hand and “pattern or ornament” on the other. The ribbing clearly formed part of the shape of the article – without it it would have been shaped differently. Here there is no question of a different shape at all.
21. The position was much the same in *Sommer Allibert (UK) v Flair Plastics* [1987] RPC 599. The grooves on the surface of plastic chairs were held to be “features of shape or configuration” – the court not drawing a distinction between one or the other.
22. Thus the upshot of all the registered design cases is that for over a century no one has ever held that merely colouring an article in a novel way amounts to “shape or configuration.” Clearly that is a telling point against the Lambretta’s construction of those words.
23. Before I consider further Lambretta’s contentions on this point I should get out of the way what I consider to be a peripheral dead-end. This is the question of two or three dimensions. It will be noted that Luxmoore J in part reasoned that shape and configuration were three-dimensional. Before Etherton J in this case there was debate about this too (see paragraphs 33-49). Etherton J concluded that “configuration” in the meaning of “design in Part III of the 1988 Act refers to the relative arrangement of three-dimensional elements.”
24. I do not think that a debate about dimensions assists. All articles (even thin flat ones) are 3 dimensional (using the practical Euclidean view of the world – not that of modern day physics). There is no reason why a “design” should not subsist in what people would ordinarily call a “flat” or “2-dimensional” thing – for instance a new design of doily would have a new “shape” and could in principle have UDR in it.
25. Thus dimensions do not really come into it. The real question is whether the words “configuration .... of an article or part of an article” can cover the mere colouration of parts of an article. Mr Wyand submitted they could – that it would not be an abuse of language to say that the red, blue and white components of the Lambretta top were “configured” together. That is true but beguilingly simple – the truth is that the components are indeed configured to produce the ultimate complete article but their colour has nothing to do with that configuration.
26. Mr Wyand suggested that the decision of Pumfrey J in *Mackie Designs v Behringer* [1999] RPC 717 supported a sufficiently wide meaning of the word “configuration” to cover this case. The issue arose as to whether circuit diagrams were “design documents” within the meaning of s.51 of the Act. s.51(3) defined



“design” for all practical purposes in the same way as s.213(2). Pumfrey J held that circuit diagrams were for the “configuration” of an article – showing what the components were and how, and how in principle, they were to be connected amounted to “configuration” of the article.

27. The decision has been fiercely criticised in paragraphs 53.6-10 of the 3<sup>rd</sup> edition of Laddie, Prescott and Vitoria’s *Modern Law of Copyright and Designs* (2000). The heart of the criticism is that a mere schematic diagram is not the design of “an article or part of an article” at all – any more than the London Underground Map is truly a depiction of the real-world positioning of the stations. Many different “articles” can comply with a circuit diagram. There may well be force in the criticism, but it is not necessary to decide that here. For even the wide meaning of configuration – “the relative arrangement of parts or elements” - adopted by Pumfrey J is not wide enough to cover merely colouring a pre-existing article.
28. I should mention the example of the design of a patchwork quilt, raised by Sedley LJ in the course of debate. Suppose a quilt of conventional overall rectangular shape made up of patches of conventional shape. One could fairly say that the overall pattern produced was as a result of the configuration of the patches – but that is not good enough. UDR does not subsist in patterns. It can only subsist in the shape or configuration of articles or parts of articles. I mention in passing that there might well be ordinary artistic copyright in the overall design produced by the patches – the definition of “artistic work” is now wide and includes “a graphic work, photograph, sculpture or collage.” But it does not assist the debate over UDR to know whether or not artistic copyright would cover the case. For the reasons I give below it is seldom helpful to start with the proposition “there must be protection” and fashion one of the many possible IP rights to give that result.
29. Accordingly I am of the view that Etherton J was right to hold that mere choice of colourways of a standard track top was not “an aspect of the shape or configuration of an article or part of an article.”

*Issue (ii) Surface Decoration?*

30. Even if that were not so, the exclusion of “surface decoration” from the scope of UDR must cover this case. It is true that the parts of the garment are dyed right through, but any realistic and practical construction of the words “surface decoration” must cover both the case where a surface is covered with a thin layer and where the decoration, like that in Brighton rock, runs throughout the article. To hold otherwise would mean that whether or not UDR could subsist in two different articles, having exactly the same outward appearance, depended on how deep the colours went. Parliament cannot have intended anything so capricious.
31. I should also deal with an incidental argument arising from the exclusion of surface decoration. It is suggested that “shape or configuration” would otherwise include surface decoration – that the exclusion is a pointer to the width of those words without it. It is not an argument which could really help Lambretta – for it necessarily concedes that the colourways are surface decoration. But in any event I do not think it right. Surface decoration can be more than essentially flat – you can decorate a thing with three dimensional decoration – for instance the “cock beading” considered by Jonathan Parker J in *Mark Wilkinson Furniture v*

*Woodcraft Designs* [1998] FSR 63. The point of the exclusion is obviously to avoid problems of this sort – three-dimensional embellishments of an article are intended to be excluded. They may have an independent artistic copyright – that depends on the rules for artistic copyright and section 51.

