

Neutral Citation Number: [2015] EWHC 216 (Ch)

Claim No: HC13F01255

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2015

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

Between:

G-STAR RAW CV

**(a company incorporated under the laws
of the Netherlands)**

Claimant

- and -

- (1) RHODI LIMITED**
- (2) RHODI INC. IMPORTS LIMITED**
- (3) VOI JEANS LIMITED**
- (4) RHODI MARKETING LLP**
- (5) RHODI SUPPLIERS LIMITED**
- (6) RHODI GROUP LIMITED**
- (7) ASIF IBRAHIM BUX (formerly PATEL)**
- (8) FIROZ IBRAHIM BUX (formerly PATEL)**

Defendants

Hugo Cuddigan (instructed by Wragge Lawrence Graham & Co LLP) for the Claimant
Jonathan Hill (instructed by Kuit Steinart Levy LLP) for the Defendants

Hearing dates: 29-31 October, 3 November 2014

RICHARD SPEARMAN Q.C.:

Introduction

1. The Claimant (“G-Star”) carries on business as a designer, manufacturer and distributor of clothing and fashion accessories. In particular, G-Star is one of Europe’s leading denim fashion brands and designers of contemporary urban garments.
2. In this action, G-Star, represented by Hugo Cuddigan, seeks injunctions, orders for delivery up, an inquiry as to damages or an account of profits, and other relief in respect of alleged infringement of the United Kingdom unregistered design rights in the design of a pair of contemporary jean trousers known as the “Arc Pant”. The Defendants contend that the rights in question entered the licence of right period under section 237 of the Copyright Designs and Patents Act 1988 (“the CDPA”) on 1 January 2014, such that no injunction restraining infringement is now available to G-Star on any view.
3. G-Star accepts that all the articles which, as it alleges, infringe its rights were made abroad. However, G-Star contends that they are “infringing articles” pursuant to section 228(3) of the CDPA, on the basis that (a) they have been imported into the United Kingdom and (b) they copy G-Star’s design so as to produce articles exactly or substantially to that design, such that they would have infringed G-Star’s unregistered design rights if they had been made in the United Kingdom. G-Star’s claim against the corporate Defendants is accordingly for secondary infringement pursuant to section 227 of the CDPA. G-Star also has a claim against the individual Defendants on the basis that they entered into a common design with some or all of the corporate Defendants to do the acts which, on G-Star’s case, involved infringement of its rights.
4. The claim relates to 9 separate styles of jeans marketed under the “Voi” brand, called “Bowral”, “Capel”, “Carton”, “Ibaraki”, “Jurien”, “Maleny”, “Vale”, “Vobar” and “Winton” (“the Rhodi Styles”). The Defendants, represented by Jonathan Hill, take issue with G-Star’s case root and branch. However, their main line of defence is that (a) none of the Rhodi Styles are substantially the same as the Arc Pant, and no constituent part of them is substantially the same as its counterpart in which G-Star claims that unregistered design right subsists and (b) in any event, they did not copy the Arc Pant.
5. According to a witness statement made by their solicitor at an earlier stage of these proceedings, the Defendants contend that “their styles were created without reference to the Arc Pant” and “they created their designs in late 2011 onwards by just following general fashion trends in the denim market, and to the extent that their styles have similarities with the Arc Pant this is due to them sharing generic features which had by late 2011 become common”. However, it forms no part of their case before me that the designs in issue are commonplace – or, for that matter, that any of them are functional.
6. In many cases there will be an inter-relationship between the issues of whether articles have been made substantially to a design and whether that design has been copied. If there is a substantial similarity between the defendant’s design and that of the claimant,

that may more readily give rise to an inference of copying; and, conversely, if there has been copying, that may render it more likely that the articles are substantially similar.

7. Confusingly, and contrary to what their names suggest, it appears, and is admitted on the pleadings, that it was the Second Defendant, Rhodi Inc. Imports Limited, that stocked for commercial purposes, offered for sale and put on the market in the United Kingdom the allegedly infringing articles; and that it was the Fifth Defendant, Rhodi Suppliers Limited, that imported those articles and sold them to the Second Defendant.
8. It is denied that any of the other corporate Defendants played any part in the activities of which G-Star complains. There is evidence that the First Defendant, Rhodi Limited, supplied staff who worked on those activities, and that the Fourth Defendant, Rhodi Marketing LLP, operated a website that had some involvement in those activities. I return below to whether these facts provide a basis for establishing liability against them. So far as concerns the Third Defendant, Voi Jeans Limited, and the Sixth Defendant, Rhodi Group Limited, however, as Mr Cuddigan effectively conceded in closing, in my judgment G-Star has no real case at all, and I say little more about them.

Previous proceedings

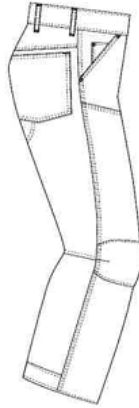
9. This is not the first instance of litigation between these parties, or some of them. Following initial test sales to the public in June 2008, the Arc Pant was fully launched at an industry show in Berlin in July 2010, and G-Star went on to achieve sales of more than 2 million items by the end of 2012. In January 2010, G-Star became aware of a “Voi” style called “Mavrick”, which was described in a G-Star internal email dated 19 January 2010 as being “the most blatant copy [of the Arc Pant] so far. Almost everything is the same, shape of leg, shape of front pocket, shape of back pocket”.
10. G-Star and others then brought proceedings (“the “2010 proceedings”) against (among others) all the Defendants to the present action except Voi Jeans Limited and Rhodi Marketing LLP (“the 2010 Defendants”), alleging infringement of design rights in the Arc Pant and other G-Star styles in relation to various “Voi” styles of jeans including “Iceman” and “Mavrick”.
11. The 2010 proceedings were compromised by a Consent Order dated 15 July 2011. The terms of settlement are confidential, but included provision for the 2010 Defendants to procure a bank guarantee to which G-Star could have recourse in the event that G-Star provided satisfactory evidence that G-Star’s rights had subsequently been infringed by the 2010 Defendants. On 14 February 2013, G-Star made a claim under that guarantee, which the bank met using monies that it recouped from Rhodi Group Limited.
12. In the present action, both sides place reliance on these events.
13. On the one hand, G-Star relies upon them (a) as a step in the story of the Defendants’ alleged copying of the Arc Pant, and (b) as relevant to its case that (as it needs to establish to make good a claim of secondary infringement) the Defendants knew or had reason to believe that the articles complained of in this action were “infringing articles”.

In addition, by the present claim G-Star seeks to make good its contention that infringement did indeed occur subsequent to the settlement of the 2010 proceedings.

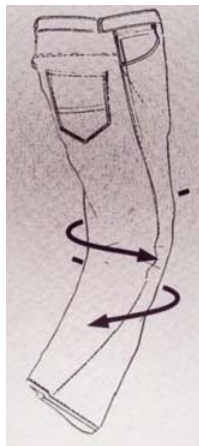
14. On the other hand, the Defendants contend that there was no such subsequent infringement, and, accordingly, that G-Star was not entitled to payment under the above bank guarantee. The Defendants therefore counterclaim for (a) a declaration of non-infringement and (b) repayment to Rhodi Group Limited of the sum which G-Star obtained under that bank guarantee. The Defendants also argue that this history supports the improbability that they would have copied the Arc Pant as alleged in the present action. They say, in essence, (i) “once bitten, twice shy”, and (ii) that it would have been foolhardy for them to do this, because it would have been obvious to them that G-Star would be monitoring their compliance with the above settlement agreement.
15. The genesis of the present action occurred in December 2012, when G-Star learned of the existence of the “Jurien” style, which it regarded as an infringement of its rights.
16. By letter dated 12 December 2012, G-Star’s solicitors objected to the “Jurien” style, and complained that the terms of settlement of the 2010 proceedings had been breached: “... the JURIEN style substantially reproduces the majority of the prominent features of two particular Voi styles complained of in [the 2010 proceedings] ... Our client is very surprised that you have chosen to reproduce our client’s design again, simply using a new style name, in such a flagrant manner. In correspondence and discussions during those earlier proceedings our client made it abundantly clear that such infringing activity by your client would not be tolerated, and would be the subject of immediate action if it occurred”. G-Star subsequently objected to other “Voi” styles.

The parameters of the design claim

17. The thrust of G-Star’s case as to the origin, existence and nature of the rights in issue is paraphrased in the narrative contained in the 2011 edition of the Denim Bible, Jeans Encyclopaedia III: “In 1996, G-Star pioneered the introduction of the first sculpted, 3-D denim with the iconic G-Star Elwood ... created by G-Star’s head designer Pierre Morisset ... Gradually it became a worldwide success and today the G-Star Elwood is widely adopted ... With this design, G-Star mapped out an altogether new way of thinking about denim. The latest evolution of 3-D denim design comes with the Arc Pant, which was first introduced in 2009. This highly architectural cut features a low crotch and straight hip, with an asymmetric tapered leg that “turns” around the human leg, thanks to twisted side seams and inseams. This way the pant follows the natural shape of the leg. The result is a silhouette that looks built for a 3-D human being”.
18. In the Elwood Pant, the 3-D shape is the product of a separate shaped knee panel and an additional horizontal seam at the back of the knee. In consequence, when hung vertically, the legs curve slightly forward, and then backwards from the knee down. The result looks as follows:



19. In the Arc Pant, the 3-D shape is produced in a different way, reflected in the 5 design aspects which G-Star relies upon in the present action (“the Arc Pant Designs”), namely (i) the shape of each of the legs of the ARC Pant, that is to say the shape of the legs in the most capacious arrangement that the arrangement of their fabric allows, (ii) the shape of a third pattern piece, tapering towards its top, along the length of the inside leg of the ARC Pant, (iii) an accentuated knee portion, achieved in part by gathering fabric at knee height by way of a dart, positioned on the front panel at the inside seam pointing diagonally forward, and serving to emphasize the bent knee which results from the third pattern piece described above together with the other two pattern pieces, (iv) a foreshortened back panel, resulting from an additional seam, and (v) the twisted leg configuration, created through the combination of different pattern parts described above, sewn together to create a leg which does not hang straight, but bends at the knee inwards and backwards, and turns around the leg when worn such that it creates a corkscrew effect. The result, as depicted on the hang-tag for the Arc Pant, looks as follows:



20. G-Star contends that the Rhodi Styles can be divided into 3 groups, and G-Star’s case with regard to those groups can be summarised as follows:

- (i) “Ibaraki”, “Bowral”. These styles are strikingly similar to the Arc Pant in every way. In particular, the pattern pieces so far as material are almost identical. It must follow that the remaining aspects of the designs are too. These styles are also essentially identical to “Iceman” and “Mavrick” (which were the subject of the 2010 proceedings).
 - (ii) “Jurien”, “Vale”, “Vobar”, “Carton”. These appear to share the same panel patterns. They are still 3-D jeans which bend and twist just like the Arc Pant. There has been some minor tweaking of the seam positions, but the resultant shape remains the same.
 - (iii) “Maleny”, “Capel”, “Winton”. So far as material, these too share the same panel patterns. The front panel differs from the styles in group (ii) by having a smaller knee dart and an additional dart just below the crotch. That apart, these styles are the same as those in group (ii).
21. In outline, the Defendants start with the proposition that design right subsists in an original design of any aspect of the shape or configuration of the whole or part of any article (see section 213 of the CDPA). Next, the Defendants place great emphasis on the specific, and thus, as they submit, narrow, nature of the Arc Pant Designs on which G-Star relies. They point out, as is common ground, that the test of whether an infringing article is made substantially to the claimant’s design is “an objective test to be decided through the eyes of the person to whom the design is directed” (*C & H Engineering v F. Klucznik & Sons Ltd* [1992] FSR 421, Aldous J at 428). The Defendants therefore argue that what matters for the purposes of G-Star’s claim, in respect of each of the Rhodi Styles, is whether the shape and configuration of that Rhodi Style, or any of its constituent parts, is exactly or substantially the same as the shape and configuration of any of the Arc Pant Designs as embodied by the appearance of those designs in the Arc Pant.
22. The Defendants contend that (a) in the first instance, the court should assess the level of similarity (or lack of similarity) by comparing the shape of the respective pattern pieces and (b) thereafter, if necessary, the court should determine whether the shape and configuration of the garments are nevertheless exactly or substantially the same by conducting a detailed examination of the garments in physical form.
23. The Defendants submit that:
- (i) The claims concerning the “Capel”, “Carton”, “Jurien”, “Maleny”, “Vale”, “Vobar” and “Winton” styles are ill-conceived, as appears from a comparison of the pattern shapes of these designs and those of the Arc Pant. In particular, even a cursory comparison between the Arc Pant and the “Capel”, “Maleny” and “Winton” styles shows that these patterns share no commonality of shape or configuration, except at the most general, unprotected level.
 - (ii) The claims in respect of the “Bowral” and “Ibaraki” styles are more substantial, but should still be rejected, for reasons which I will consider below.

24. Mr Cuddigan pointed out that it appeared from paragraph 3 of the Amended Defence and Counterclaim that the Defendants were, or might be, seeking to advance a “squeeze” argument based on the “design corpus”, to the effect that because the design corpus at the time when the alleged infringements were designed shared features of the Arc Pant, the scope of protection for the rights in issue should be reduced. Mr Cuddigan submitted, and I agree, that this argument should be rejected for the reasons given by Park J in *Frayling Furniture v Premier Upholstery Ltd* [1999] 22(5) IPD 22051 at [44] and by the authors of *The Modern Law of Copyright and Designs, Laddie Prescott & Vitoria, 4th edn* at paragraph 48.3:

“The second difference [between infringement of unregistered and registered designs] concerns so-called ‘squeeze arguments’. In registered design infringement proceedings it is common for the defendant to rely on the closeness of the prior art to encourage the court to give the registration a narrow scope. Thus it is sometimes said that if only small differences distinguish the registration from the prior art, small differences are sufficient to take the defendant out of infringement. This type of argument flows from the fact that the scope of a registration is determined by its degree of novelty and individual character. Novelty and individual character in that sense have no part to play in UK unregistered design right cases. Indeed, an unregistered design right can be valid even if the design it covers is identical to a prior design, as long as the later design is original, in the sense that it was not copied from the earlier one, and the earlier design is not [commonplace]. Therefore, in many cases, the admission of squeeze arguments would be to allow issues of novelty and individual character in by the back door. This was explained in *Frayling Furniture v Premier Upholstery Ltd*, a case concerned with upholstered furniture. The defendant had found a number of illustrations of prior designs which were close to the designs in issue. On the basis of these it advanced an argument that the scope of the design right should be narrow. The court said:

“The squeeze argument has a lot of force where one item of prior art can destroy the registration. It has far less force in the field of unregistered design right under the 1988 Act, where the identical or closely similar prior art has to exist in sufficient numbers and be sufficiently well-known to make the design commonplace. A handful of roughly similar designs in the prior art is not enough.”