32. Accordingly I think the Judge was right to conclude that UDR cannot subsist in the design of the Lambretta top.

*Issue (iii): Is s.51 a defence?*

33. Next comes the question whether, supposing Lambretta would otherwise have a cause of action in artistic copyright, s.51 operates as bar to that action. It reads, so far is material:

“(1) It is not an infringement of any copyright in a design document or model recording or embodying a design for anything other than an artistic work or a typeface to make an article to the design or to copy an article made to the design.

(2) ...

(3) In this section –

“design” means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article, other than surface decoration; and

“design document” means any record of a design, whether in the form of a drawing, a written description, a photograph, data stored in a computer or otherwise.”

34. s.51 does not apply if the design document is itself for an artistic work. So if it is for, say a sculpture, the defence does not apply. And in relation to certain kinds of artistic works, Parliament has decided that even if s.51 does not apply, the term of protection (normally 70 years from year of author’s death) is reduced if there is industrial production of the work. The details of this are to be found in s.52 and the statutory instrument made thereunder. The provision broadly carries on the regime formerly existing under s.10 of the Copyright Act 1956 but only for those artistic works for which s.51 does not provide a total defence. For present purpose the significance is the period of protection. Even for artistic works identified in the statutory instrument which are reproduced industrially the period is much greater than that for UDR – 25 years from first marketing in the case of works within s.52. For other artistic works the period is 70 years from the year of death of the author.
35. Mr Wyand submits that if Lambretta do not have UDR, then they must have rights in artistic copyright – that Parliament cannot have intended to leave a “hole”

between UDR and ordinary copyright rights. He relies on what was said by Jonathan Parker J in *Mark Wilkinson*:

“s.51 of the 1988 Act removes copyright protection from designs which are protected by design right. The twin concepts of copyright and design right are thus rendered mutually exclusive”

36. He suggests that Jonathan Parker J was thereby saying you get UDR or ordinary copyright – there are no gaps. Now it is generally the case that that is so – but I do not think Jonathan Parker J was intending to say that it was always and necessarily so. Whether or not there is a “gap” or “hole” on the facts of a particular case must in the end depend solely upon the language used to create the rights concerned.
37. There is a more fundamental reason for rejecting this general argument. Implicit within it is an implied premise that “anything worth copying is worth protecting.” It goes too far – in effect one starts with the answer. Such an approach has recently been rejected by the High Court of Australia in *Network Ten v TCN Channel Nine* [2004] HCA 14, 11<sup>th</sup> March 2004. The majority opinion of McHugh CJ, Gummow and Hayne JJ includes the following passage about the “there must be protection” argument:

“14. Counsel for Nine invoked a well-known statement made in *University of London Press Ltd v University Tutorial Press Ltd* ([1916] 2 Ch 601 at 610). This was a case of infringement of copyright in an original literary work and Peterson J applied “the rough practical test that what is worth copying is prima facie worth protecting”. But later authorities correctly emphasise that, whilst copying is an essential element in infringement to provide a causal connection between the plaintiff’s intellectual property and the alleged infringement (*Copinger and Skone James on Copyright*, 14<sup>th</sup> ed (1999), vol 1, §7.08), it does not follow that any copying will infringe. The point was stressed by Laddie J when he said (*Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700:

“Furthermore many copyright cases involve defendants who have blatantly stolen the result of the plaintiff’s labours. This has led courts, sometimes with almost evangelical fervour, to apply the commandment ‘thou shalt not steal’. If that has necessitated pushing the boundaries of copyright protection further out, then that has been done. This has resulted in a body of case law on copyright which, in some of its further reaches, would come as a surprise to the draughtsmen of the legislation to which it is supposed to give effect.” See also *Copinger and Skone James on Copyright*, 14<sup>th</sup> ed (1999), vol 1, §7.31)”

15 Professor Waddams, speaking of the use of terms such as “piracy”, “robbery” and “theft” to stigmatise the conduct of alleged infringers of intellectual property rights, describes “the choice of rhetoric” as “significant, showing the persuasive power of proprietary concepts” (*Dimensions of Private Law: Categories and concepts in Anglo-American legal reasoning*, (2003) at 175-176). He also remarks (at 174):

“Against the merits of enlarging the property rights of one person or class of persons must always be set the loss of freedom of action that such enlargement inevitably causes to others.”

In another English decision, Jacob J identified Peterson J’s aphorism in *University of London Press* as an indication of the dangers in departing too far from the text and structure of the legislation; his Lordship said that the aphorism “proves too much” because if “taken literally [it] would mean that all a plaintiff ever had to do was to prove copying” so that “appropriate subject matter for copyright and a taking of a substantial part would all be proved in one go”. (*Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275 at 289. See also the decision of Pumfrey J in *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95 at 133)

38. Accordingly I approach the question of whether s.51 provides a defence with no preconceived bias one way or the other and without regard to the fact that I have concluded that there is no UDR in the colourways as such. All depends on the meaning of s.51 in context. And as the Judge rightly observed s.51 is obviously not simply saying “anything protected by UDR is not protected by artistic copyright,” as it has the other way round in s.236.

39. Now, apart from the colourways, there is no doubt that Mr Harmer’s drawing is a “design document”. Does the fact that “surface decoration” is excluded from the definition of “design” for the purpose of s.51 make any difference? I think not. For these colourways are not just colours in the abstract: they are colours applied to shapes. Neither physically nor conceptually can they exist apart from the shapes of the parts of the article. It is not as though this surface decoration could subsist on other substrates in the same way as, for instance, a picture or logo could. If artistic copyright were to be enforced here, it would be enforced in respect of Mr Harmer’s whole design drawing. But that is not allowed by s.51. I think the Judge put it elegantly when he said (para 74):

“Such an approach ... would appear to give rise .. to an impossible task. It would require the Court to consider the existence and infringement of copyright in respect of the juxtaposition of colourways divorced from the shape or configuration of the article in question, even though the shape and configuration of Lambretta’s garment provide the

borders of the colourways and the means by which the colourways are juxtaposed.”

40. Accordingly I think Etherton J was right to hold that s.51 barred the claim here. I am reinforced in this view by the bizarre oddity that would otherwise arise – that Lambretta would have a much longer period of protection (25 years from first marketing) than if they have a proper UDR, for instance by actually designing a new garment rather than just (for I here ignore the stripes and logos) colouring an old one.
41. I leave the appeal with one further observation: that the new European unregistered design right, although lasting for a shorter period than the UK UDR, clearly would cover this case. Art. 3(a) of Regulation 6/2002 says:

“ ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”

This Regulation was not in force at the time when the events of this case occurred. But it demonstrates how, if one wanted to cover a case such as the present, it could be done. Whether the UK still needs its own unregistered design right on top of that provided by the Regulation is perhaps also open to question.

*Issue (iv): “Commonplace in the design field in question.”*

42. I now turn to the first point of Teddy Smith’s cross-appeal, the question of “commonplace in the design field in question.” It is not surprising that the courts have found this difficult to grapple with – it is a “vague and imprecise concept” as Mummery LJ observed at p.478 of the *Farmers Build* case. The vagueness extends not only to the meaning of “commonplace” but also to “the design field in question.” But grapple we must, even though as Lord Morton, when the Bill was before the House of Lords correctly prophesied that it was “likely to give rise to much litigation” (quoted by Mummery LJ at p.479).

*“Design field in question”*

43. The Judge, rightly, considered that he ought to consider first what was covered by “the design field in question.” Logically it is a prior question to “commonplace” and it arises at least partially here. For Etherton J held that:

“in 2000 and 2001 there was a broad distinction to be made between clothes designed to be marketed to young men as sportswear and clothes designed to be marketed to young men as casual clothing other than sportswear.”

And that:

“the relevant design field, for the purpose of s.213(4) of the 1988 Act, was the field of clothes designed and marketed for sale to young men as casual wear, as distinct from sportswear.

44. I think the Judge erred in principle to narrow down “design field” in this way. Whilst one can see that there is an obvious spectrum between what might be called sportswear-only garments (e.g. scuba-diving suits) on the one hand and leisurewear-only garments on the other, many garments for many years have been multi-purpose. To ask whether someone in the High Street wearing a red “football” shirt with “HENRY 14” emblazoned across the back on it is wearing sportswear or leisurewear is to ask a meaningless question. And designers, particularly of leisurewear with a “sporty” image, have been bound to include within their “common general knowledge” (to borrow a term from patent law) the design of sportswear.
45. I think that when the Act speaks of “design field in question” a reasonably broad approach is called for. What matters are the sort of designs with which a notional designer of the article concerned would be familiar. So here, a tracksuit designer, designing a garment intended to give a “sporty” image would naturally look to and have as part of his background knowledge and experience, the design of well-known actual sportswear, whether strictly so called or not. It is all part of the image.
46. I am reinforced in this view by the origins of the phrase. This was the Semiconductor Products (Protection of Topography) Directive 87/54/EEC. Although this required protection of the topography of a semiconductor it excluded from protection “elements that are commonplace in the semiconductor industry.” “Commonplace” applied to the industry as a whole, not discrete subdivisions of it such as telephone or calculator or clock chips. When the semiconductor protection was subsumed within UDR and “design field in question” replaced “the semiconductor industry” it is unlikely that Parliament meant the new phrase to be read narrowly when the previous phrase, in its context, was wide.
47. I also think my view accords with the decision of this court in *Scholes Windows v Magnet* [2002] FSR 172. The dispute was whether the “design field” was “window design” generally or was more limited to – (variously) U-PVC casement window, casement windows or U-PVC windows. The judge’s decision of “window design” generally was upheld. Mummery LJ said (para. 31)

“the expression is obviously intended to set sensible limits to the inquiry whether a design is ‘commonplace’. The making of comparisons with pre-existing designs are matters of fact and degree to be assessed by the tribunal of fact in taking account of all the relevant circumstances.”