The only types of squeeze based on prior art which will work, we suggest, rely on commonplace prior designs.”

The issues

25. Accordingly, the main issues in this claim and counterclaim are as follows:

- (i) Subsistence and ownership of the Arc Pant Designs.
- (ii) Whether garments made to the Arc Pant Designs were first made available in 2008.

- (iii) Whether all or any of the Rhodi Styles were made substantially to the Arc Pant Designs.
- (iv) Whether any aspects of the Rhodi Styles that are held to have been made substantially to the Arc Pant Designs were copied from the Arc Pant or were instead the result of an independent but convergent design process.
- (v) Whether, in respect of each of the Rhodi Styles that is held to embody a copied aspect of design, all or any of the Defendants were involved in the same being imported into the United Kingdom for commercial purposes, or possessed for commercial purposes, or being sold or offered or exposed for sale in the course of a business (see section 227 of the CDPA).
- (vi) Whether, in respect of each of those Rhodi Styles, each Defendant who was involved in any of the above acts of secondary infringement knew or had reason to believe that such garments were infringing articles (see section 227).
- (vii) Whether, in respect of any infringement that is found, the Seventh Defendant or the Eight Defendant is liable for it as a joint tortfeasor.
- (viii) Whether G-Star provided satisfactory evidence of breach of its rights following the conclusion of the 2010 proceedings.

Unregistered design right

26. In paragraphs 27 to 38 below, I gratefully adopt, with limited changes, the analysis and summary of the law provided by Lewison J (as he then was) in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group Ltd & Anr* [2009] EWHC 26 (Pat) at [21]-[33].

Legislative framework

27. Section 213 of the CDPA provides, so far as material:

- “(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 ...”

28. Pursuant to section 226(1), a person who is entitled to unregistered design right has the exclusive right to reproduce the design for commercial purposes by making articles to that design or by making a document recording the design. Section 226(2) provides:

“Reproduction of a design by making articles to the design means copying the design so as to produce articles exactly or substantially to that design...”

29. As Mummery LJ explained in *Farmers Build Ltd v Carrier Bulk Handling Materials Ltd* [1999] RPC 461, 480:

“The purpose of copyright and of design right is not to protect the “novelty” of the work against all competition; it is to provide limited protection against unfair misappropriation of the time, skill and effort expended by the author of design on the creation of his work.”

What is a design?

30. In *Rolawn Ltd v Turfmech Machinery* [2008] RPC 27 Mann J said at [79]:

“It is important to isolate the design in respect of which protection can be properly claimed, and it is vital to ensure that it falls within the definition of design. The Act defines design as “any aspect of the shape or configuration ... of the whole or any part of an article”, and the right cannot exist until there is an embodiment of the design in an article or in a design document. This combination of features means that design right is confined to what one can actually see in an article - either the physical article or a drawing.”

31. Design right does not therefore protect ideas. Ideas are protected by patent law. It follows that, in the present case, G-Star are not entitled to claim design right for the general concept of “3-D” or “twisted fit” jeans: *Kleeneze Ltd v DRG (UK) Ltd* [1984] FSR 399.

What is an aspect of the shape or configuration of an article?

32. It is plain from the words of section 213 that design right can be claimed for the design of part of an article. An aspect of the design is something that is discernible or recognisable (not necessarily to the naked eye) but it need not be visually significant: *A Fulton Co Ltd v Totes Isotoner (UK) Ltd* [2004] RPC 16, at [31].

Self-selection

33. One consequence of section 213 is that the claimant may select a part of the article and claim design right for that part only. The courts have recognised this possibility since the early days of design right. In *Ocular Sciences Ltd v Aspect Vision Care* [1997] RPC 289, Laddie J said at 422:

“...the proprietor can trim his design right claim to most closely match what he believes the defendant to have taken. The defendant will not know in what the alleged monopoly resides until the letter before action, or, more usually, the service of the statement of claim. This means that a plaintiff’s pleading has particular importance. It

not only puts forward the claim but is likely to be the only statement of what is asserted to be the design right.”

34. Unregistered design right is, of course, not a true monopoly: it merely prevents copying. But otherwise that statement of the law is correct, subject to the gloss given by Jacob LJ in *A Fulton Co Ltd v Totes Isotoner (UK) Ltd* [2004] RPC 16, at [34]:

“I do not fully go along with Laddie J’s suggestion that what the proprietor can do is to “trim his design right claim”. It is not really a question of “trimming”—it is just identifying the part of his overall design which he claims has been taken exactly or substantially. And although Laddie J was right in saying that the defendant will not know in what the *alleged* (my emphasis) monopoly resides until the letter before action or the claim form, that does not mean the defendant does not know where he stands before then. The man who copies a part of an article, exactly or substantially, will know what he has taken. It is true that it will be for the designer to formulate his claim properly in any proceedings, but the subsistence of his rights does not depend on how he frames his claim.”

35. While it is true that a man who copies part of an article will know what he has taken, it is also true that similarities between the design relied on and the allegedly infringing article are often relied on to raise the inference of copying which the defendant must then rebut. There is a danger that the ability of the claimant to select parts of his design which are small in comparison to the overall article will give rise to a distorted impression of what the defendant has done which comes close to reversing the burden of proof.

Reproduction

36. What must be established is that the design in which design right subsists has been copied so as to produce “articles exactly or substantially to that design”. Two points arise. First, although the Act allows design right to subsist in (and be claimed for) *part* of an article, the definition of reproduction speaks only of making “articles”. There is, therefore, a linguistic mismatch between subsistence of design right and the right that it confers. But it must obviously have been Parliament’s intention that if design right subsisted in part of an article (e.g. the spout of a teapot) the right would be infringed by incorporating a copy of that spout in another teapot, even if the infringing spout is not itself a whole article. Second, even if the design has been copied, the infringing article must be produced “exactly or substantially” to the copied design. Mere similarity is not enough.

37. In *C & H Engineering v F Klucznik & Sons Ltd* [1992] FSR 421 Aldous J said at 428:

“Under section 226 there will only be infringement if the design is copied so as to produce articles exactly or substantially to the design. Thus the test for infringement requires the alleged infringing article or articles be compared with the document or article embodying the design. Thereafter the court must decide whether copying took place and, if so, whether the alleged infringing article is made exactly to the design or substantially to that design. Whether or not the alleged infringing article is made substantially to the plaintiff’s design must be an objective test to be decided through the eyes of the person to whom the design is directed.”

38. Although, at least in theory, two separate criteria must be satisfied *viz.* copying and making articles exactly or substantially to the copied design, it is not easy to conceive of real facts (absent an incompetent copyist) in which a design is copied without the copy being made exactly or substantially to the copied design. In practice, if copying is established, it is highly likely that the infringing article will have been made exactly or substantially to the protected design. If copying is not established, then whether the article is the same or substantially the same as the protected design does not matter. However, similarity in design may allow an inference of copying to be drawn.

Copying: the approach to the evidence

39. In *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group Ltd & Anr* [2009] EWHC 26 (Pat) at [34]-[37], Lewison J continued as follows:

“34. I find helpful the observations of Lord Millett in *Designers Guild Ltd v Russell Williams* [2000] 1 WLR 2416, 2425 considering the question of copying in relation to an artistic work:

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

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying. But differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material. In the present case the disposition of the flowers and (except in one instance) the colourways of the defendant's design are very different from those of the plaintiff's design. They were not taken from the copyright work, and the plaintiffs make no complaint in respect of them. They make a significant difference to the overall appearance of the design. But this is not material where the complaint is of infringement of copyright and not passing off.”