#### *Commonplace*

48. In *Farmers Build* Mummery LJ did his level best to provide some sort of guidance for this concept. He said:

“ (3) If the court is satisfied that the design has not been copied from an earlier design, then it is “original” in the “copyright sense”. The court then has to decide whether it is “commonplace”. For that purpose it is necessary to

ascertain how similar that design is to the design of similar articles in the same field of design made by persons other than the parties or persons unconnected [sic] with the parties.

(4) This comparative exercise must be conducted objectively and in the light of the evidence, including evidence from experts in the relevant field pointing out the similarities and the differences, and explaining the significance of them. In the end, however, it is for the court and not for the witnesses, expert or otherwise, to decide whether the design is commonplace. That judgment must be one of fact and degree according to the evidence in each particular case. No amount of guidance given in this or in any other judgment can provide the court with the answer to the particular case. The closer the similarity of the various designs to each other, the more likely it is that the designs are commonplace, especially if there is no causal link, such as copying, which accounts for the resemblance of the compared designs. If a number of designers working independently of one another in the same field produce very similar designs by coincidence the most likely explanation of the similarities is that there is only one way of designing that article. In those circumstances the design in question can fairly and reasonably be described as “commonplace”. It would be a good reason for withholding the exclusive right to prevent the copying in the case of a design that, whether it has been copied or not, it is bound to be substantially similar to other designs in the same field.

(5) If, however, there are aspects of the plaintiff’s design of the article which are not to be found in any other design in the field in question, and those aspects are found in the defendants design, the court would be entitled to conclude that the design in question was not “commonplace” and that there was good reason for treating it as protected from misappropriation during the limited period laid down in the 1988 Act. That would be so, even though the design in question would not begin to satisfy any requirement of novelty in the registered designs legislation.”

*The approach of the Court of Appeal to “commonplace in the design field in question”*

49. There was no dispute about this – but it is important nonetheless. Mummery LJ set it out in *Scholes Windows* at paras 21-26. Following the decision of the House of Lords in *Designers Guild v Russell Williams* [2001] FSR 11, the Court of Appeal will only interfere with the trial judge’s conclusion if it is clear that he misdirected himself or erred in principle.

*The alleged errors in this case*

50. Mr Arnold submitted that the Judge indeed misdirected himself or erred in principle. He identified the following matters:

- i) The erroneously narrow view of the “design field in question”;
- ii) A failure to take into account that the design was just the colourways;
- iii) Reliance solely on the opinion of Lambretta’s expert witness Mr Silverman and ignoring the opinion of Teddy Smith’s expert (Mr O’Neill);
- iv) A failure to appreciate that Mr Silverman’s opinion was based on the total design of the Lambretta top – not merely the colourways.

51. I have already held that Mr Arnold is right about the first point. And this may have led the Judge to disregard certain items of prior art. The Judge said “none of the witnesses was able to point to any other top in that field of design which had the same juxtaposition of colourways as the Lambretta Track top.” The field of design he had already held was limited to “leisure-wear as opposed to sportswear”. Thus a number of items of prior art relied upon were sportswear. The Judge rejected these in the following paragraph:

“94. Mr Arnold placed emphasis upon the evidence that, by that date, there was a trend for retro or vintage clothing generally, including zip-through tracksuit tops. Those tops, which were originally designed for sale as sportswear, would have been worn by some young people as casual wear. Such clothing would have included, for example, an Adidas tracksuit top with red sleeves, a blue body, blue stripes on the arms, and some white detail, as well as, possibly, a Sergio Tachini track top with a blue body, red sleeves, white zip, collar and cuffs, and white stripes on the sleeves and body, worn by the well-known tennis player John McEnroe in 1981. I am satisfied, however, that, as at June 2000, the number of people purchasing those vintage tracksuit tops would have been relatively small. Further, I am satisfied that the precise colourways of the Lambretta Track Top were uncommon, notwithstanding that variations of those colourways could be found on some vintage clothing:”

52. Mr Arnold submitted that the Judge was wrong to discount these items. He appears to have done so on the basis that purchases of vintage garments would have been low by 2000. That to my mind misses the point. It was common ground that there was a trend for designers in the year 2000 to go for a vintage or “retro” image. That is indeed what Mr Harmer and Next’s designer were doing (M. Sansat also said he was doing this, but that cannot be taken into account at present because it is undecided whether or not he copied). That being the case, the question is not whether people were buying vintage garments as such (there was evidence of this at Camden Lock and on a sort of electronic jumble sale).