35. Nevertheless it is also important to bear in mind Mummery LJ's warnings in *Farmers Build* (at 481 and 482):

“Substantial similarity of design might well give rise to a suspicion and an allegation of copying in cases where substantial similarity was often not the result of copying but an inevitable consequence of the functional nature of the design. ...Copying may be inferred from proof of access to the protected work, coupled with substantial

similarity. This may lead to unfounded infringement claims in the case of functional works, which are usually bound to be substantially similar to one another.

...[The court] must not forget that, in the field of designs of functional articles, one design may be very similar to, or even identical with, another design and yet not be a copy: it may be an original and independent shape and configuration coincidentally the same or similar.”

36. However, as in any case where there are factual presumptions and shifting evidential burdens, the question of copying is in the end a question of fact; and one which must be proved by the claimant on the balance of probabilities.
37. In considering the question of copying, the function of the experts is not to evaluate the factual evidence, but to point out to the court the similarities and differences between the design and the alleged infringement; and the significance of those similarities and differences, so that the court can come to a view on whether they are such as to lead to a rebuttable inference that the defendant has copied the claimant's design. Both sides of the equation are important. An expert ought to deal both with the similarities between the design and the alleged infringement and also with the differences. To concentrate on the similarities alone or on the differences alone gives an unbalanced view.”

The witnesses

40. G-Star relied on the evidence of the following witnesses of fact:
 - (i) John Coldham (an associate at G-Star’s solicitors).
 - (ii) Jourica (“Rixt”) Van Der Tol (a pattern maker at G-Star, who was one of the designers of the Arc Pant).
 - (iii) Pierre Morisset (the former Head Designer at G-Star, and another of the designers of the Arc Pant) (accompanied by a notice under the Civil Evidence Act 1968).
 - (iv) Charlotte Wittkampf (Intellectual Property Counsel at G-Star).
 - (v) Marie Pettersson (a pattern maker and atelier assistant at G-Star).
41. The Defendants relied on the following witnesses of fact:
 - (i) Firoz Ibrahim Bux (the Eighth Defendant and a former director of the First to Sixth Defendants).
 - (ii) Asif Ibrahim Bux (the Seventh Defendant and former director of the First to Sixth Defendants).
 - (iii) Yusuf Valli (who had responsibility for legal and financial matters on behalf of the First to Sixth Defendants).
 - (iv) Salim Bux (who made clear that he was unrelated to the Seventh and Eighth Defendants, who provided services as a designer to the Fifth Defendant, and who was involved in the design of the Rhodi Styles).

- (v) Estelle Moore (a freelance fashion designer engaged by the Fifth Defendant to measure the shapes of panels in the Arc Pant and in the Rhodi Styles).
 - (vi) Jan Goddard (who was until recently the UK Account Manager working for the Second Defendant).
 - (vii) Syed Jasimullah (a senior manager at one of the Defendants' manufacturers).
42. In addition, I received reports and heard evidence from the following experts:
- (i) For G-Star, Timothy Browne (a consultant in design and product development, specialising in denim products).
 - (ii) For the Defendants, Mohsin Sajid (a fashion designer specialising in denim).
43. I found all the Claimant's live witnesses to be honest, reliable and helpful. The evidence of the Defendants' witnesses was more patchy. Aspects of their evidence were shown to be undependable, as I explain further below. This gave rise to a number of difficulties for the Defendants' case, which were compounded by gaps in the Defendants' evidence.

Subsistence and ownership of the Arc Pant Designs

44. Ms Van Der Tol was an impressive witness. The Defendants' expert, Mr Sajid, generously said of her in cross-examination that she was an "amazing woman" and "very, very inspiring". She described in detail in her first witness statement the design process which resulted in the creation of the Arc Pant. This process took 7 months to complete.
45. It began on 14 November 2007, when Pierre Morisset, the then head designer at G-Star, came into the atelier and told her about an idea that he had for a new design. In substance, he envisaged a pair of jeans that (i) looked very worn-out, (ii) had emphasized, stretched, bent (3-D) knees with an "anti-fit" effect (iii) had an extreme amount of fabric around the knee and (iv) moved away from "the multi-section, almost modular, Elwood".
46. Following discussions between the two of them, Ms Van Der Tol started to prepare a paper pattern. She did this by taking a paper pattern of the two panels of a traditional pair of 5-pocket pants and cutting them (horizontally) into several pieces. She then reshaped the panels by adding more paper to some areas, and by overlapping some of the pieces from other areas, and then sticking them back together with tape. Ms Van Der Tol also made vertical cuts in the traditional paper patterns, removing sections from the side of one panel and adding them to the other. This exercise created two panels with opposing curves – one more curved than the other – which, when sewn together, would begin to create the 3-D shape that she and Mr Morisset were trying to achieve. Further, spreading some pieces apart added extra material at the front of the leg to

create the accentuated knee portion. To shape the knee further, she used a single (biased) dart in the front panel.

47. Ms Van Der Tol knew that the Elwood design had removed material from the back of the leg by an additional horizontal seam. However, in order not to break the line of the panels, she thought that she could achieve a similar effect by using a vertical seam. To achieve this, she cut a relatively large vertical section off the back panel of the original paper pattern, and created a third pattern piece, which would create a new seam down the back of the pants. She did a similar exercise of cutting the third pattern piece into horizontal sections and then overlapping various sections to create another curved panel. In creating the curve in this third panel piece, she took out fabric along what would become the new back seam of the leg. This created a shorter seam at the back which made the leg turn. The combination of the asymmetric shapes of the resulting three panels, together with the separation of the third pattern piece from the back panel to create the third panel and the new, shortened back seam, resulted in a pulling tension along the seams of the legs where the three pieces were joined. This was all intended to create the 3-D shape, with accentuated knee portion, which she and Mr Morisset were seeking.
48. The result was to produce panels which were of markedly different shape to those used in conventional western cut jeans. This can be illustrated by a comparison of the back panel of the Arc Pant (on the left) with the back panel of a pair of Levi 501 jeans (on the right):



49. This pulling effect resulted in the fabric turning around the leg, emphasizing both the 3-D and “anti-fit” aspects of the overall shape. Ms Van Der Tol says in her statement: “At the time, I was not aware of any other product which had this pulling and shortening effect the way this new pant had, and we certainly felt this was a whole new aspect of design in jeans. Having finished my cutting and sticking of the paper panels, I ended up with three panels, all of markedly different shape, size and curve”.