The question is whether the retro-vintage images were common in the minds of designers. That is the approach adopted in *Scholes Windows*. There the design of a plastic window horn, based on a Victorian design which had not been made for many years, was held commonplace because it was still current in the minds of the designers.

53. Accordingly I think it is open to consider the question afresh. Was the choice of red, blue and white colourways one that was commonplace in the field of leisurewear design? I think it was. The items referred to by the judge, although from the past, were clearly still well known in 2000. An Adidas top with red body, blue sleeves and white trim was on sale in 1997, the image of McEnroe holding the Wimbledon trophy in 1981 and wearing a very similar red, blue and white colourway was regularly shown and so on.
54. When one comes just to the choice of colours for arms and body (the zip is only a minor aspect) there really is not a lot of choice. Red and blue were well known and I think the fair conclusion is that they were indeed commonplace. It is not necessary to say whether the overall design (with stripes and logo positions) was commonplace, for they do not form part of the design for the purposes of UDR.
55. I turn to the experts. Both opined on the “ultimate question,” commonplace or not. That is technically admissible by virtue of the Civil Evidence Act 1972, although the question is really one for the judge. I recently said in a patent case *Rockwater v Technip France* [2004] EWCA (Civ) 381, para. 15:

“Because the expert’s conclusion (e.g. obvious or not), as such, although admissible, is of little value it does not really matter what the actual attributes of the real expert witness are. What matters are the reasons for his or her opinion”

56. That is particularly true of opinions as “commonplace.” What really matters is what prior designs the experts are able to identify and how much those designs are shown to be current in the thinking of designers in the field at the time of creation of the design in question. In this case there was a difference in approach between the parties’ experts, Mr Silverman and Mr O’Neill. A joint statement by the experts following a meeting said:

“The experts disagreed on the following issues

- (a) That the design was commonplace at the time of its creation
- (b) The relevance of their respective research in that Mr Silverman’s research was based on Trade and Consumer Journals and Mr O’Neill’s research was based on rather more Specialist journals, some of a retrospective nature.”

57. So Mr Silverman essentially confined himself to looking at what was currently on the market (he only researched the trade journal *Menswear* and the “lads” magazine *FHM*). Mr O’Neill’s approach was wider – looking for the sort of things a designer with “retro” in mind would have in mind in 2000.

58. On that basis, I do not think the judge was correct to go by Mr Silverman's opinion. That is perhaps all the more so given that Mr Silverman (and indeed Mr O'Neill) was largely considering the design as a whole, including the items which must be notionally ignored, namely the stripes and positioning of the logos. In fact no search was done simply for garments with red and blue colourways or without a visually minor white zip.
59. Accordingly I would hold, if necessary, that the Judge erred in principle in his approach to commonplace and that the choice of colourways was indeed commonplace. That is not saying the same thing as that Mr Harmer's overall design was commonplace, which it may well not have been.

*Issue (v) Did M. Sansat copy? Should there be a retrial?*

60. Etherton J held that the similarities between the Lambretta and Teddy Smith tops were such as to give rise to an inference of copying. That was not challenged on appeal. It was, therefore, common ground that it was for Teddy Smith to prove independent design work in accordance with the well-known principal that once an inference of copying arises the onus shifts on to the alleged copier to prove independent design work.
61. Clearly although the inference arose, it was not a strong inference – not for instance of the near-overwhelming strength where two pages of text are identical. All that had to be explained was the identity of the colourways. Next were able to rebut the presumption by explaining their independent design work. But the Judge rejected M. Sansat's evidence as to independent design. He said that "his evidence was not entirely satisfactory" in explaining the genesis of the design of the Teddy Smith track top and, in particular, colourways and cloth used in that garment. A most material part of the Judge's reasoning included the fact that both the Lambretta and Teddy Smith track tops used a kind of stitching called "French rib".
62. Mr Arnold makes two points. First he says that the "French rib" attack took Teddy Smith by surprise and they had no proper opportunity to deal with it. Secondly, he says that, although the Judge is in no way to be blamed for this, M. Sansat's evidence appeared to be unsatisfactory because of the failings of the interpreter. In further support of his suggestion that the French rib point was false, Mr Arnold sought to put in fresh evidence on this appeal designed to show that French rib was not a unique kind of stitching.
63. French rib was not mentioned in the pleadings. Nor was it mentioned in Mr Harmer's pre-trial witness statement. Both of these are places where one would normally expect a man who says he has been plagiarised to raise the point. The point was not also raised in the opening skeleton argument or in counsel's opening speech. It was only during Mr Harmer's cross-examination that it was first mentioned, raised by the witness rather than by any specific question:

"Q. The sample supplied by RHM was a standard tracksuit top wasn't it?

A. Yes.

Q. In terms of its cut, it was indistinguishable from many other tracksuit tops?

A. Apart from we had requested that sample to be made in a French rib which was a fabric not used for tracksuit tops normally.

Q. But you are not suggesting you were the first person to use a French rib are you?

A. I am suggesting that to my knowledge, I was the first person to use a French rib for a tracksuit top, yes.”

64. When M. Sansat himself gave evidence he was challenged about his choice of French rib. But it had never been made clear to him in advance that it was going to be suggested that that particular knit was an indication that he had copied. The Judge found, as I have said, that his evidence was unsatisfactory. But it is now clear (by agreed evidence before us) that unfortunately the interpretation of some of the questions and of his answers was inaccurate. Most of the inaccuracies were of peripheral significance. But that was not so in relation to his evidence concerning French rib. At one point it is clear that M. Sansat thought he was being asked about the ribbing round the cuffs rather than the kind of knit used to make the garment. It is little wonder that in English his answers seemed unsatisfactory.
65. More generally I think there is substance in the claim that the French rib point took the defendants by surprise. And that this may have been unfair. Where there is an allegation of copying, fairness requires that the claimant should identify the points relied upon well in advance of trial. That should normally be in the pleadings but at least ought to be in the witness statements. As Aldous J observed in *N&P Windows v Cego* [1989] FSR 56 “I would have thought that it was essential in future cases that points of similarity are set down.”
66. That applies to all points of similarity, whether they form important parts of the work alleged to have been copied, unimportant parts or even, something which strictly does not form part of the work sued upon (as here, where the knit was not part of the alleged UDR or artistic work). This is because, very often, that which constitutes a substantial part of a work may not be that which is relied upon to prove copying. Frequently the indicia of copying lie in unimportant details. Hoffmann J put it this way in *Billhöfer v Dixon* [1990] FSR 105:

“In considering the question of causal connection, i.e. whether the alleged infringement was copied from the copyright work, it is the resemblance in inessentials, the small, redundant, even mistaken elements of the copyright work which carry the greatest weight. This is because they are least likely to have been the result of independent design. Such resemblances may lead the court to conclude that everything in the alleged infringement was copied. On the other hand when the Court has decided that some parts were copies and others were not, the question of whether

they amounted to a substantial part depends upon whether they were sufficiently important.”

67. In this case, because the point arose so late, the defendants were in no position at trial to prove that French rib, far from being unique, was a common or relatively common knit for the use in garments of this general kind. This is the very kind of thing which would need some research and cannot be dealt with on the hoof. Mr Arnold before us sought to adduce further evidence as to the use by others (including Teddy Smith, Fred Perry) of French knit (sometimes by another name) for track tops or similar garments. I think it was right to admit it and although Mr Wyand criticized it, it seems to me at least, without an answer, to have some force.
68. Of course normally the Court of Appeal is most reluctant to interfere with a finding of copying. After all, the trial Judge has seen and heard the witness and has, in the nature of things, been more fully immersed in the detail than is possible in the Court of Appeal. But in this case I think there is just enough, taking both the French rib point and the unsatisfactory interpretation, to indicate a very real doubt as to whether the trial Judge’s conclusion was right. Had it been necessary, I would have ordered a fresh trial on the issue of copying or not.
69. In that fresh trial it would further be important for it to be shown that M. Sansat had access or the opportunity of access to an actual Lambretta garment - mere pictures do not reveal the nature of the knit. There was no direct evidence that M Sansat had come to London at the relevant time i.e. in the short period from when the garment came on the market and when he did his design work. It was never put to him that he had been in the UK during that time – all there was was his general evidence that he came to England from time to time. The Judge accepted that Mr Shah, the managing director of Teddy Smith (UK), had played no part in supplying a Lambretta garment to M Sansat.
70. Also remaining to be explored, is another oddity. Mr Harmer’s design document instructed the manufacturer “knit as your tracksuit supplied”. That would seem to be inconsistent with his evidence that he was the first person to use French knit. True it is that he was not pursued in cross-examination about this, but at the time it was not obvious that French knit was going to be relied upon as an indication of copying.
71. Mr Wyand submitted that although the French knit point was raised late, that it came in as result of Mr Arnold’s cross-examination – that it was Teddy Smith who brought the point into the case and they cannot complain. I reject that argument for two reasons. Firstly it was the witness not Mr Arnold who introduced it. Mr Arnold asked a question about the cut not the fabric and the witness brought the fabric into his answer. Secondly and more fundamentally it is to treat litigation as a game. Fairness is more important than that. In truth Mr Arnold cannot be blamed for following the answer up – for he had no prior indication, as he should have had, that the point was supposed to have any significance.
72. Mr Wyand also submitted that although the point was raised late, Teddy Smith had an ample opportunity of dealing with it and indeed made some efforts so to do