50. These 3 resulting panels were at the heart of what became the Arc Pant. The seams and pattern pieces achieved a turning effect around the under part of the leg. These effects are demonstrated in an explanatory drawing, which, according to her evidence, was attached to the product when it went to its official launch in 2008 as the hang-tag to which I have already made reference above. The arrows on the hang-tag show the turn of the fabric resulting from the design; first turning inwards, and then, below the knee, out and round behind the leg. Ms Van Der Tol states: “Although we took some care to decide precisely where the various vertical seams were placed, this was not the key aspect. For us, the key was the overall shape that the three asymmetrical panels and the tension created”.
51. Work on the design continued with Ms Van Der Tol mocking up paper versions of the leg and then preparing fabric versions which were modelled at the atelier on Christopher (known as Casper) White, at which stage a number of alterations were made to the panel shapes, the size and position of the dart, and the position of the seams. With the help of input from Mr Morisset and from her colleagues Tessa van Doorn (in the merchandising department), Maarten Wentholt (a designer/merchandiser assigned to “special projects”) and Casper White (in marketing/sales), further toiles were made, fitted on Casper White, and reviewed and then discussed, among things to take account of the fit, comfort and prospective marketability of the design.
52. Ms Van Der Tol dealt in her evidence in chief with one particular aspect of the work which was carried out during the course of this design process. This related to a straight “ledge” on the pattern of the back panel which was produced by her. As she explained, if all the pieces meet at one point, this creates a thick and stiff layer of fabric which gives rise to difficulties when the fabric is being stitched. To avoid this problem, Ms Van Der Tol created a straight section in that part of the back panel piece which sits between the legs of a garment that is made to that pattern, and shaped the front panel piece and the third panel piece to fit this configuration. This feature is not easily visible when a garment made to that pattern is worn, because it is located on the inner part at the top of the leg.
53. As Ms Van Der Tol explained in evidence, this was not the only way of addressing this problem, but was instead “particularly drawn by me and cut”. Accordingly, she said: “So, if I see a pair of pants with the same line, I think, well, why would you decide to have it at the same place? You can put it everywhere [sic] without changing the shape”. Both Mr Browne and Mr Sajid agreed with this last point. In cross-examination, Mr Sajid was asked: “... there is no ergonomic need for the panel to follow that shape?” and he replied: “It can go anywhere it likes to. That is what two of the other witnesses have said as well”.
54. During the later stages of development, the design was eventually labelled the “Arc Pant”. That name was an abbreviation of “Architecture,” and was chosen to reflect the notable 3-D architecture and the shape of the product.
55. The design then went through G-Star’s usual desktop publishing and prototype procedures, during which the detail (involving pockets, belt loops, logos, and so forth) was finalised. Ms Van Der Tol states that the only real change to the overall shape

during this period resulted from further discussion concerning the knee portion, such that “Throughout the design process, the 3-D shape and the turning effect achieved at the initial conception phase remained virtually unchanged”. The finalised design was approved for production on 19 June 2008.

56. This evidence was scarcely challenged in cross-examination, and, to the extent that it was, I do not consider that it was undermined.
57. Ms Van Der Tol rejected the suggestion that the particular “ledge” which she had chosen is “the most obvious way of avoiding converging seams”, saying “Not particularly, no. You can put it in wherever you want ... The most logical approach would have been to put it towards the back crotch seam ... [But] I did not want to refer to [the Elwood] in any way so that is why I did not put it up to the centre back seam ... There are lots of choices [as to how to deal with where sections join] ... you can go wherever you like with it”.
58. It was suggested to Ms Van Der Tol that this “ledge” was not present in one of the Defendants’ designs, namely the “Ibaraki”. She disagreed, saying that it was present in the “Ibaraki”, albeit shorter there than in the Arc Pant (2cm in comparison to over 3cm).
59. In re-examination, Ms Van Der Tol said that the “ledge” was clear in the Defendants’ “Bowral”, “Capel”, “Ibaraki”, “Maleny” and “Winton” designs, that in the “Jurien” design “it is a bit more biased but it is still a little angle” and that in the “Vale” design “you could discuss it, but there is this tiny little angle”. She did not mention the “Carton” and “Vobar” designs in this context.
60. This account was clear, compelling and supported by both contemporary documents, including original pattern pieces which were produced for inspection in court, and the statement of Mr Morisset. On the basis of this evidence, and having regard to other undisputed facts which mean that the criteria contained in section 213(5) of the CDPA are satisfied in the present case, in my judgment it is plain that unregistered design rights subsist in the Arc Pant Designs (see section 213) and that G-Star is the owner of those rights (see section 215).

Whether garments made to the Arc Pant Designs were first made available in 2008

61. On the basis of the same evidence, I consider that G-Star succeeds on this issue as well.

Whether all or any of the Rhodi styles were made substantially to the Arc Pant Designs

62. The evidence before me included the following key documents, underlined below, which are annexed to this judgment:
 - (i) The Arc Pant cutting pattern is contained in exhibit “JCVDT-5” to Ms Van Der Tol’s first witness statement.
 - (ii) The cutting patterns of the “Iceman” and “Mavrick” styles, created for G-Star by Ms Van Der Tol by “reverse engineering” from samples of those articles in the

manner set out in Ms Van Der Tol's second witness statement, are included in exhibit "MEP-02" to the first witness statement of Ms Petterson, in the digitized and reduced form described by Ms Petterson in that witness statement.

- (iii) The cutting patterns for the Arc Pant and for the "Bowral", "Capel", "Ibaraki", "Jurien", "Maleny", "Vale", and "Winton" styles are shown compendiously in exhibit "JDC-11" to the fourth witness statement of Mr Coldham. This exhibit includes a reduced and simplified version of the Arc Pant cutting pattern contained in exhibit "JCVDT-5". Further, within this exhibit, one of the three pattern pieces has been shortened so as to show only the leg portion in the cutting pattern for the "Bowral" style (and maybe for some of the other Rhodi Styles).
 - (iv) Photographs showing the Arc Part, each of the Rhodi Styles, and Levi's 501 and Twisted jeans, as they appear in front, back and side views on a mannequin and in front and back views when laid on a table are contained in exhibit "CW-03" to the first witness statement of Ms Wittkampf.
63. Both sides placed reliance on the expert evidence in support of the opposing cases that the Rhodi Styles were and were not made substantially to the Arc Pant Designs.
64. In his first report, dated 14 March 2014, the Defendants' expert, Mr Sajid, considers each of the Arc Pant Designs in turn. Before doing so, at paragraph 19 of that report, Mr Sajid states: "During my research I have found no designs predating the ARC Pant which have the same precise shape or configuration as any of the five design aspects relied upon by G-Star. I have however found use of the style ideas of which the design aspects are examples, both before late 2007 and afterwards. It is these uses I discuss below with a view to assisting the Court to compare and assess the significance of the similarities between these other uses and the ARC Pant."
65. Mr Sajid considers the five pleaded aspects relied upon by G-Star as follows:
- (i) The first aspect, namely "the shape of each of the legs of the ARC Pant, that is to say the shape of the legs in the most capacious arrangement that the arrangement of their fabric allows", is considered at paragraphs 20-39. Mr Sajid concludes at paragraph 39 that "arc shaped jeans, and jeans with closely related fits, were a trend which became mainstream around early 2011 by which point numerous high street brands began to produce such designs. This suggests to me that these designs were a continuing market trend followed by numerous designers, and eventually mainstream high street designers, up to and including the time at which Voi created their designs".
 - (ii) The second aspect, namely "the use of a third pattern piece, tapering towards its top, along the length of the inside leg of the ARC Pant", is considered at paragraphs 40-44. At paragraph 40 Mr Sajid states that "the use of a third panel was common by [the time of release of the Arc Pant], although not necessarily in a shape tapering towards the top", and at paragraph 44 he concludes "it is clear that the use of a third pattern piece was a continuing trend followed by numerous designers at the time Voi created their designs".