at trial. Moreover, he submitted, Teddy Smith's expert witness was specifically asked about French knit by an inquiry by the judge and said he was not aware of it being used for a track top before. As to the problems over interpretation, Mr Wyand submitted that the time to raise this was also at trial and that indeed Mr Arnold had specifically raised the fact that there was some mistranslation and the judge had taken that into account before rejecting M. Sansat's evidence. The time to complain, submitted Mr Wyand, was at the trial. And if the French rib point really mattered, an adjournment should have been sought.

73. Powerful though these points are, they are not an answer. As regards the interpretation errors Mr Arnold was not in a position at the time to point to any detail – that required what was done after trial, namely a close listening to the tapes by someone who was properly bilingual. As for asking for an adjournment, that was in reality impractical and in any event put Mr Arnold in a dilemma which would not have arisen if there had been advance notice of the point. When a trial is in full flow, as this one was when it first really became apparent that French rib was supposed to indicate copying, namely in the course of M. Sansat's cross-examination, courts are most reluctant to adjourn with all the delay and cost implications. In this case it would have been all the more difficult in that the other defendant would not have wanted an adjournment. Nor do I think it matters that the Teddy Smith's expert was not familiar with the use of French rib – for he was not an expert in the fabrics used – he was there on the subject of fashion. The real problem is that the point emerged so late.
74. Thus I think that the Judge's overall conclusion that Teddy Smith copied cannot, on the facts as we now know them (particularly as to the availability of French rib and the unsatisfactory nature of the interpretation) be sustained. That is not to say that copying was disproved. It is merely that if Lambretta otherwise had a legal right, justice could only be served by a retrial of the issues concerning French rib and copying.

*Issues (vi) and v(ii) substantially to the design or substantial reproduction?*

75. Mr Arnold frankly acknowledged that these were not his best points – nor were they. If UDR subsisted and included the colourways, or if s.51 did not bite, and if M. Sansat copied, then the Teddy Smith garment would obviously be “substantially to the design” or a “substantial reproduction” as the case may be.

*Issue (viii) Costs*

76. Having regard to the view I have taken on the substantive matters the costs point falls away and it is unnecessary to deal with it.

*Conclusion*

77. Accordingly I would dismiss the appeal. I would also uphold the Judge's ultimate finding of no liability on the grounds that if UDR could otherwise subsist, it was commonplace. If necessary I would have ordered a retrial on the French rib point.

**Lord Justice Mance:**

78. I have had the benefit of reading in draft the judgment given by Jacob LJ. I agree with his conclusions on issues (i) and (ii) in paragraphs 1 to 29 and on issues (iv)(v)(vi) and (viii) in paragraphs 43 to 76. However, with the very greatest of diffidence, I do not find myself able to adopt the reasoning in paragraphs 33 to 42 on issue (ii) or therefore to agree with him or the judge on this one issue relating to s.51 of the Copyright and Patents Act 1988. The consequence of accepting the alternative view which I am about to express would be that the matter would have to go back to the judge for further consideration.
79. I can express my thinking quite shortly. The starting point, apart from s.51, is that the whole of Mr Harmer's drawing attracted artistic copyright (even though it included the standard shape of a sample track-suit top obtained from Lambretta's manufacturers); and that third parties were precluded accordingly from copying (either two- or three-dimensionally) the whole or any substantial part of Mr Harmer's drawing without licence: see s.16(1) to (3).
80. However, the effect of s.51 is to prevent it being an infringement of any claim to artistic copyright "to make an article to the design or to copy an article made to the design" embodied in Mr Harmer's drawing. The concept of "design" under s. 51 is somewhat wider than that used in s.213. The effect of the definition in s.51(3) is that "design" under s.51(1) may include either or both of the aspects excluded from "design" under s.213 by virtue of s.213(3)(a) and (b). So Parliament decided that those two aspects should not enjoy any protection either as design right under s.51 or by way of artistic copyright. But, in order "to make an article to the design" or "to copy an article made to the design" embodied in a drawing, it is, because of the definition in s.51(3), still necessary to conclude that the article was made, or was a copy of an article made, to the design, meaning "the design [as embodied in the drawing] of any aspect of the shape or configuration .... of the whole or part of an article, other than surface decoration". Only if it was, does s.51 prevent there being any copyright infringement. And, even if it was, I do not see any basis for reading s.51 as going further than preventing any copyright infringement *to the extent* that it was made, or was a copy of an article made, to the design in that limited sense. The alternative is that, as soon as any design right is infringed in a drawing by making an article, or copying an article made, to the shape or configuration shown in a drawing, there can be no infringement of any copyright in respect of that drawing, no matter what the relative importance of the shape or configuration and of the other aspects copied. That would seem arbitrary.
81. In the present case, there was nothing special about the shape or configuration of the track-suit top shown in Mr Harmer's drawing. Assuming that Teddy Smith copied anything from that drawing, it seems improbable that it was the shape or configuration of the track-suit top. On that basis, s.51 would not seem to apply at all.
82. In any event, however, s.51 requires one to ignore any copying of the shape or configuration of the track-suit top, when assessing whether Teddy Smith copied the whole or any substantial part of Mr Harmer's drawing for the purposes of s.16. What Teddy Smith did copy, if they copied anything, was the colourways and surface decoration. The relevant question in the light of ss.16 and 51 is therefore whether, in doing this, they copied the whole or a substantial part of Mr Harmer's

drawing. I do not see that this is or becomes an impossible question, merely because, in asking whether Teddy Smith copied a substantial part of Mr Harmer's drawing, one is required to ignore any copying (if there had happened to be any) of the shape or configuration of the article embodied in Mr Harmer's drawing. Distinctions between shape and configuration and other aspects are inherent in s.51 and indeed s.213, and discrimination between "substantial" and lesser parts of a work is inherent in s.16(3). I express no view, however, as to whether (ignoring any copying, if there was any, of the shape or configuration of the article embodied in the drawing) any copying by Teddy Smith of the colourways and surface decoration could by itself be said to involve copying of a substantial part of Mr Harmer's drawing as a matter of fact. I have some doubt in the light of paragraphs 74 and 128 of the Judge's judgment whether he addressed this hypothesis squarely (cf. issue (vii) and paragraph 75 of Jacob LJ's judgment). The position regarding surface decoration appears to me consistent with my conclusion as to the law. Surface decoration can have no design right protection under s.213, but it is excluded by s.51(3) from the concept of design for the purposes of s.51(1). So copyright in a drawing showing an article with surface decoration may still be infringed, if (putting aside any copying of the design of the shape or configuration of the article) there has, by virtue of the copying of the surface decoration, been copying of a substantial part of the drawing. I do not see any basis for limiting the copyright protection in case of surface decoration to a situation where the surface decoration could be said itself to constitute a separate drawing.

83. I do not regard s.236 as pointing in any different direction, s.236 provides:

"Where copyright subsists in a work which consists of or includes a design in which design right exists, it is not an infringement of design right to do anything which is an infringement of the copyright in that work."

It seems to me that there may, in the light of s.226(1)(b), be infringements of design right in circumstances in which there has also been an infringement of copyright about which the copyright owner is not precluded from complaining under s.51; and that the effect of s.226(1) is to give priority to the copyright protection in such a case. If anything, that suggests to me a dove-tailing of design right and copyright protection, which appears consistent with the view which I favour.

84. I note what Jacob LJ says about the longer period of protection that would apply in respect of artistic copyright, compared with any design right. But the rules and periods for different types of protection of intellectual property appear to me to be the product of history and piecemeal development at the national and international level. I have not been able to derive from them an overall scheme which would suggest that the conclusion which I would favour is wrong.

**Lord Justice Sedley:**

85. There is a difference of opinion between Mance LJ and Jacob LJ on one issue only. If the view taken by Mance LJ were right it would be necessary to remit the case for a further hearing. But I am satisfied, having considered their respective reasons, that the preferable view is that of Jacob LJ.

86. As their opinions demonstrate, neither view is unproblematical. It would be intellectually satisfactory and aesthetically tidy if UDR and copyright made a seamless whole, but there is no warrant for supposing that this is either the intent or the necessary effect of the present legislative provisions. Mance LJ correspondingly adopts no such premise, but finds it a satisfactory conclusion.
87. It seems to me, however, that the issue comes down to the essentially factual question whether the colourways on this design are part of the shape or configuration of the garment or are no more than its surface decoration. I think these colourways are part of its configuration. The contrast between s.51 and the formula in art. 3(a) of Regulation 6/2002 is not determinative, but it is instructive in showing how readily copyright protection could have included colourways of this kind.
88. For my part, I do not find it difficult to make a distinction between shape and configuration, even though in most instances it will be a distinction without a difference. Shape in general is the outline of an object; its configuration ordinarily connotes how its elements are assembled. The distinction between the hot water bottle and its ribbing, considered by Lord Evershed in *Cow v Cannon* [1959] RPC 344, 350, seems to me (with all respect to the contrary view of Jacob LJ) a fair example. Another example, which I suggested in argument, is a patchwork quilt, rectangular in shape but polygonal (or triangular or variegated or whatever) in configuration.
89. For these reasons and those given by Jacob LJ I would dismiss this appeal.