- (iii) The third aspect, namely “an accentuated knee portion, achieved in part by gathering fabric at knee height by way of a dart, positioned on the front panel at the inside seam pointing diagonally forward, and serving to emphasize the bent knee which results from the third pattern piece described above together with the other two pattern pieces” is considered at paragraphs 45-52. Mr Sajid concludes at paragraph 52 that “the use of a dart to achieve an accentuated knee portion was a continuing market trend followed by numerous designers up to and including the time at which Voi created their designs”.
 - (iv) The fourth aspect, namely “a foreshortened back panel, resulting from an additional seam” is considered at paragraphs 53-57. Mr Sajid concludes at paragraph 57 that: “The foreshortening of the back panel for better ergonomic fit was a continuing market trend followed by numerous designers up to and including the time at which Voi created their designs”.
 - (v) The fifth aspect, namely “the twisted leg configuration, created through the combination of different pattern parts described above, sewn together to create a leg which does not hang straight, but bends at the knee inwards and backwards, and turns around the leg when worn such that it creates a corkscrew effect” is considered at paragraphs 58-61. Mr Sajid states at paragraph 58 “The use of arc fit legs through configuration and combination is evident in early army and military wear, and chinos which predate November 2007”. At paragraph 58, he refers to “Levi’s Red jeans from 1999” of which he says “although they only use two pattern pieces, [they] have arc legs with twisted seams and dart details on the back yoke” and “the design also uses darts, although in a different way to the ARC Pant” and that: “this clear use of twisted seams is very similar to the ARC Pant but predates it by 8 years”. At paragraph 60, he says “The Michiko Koshino design from 2005 shows the use of third panel, 3D darts and most importantly twisted seams shows a twisted leg shape through configuration and combination”. At paragraph 61 he says “See also the Levi’s jeans shown at the Isbo trade fair in February 2008”. In addition, in paragraph 62 he states: “I believe the twisted leg shape from the ARC Pant has most definitely influenced the denim world, but it was the Levi’s Red collection from 1999 that was a turning point”.
66. G-Star’s expert, Mr Browne, addresses the similarities and dissimilarities between the ARC Pant and the Rhodi Styles in section 4 of his report dated 25 June 2014. As this report was served after Mr Sajid’s first report, it includes a response to that report.
 67. Mr Browne inspected examples of the “Iceman” and “Mavrick” styles as well as of each of the Rhodi Styles, and copies of the cutting patterns produced by the G-Star witnesses referred to above for all those styles except “Carton” and “Vobar”.
 68. The Defendants did not produce cutting patterns for the “Carton” and “Vobar”, but one of the Defendants’ witnesses, Ms Moore, pinned out all of the Rhodi Styles in an attempt to “reverse engineer” patterns for all those styles, and Mr Browne referred to her work product in relation to the “Carton” and “Vobar” styles.

69. Mr Browne's report includes the following (in which I have corrected his spelling from "Maverick" to "Mavrick"):

"4.4 On seeing the cutting patterns of the Iceman and Mavrick styles, and comparing them to the cutting pattern of the ARC, my immediate reaction was that they had been copied from the ARC cutting pattern. Even bearing in mind the way that the patterns for the Iceman and Mavrick styles were recreated (by "reverse engineering"), in my view the Iceman and Mavrick cutting patterns are effectively identical to that of the ARC.

4.5 I was asked my views as to whether the Iceman and Mavrick cutting patterns could have been produced simply by a designer seeking to make a "bow-legged" pair of jeans, with no reference to G-Star's ARC design. I have a lot of experience in pattern making and pattern cutting (as outlined in the background section of this report, above), and in my view this suggestion is so highly unlikely that it could be dismissed as fanciful, for reasons I now explain.

4.6 There would have been two distinct concepts involved in the design of a pair of three-dimensional jeans such as the ARC jeans or the Iceman/Mavrick jeans. The first is to establish the three-dimensional shape that is desired; the second involves working out how to achieve the desired shape using flat panels of material. As I have explained above, the three-dimensional shape of the ARC jeans was itself ground-breaking. For this reason, I would *suspect* any third party who arrived at a similar three-dimensional shape to have copied the ARC, although I accept that such a shape *could* have been independently derived. However, it is the second step – the detail of the panel design – that definitively indicates to me that copying occurred.

4.7 As to the first step, I would expect a designer who wanted to produce a "bow-legged" pair of jeans to take a conventional two-dimensional approach. The most simple way to achieve this shape would be to cut two fabric patterns in the desired bow-shape and sew them together at their seams. That would result in the bow-legged shape, but it would give a flat pair of trousers. If desired, a third panel piece could be used, effectively cutting one of the original panels lengthwise, and then sewing it back together. This would produce a third seam, but leave the final article as a flat pair of trousers ...

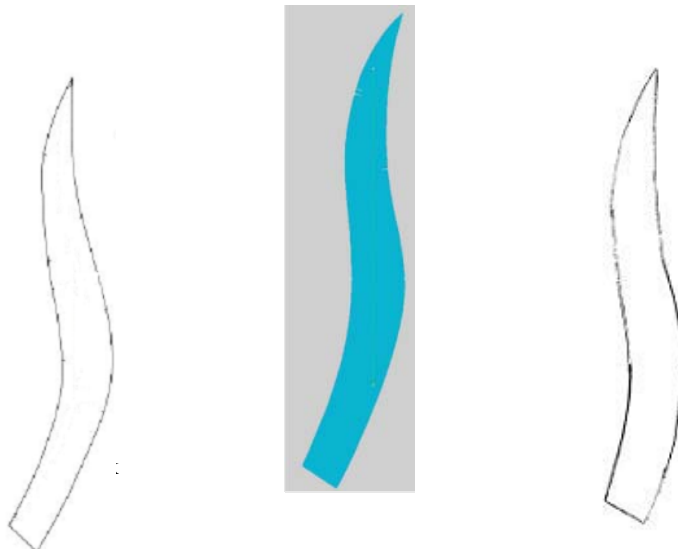
4.8 If instead the designer chose to do something out of the ordinary, and design a three-dimensional shape, that shape would first have to be settled upon. Many such shapes would be available. That, together with the fundamental originality of the three-dimensional approach, is why I state above that it would be a surprise to me if the Defendants had come up with their three-dimensional, bow-legged, genuine twist design of Iceman and Mavrick, independently.

4.9 As to the second step, even once a three-dimensional shape had been chosen, achieving that shape using flat panels of fabric would not be straightforward. Certainly it is not a task that designers of denim or urban-wear would have been familiar with. Even by looking at a finished pair of ARC jeans, it is not immediately apparent how G-Star constructed the pattern that gave effect to the resulting shape of the ARC jeans. In particular, unlike the Michiko Koshino design [relied on by the Defendants' expert, Mr Sajid] (although as stated above – I believe that came later), the ARC's third panel is not merely decorative – it is an integral part of the three-dimensional concept of the ARC pant. When considering the third panel in terms of shape of the final article,

there would be countless variations as to how to cut the pattern shape, and arrange the three pieces to create the three-dimensional desired shape for the final article.

- 4.10 Further, there would be countless ways in which one could achieve the three-dimensional shape of the ARC jeans themselves without reproducing the detail of the ARC panel designs. The shape of the panels used could vary significantly. This is clear, for example, from my consideration of the Levis Engineered jeans, whose different panel designs from the 501 still produce a substantially conventional western cut shape. Furthermore, in seeking to produce the three-dimensional shape, there is of course no reason why the designer would be restricted to just three fabric panels.
- 4.11 For all these reasons, I do not consider it credible that a designer could create each of the three pattern pieces of the Iceman or Mavrick, being in virtually identical shapes to those of the ARC, without having access to a pair of ARC jeans or their cutting pattern.
- 4.12 In my opinion, and for these reasons, Iceman and Mavrick are clearly direct and identical copies of the ARC pant. In light of the difficulties with achieving the three-dimensional shape of the ARC jeans, it would in my view have been of great assistance to any designer or pattern cutter seeking to reproduce that look to have access to an original ARC jean sample or cutting pattern.
- 4.13 Having considered the Iceman and Mavrick, I then considered the cutting patterns of the Defendants' Garments in this dispute. My view in relation to the Ibaraki and Bowral styles is the same as for Iceman and Mavrick. The cutting patterns are not materially different from the ARC cutting pattern (or those of Iceman and Mavrick) and it is not credible that they have been created without starting from the ARC pant (or the Iceman or Mavrick).
- 4.14 The cutting patterns of the other styles (namely Capel, Carton, Jurien, Maleny, Vale, Vobar and Winton) are also, in my opinion, copied directly or indirectly from the ARC. Each of these were created at roughly the same time as the Ibaraki and Bowral (Mr Salim Bux notes that all 9 of the Defendants' Garments were created between about September 2011 and June 2012). In these remaining seven styles, I can see that there has been some slight alteration to the precise shapes of the three panels. However, it appears to me that the pattern first used for the Iceman, Mavrick, Ibaraki and Bowral has been evolved by making small displacements of the seams so as to create slightly different shaped panels for the seven remaining styles. However, the minimal nature of the changes made to the overall cutting patterns, suggests to me that the designer was seeking to make a style with the same (or extremely similar) final overall shape of the garment. Even if I had not been shown the intervening styles (Iceman, Mavrick, Ibaraki and Bowral) it would be my view that these other styles were copied from the ARC jeans (particularly bearing in mind the dissimilarity with the rest of the Design Corpus existing in 2011/12 – which I address further in section 5, below).
- 4.15 If I am correct that the designer of the Capel, Carton, Jurien, Maleny, Vale, Vobar and Winton styles had available to him or her an original ARC jean sample or cutting pattern, then once again I consider that would have been of very significant assistance in the task of producing a three-dimensional jeans design.

- 4.16 The similarities in shape of the finished articles produced by the Rhodi cutting patterns is clear from the photographs of all the styles set out next to one another. Looking at the styles lying flat on a table (in Exhibit CW-01 to the First Witness Statement of Charlotte Wittkampff) and set out next to one another (at pages 7 to 10 of Exhibit CW-03) it can be seen that all of the Rhodi styles have the characteristic bow-legged shape of the ARC (in contrast to the Levi's 501 and twisted styles which have virtually straight legs).
- 4.17 Looking at the set of photographs of the styles on the mannequin (in Exhibit CW-02 to the First Witness Statement of Charlotte Wittkampff) and set out next to one another (at pages 2 to 7 of Exhibit CW-03) the characteristic twisting and creasing of the material of the ARC style ... can be seen in each of the Rhodi styles (again in contrast to the Levi's 501 and twisted styles in which the materials of both fall substantially straight to the ground showing virtually no creasing, particularly on the outside of the leg). The creasing around the knee as the fabric twists around the leg and the way the material clings to the outside leg can be discerned in the Rhodi styles. The "flap of excess material" inside the bottom of the leg is also apparent in most of the Rhodi styles. The Maleny style does not exhibit this feature although this is probably due to the elasticated "cuff" that has been included at the bottom of the legs in that style. The feature is least prominent in the pictures of the Vobar.
- 4.18 Finally, looking at the articles themselves, the similarities between the ARC and the Rhodi styles (and the dissimilarities between the Levi's 501 and Twisted styles) are stark. They reinforce my view, apparent from looking at the cutting patterns and the pictures of the articles in two dimensions, that each of the Defendants' Garments was produced by copying the ARC design."
70. Mr Browne's reliance on similarities in the shapes of pattern pieces can be illustrated by a comparison of the following images taken from the exhibits in the case. These depict the third pattern piece, which forms no part of conventional jeans, for (from left to right) the Arc Pant, the "Mavrick" and the "Bowral", as follows:



71. Mr Browne goes on to consider, in section 5 of his report, whether there is anything in the design corpus which would cause him to modify those conclusions. Having

considered the design corpus both up to the assumed date of design of the Defendants' "Iceman" and "Mavrick" styles in 2009 and then from that date up to the date of design of the Rhodi Styles, and in particular a number of third party styles relied upon by Mr Sajid in his report, Mr Browne gives a negative answer to that question. He concludes as follows:

"6.1 For the reasons set out in section 5 above, there is nothing in the Design Corpus presented by Mr Sajid as at 2011/12 which alters my views set out in section 4 above. In my view, the ARC pant is a different shape to almost all of the other styles on the market, even around the time of the design of the Defendants' garments (except, of course, Rhodi's Iceman and Mavrick styles). The design features Mr Sajid refers to in general terms, namely the use of "twisted seams", a "third pattern piece", and "darts" at the knee, are all generic design ideas. The examples he refers to show how these general design ideas have been used in practice, by various designers both at the high end of fashion and on the high street. It is clear from these examples that there are many ways to deploy these design ideas, most of which create very different finished products.

6.2 In conclusion, there does not appear to have been any style from which the Defendants could have drawn inspiration that would have resulted in the group of nine styles that they produced; there are in my view too many similarities to the ARC and the Iceman and Mavrick for the cutting patterns and resulting shapes of the finished products to be a co-incidence."

72. In cross-examination, Mr Browne accepted that he may have misunderstood one aspect of the Defendants' case concerning the way in which they had created the "Iceman" and "Mavrick" styles. However, he said that any such error on his part had not affected his general perception of the plausibility of the Defendants' case.
73. Mr Hill was also very critical of the fact that, in re-examination, Mr Browne said that he had been asked by River Island, at a time when G-Star had approached River Island, whether G-Star "would have a case" (meaning, in context, in relation to infringement of the Arc Pant) and he had said "Yes, definitely", when there was no hint of this in Mr Browne's report. In my judgment, however, this was simply an instance of how further evidence can sometimes emerge in the course of oral testimony. In any event, I do not consider that it has any impact on the reliability of Mr Browne's evidence on other topics.
74. In my judgment, to the extent that it was challenged, Mr Browne's evidence was not materially dented by cross-examination. As a witness, he was clear, credible and balanced. I found Mr Browne's evidence cogent and reliable, and, where they differ, I prefer it to the evidence of Mr Sajid, whether as expressed in his reports or orally.
75. Between the date of production of Mr Sajid's first report and the production of his second report, dated 8 August 2014, Ms Moore carried out an exercise for the purpose of comparing the shapes of the panels of the Arc Pant with the shapes of the panels of each the Rhodi Styles. Ms Moore was a freelance fashion designer at the time, although she now works for the Fifth Defendant. The exercise, in short, involved placing garments in a box with straight sides, and then measuring the distances at various points between the sides of the box and the edges of the garments. The measurements she took

are depicted in exhibits “EM2” to “EM10” to her witness statement dated 14 February 2014.

76. At first blush, these exhibits suggest a significant difference between these respective panel shapes. However, even a brief examination reveals that this initial impression is misleading. The reason is that, even on the face of the exhibits, the shapes of the garment pieces contained in the exhibits do not match the measurements that are shown in the exhibits. Thus, for example, in some instances where measurements from the edge of the box would suggest that the garment piece is curving one way, it is shown as curving another way; in some instances where the measurements would suggest that the garment piece is straight or almost straight, it is shown as curving significantly; and so forth.
77. These matters were explored in cross-examination with Ms Moore. So, also, was the question of whether some of her measurements, as recorded in these exhibits, were simply, and significantly, wrong. I do not consider that there was anything sinister in this, and I believe Ms Moore did her best to produce helpful comparisons. However, she was constrained to accept that the visual depiction of the results of her work was misleading and unreliable, and that in a number of instances her recorded measurements were wrong.
78. During the course of the trial, G-Star produced examples of the result of re-working Ms Moore’s exhibits so that the visual depictions matched her measurements. The results were quite different from those depicted visually in the exhibits to Ms Moore’s witness statement. In addition, the re-worked results showed greater similarities between the shape of the pattern pieces of the Arc Pant and those of the exemplified Rhodi Styles. Appended to this judgment are examples of Ms Moore’s originals and these re-workings overlaid.
79. I should say that Mr Cuddigan made clear that G-Star did not accept that Ms Moore’s methodology was anything like as accurate as that used by Ms Van Der Tol in any event.
80. In his second report, Mr Sajid explains that he was asked to consider the above exhibits to Ms Moore’s witness statement and that he “reviewed and considered Estelle Moore’s evidence and compared the pattern cuts for each of the 9 Voi styles in suit to the shapes produced by the pattern cuts of G-Star’s design”.
81. Mr Sajid explains that he was also asked to consider exhibit “CW02” to the first witness statement of Ms Wittkampf. He states that he reviewed and considered the shapes of the garments displayed on a mannequin shown in that exhibit, and “As a general observation, I would note that the designs shown in the images of the garments as displayed on the mannequin do look similar. However that sort of comparison, in my opinion, does not show the detail of the designs or the shape of the pattern cuts from which they are formed. When examined closely, differences in the designs become apparent”.

82. Mr Sajid explains that he was also asked to consider Mr Browne’s expert report.
83. At paragraphs 5-13 of his second report, Mr Sajid then sets out a detailed comparison of the pattern cuts in Ms Moore’s exhibits with those of the Arc Pant. His conclusions, at paragraphs 14-17, include the following:
- “14. The Voi garments might have got inspiration or indirect inspiration from the G-Star Arc but this seems to me to be the sort of trend following ... [that] is nothing out of the ordinary, as almost every modern fashion company follows trends in the market to keep relevant – especially high street fashion brands such as Voi. In my opinion it looks like two different designers independently coming to a similar conclusion as to how to implement some generalised design ideas.
15. The pattern cuts of the Voi styles have numerous differences when compared with the G-Star Arc pattern cuts and in my opinion these differences are significant; especially when considering the narrow design freedom within which the designers have had to work. The narrow design freedom is as a result of the nature of the garment and the ergonomic considerations which must be taken into account for the jean to fit round a human waist and limbs. In general I would say the Voi pattern cuts are cruder cuts as opposed to the more refined Arc cuts.
16. I would always expect there to be a certain amount of similarity between the garments when considered at a high level of abstraction, owing to the narrow design freedom, and it is true that the Voi styles look similar to the Arc when considered from a distance, as for example in the mannequin photographs. However, when considered in greater detail, the differences become apparent, especially in relation to the more prominent inseam when considering the mannequin photographs. Furthermore, the pattern cuts of the Voi styles have been cut in very different ways, and in some cases bend and twist in opposite directions to the Arc (see the Carton (Exhibit EM04), Jurien (Exhibit EM06) Vale (Exhibit EM08) and Vobar (Exhibit EM09)).
17. Mr Browne too accepts that he can see some slight alteration to the precise shapes of the panels. However, in my opinion the differences in the shapes are not slight but significant and I do not share Mr Browne’s opinion that the shape and appearance of the garments along with the pattern pieces mean that any similarity is too much of a coincidence. If the Voi designs were copied from the Arc I would expect the pattern shapes to be a lot closer. In my opinion the Voi designs are their own interpretation of the general arc style or concept, rather than copies of the G-Star Arc itself.”
84. Mr Sajid was knowledgeable, and engagingly enthusiastic, about garment design. In my judgment, however, there are a number of problems about the reliability of his evidence:
- (i) As suggested by paragraph 19 of his first report, in which he concedes that he has “not found any designs predating the ARC Pant which have the same precise shape or configuration as any of the five design aspects relied upon by G-Star”, but says that he has “found use of the style ideas of which the design aspects are examples”, much of Mr Sajid’s consideration of the Arc Pant Designs is not directed to the aspects relied upon by G-Star, but to more general matters.

- (ii) With regard to the second design aspect, for example, and as Mr Sajid accepted in cross-examination, although he concludes that “it is clear that the use of a third pattern piece was a continuing trend followed by numerous designers at the time Voi created their designs”, he provides no instance of use of “a third pattern piece, tapering towards its top, along the length of the inside leg”.
- (iii) Moreover, it is G-Star’s case that this feature is manifest in all the Rhodi Styles. It was put to Mr Sajid in cross-examination that tapering, running all the way up to the top of the inside leg is “present in every single Rhodi product in issue”. He replied “I would have to double check, but, okay, yes”.
- (iv) At one point in his cross-examination, having been asked about various examples of garments which he referred to in his first report, and whether they had these characteristics, Mr Sajid said of the conclusion in paragraph 43 of that report that “a third panel piece was in use well before November 2007” that “I think at that stage, when I was writing my report, it was purely about the third panel piece, but not necessarily focussing on the tapered point”.
- (v) Eventually, he conceded that “From the evidence that is presented, I will probably agree” that he had not been able to identify any garment (other than the Arc Pant) which embodied a third panel piece having the two characteristics of (a) tapering towards the top, and (b) running the length of the inside leg, except for jeans marketed by River Island. However, he had earlier said of the River Island jeans that their similarity to the Arc Pant was “clear evidence of them plagiarising the Arc at that stage”.
- (vi) Prior to Mr Sajid preparing his second report, the Defendants’ solicitors had sought and obtained from G-Star’s solicitors “all physical samples and pattern cuts disclosed and subsequently delivered to your office”, for the express purpose of enabling Mr Sajid to “assist with replies to your expert evidence”. According to Mr Sajid, however, he was not provided with those materials. Instead, he was only provided with Ms Moore’s witness statements and exhibits, which were flawed as explained above. It follows that Mr Sajid’s analysis, based on those exhibits, is similarly flawed. For example, it is clear from the evidence that he gave in cross-examination that his departure from his initial impression, mentioned in paragraph 4 of his second report, that the Arc Pant and the Rhodi Styles looked similar was influenced by Ms Moore’s work. Mr Sajid said “it is only when I closely looked at the work of Estelle Moore and other people that I realised, actually, you know, there are differences that I can spot”.
- (vii) Mr Cuddigan submits, and I agree, that Mr Sajid’s initial view, set out in paragraph 4 of his second report, before he conducted a detailed review based on Ms Moore’s work (among other things), comes very close to accepting that the Rhodi Styles are made substantially to the Arc Pant Designs: “... the designs shown in the images of the garments as displayed on the mannequin do look similar. However that sort of comparison, in my opinion, does not show the

detail of the designs or the shape of the pattern cuts from which they are formed. When examined closely, differences in the designs become apparent”.

- (viii) Finally, there were other inaccuracies in what Mr Sajid had written, which were independent of his reliance on Ms Moore’s work. For example, in paragraph 5 of his second report he wrote when drawing distinctions between the third panel piece in the Arc Pant and that in the “Bowral” style that “Put simply, the panel is not doing the same ergonomic job and its purpose is purely aesthetic”. However, when asked about the comparison between such pieces in cross-examination he said “They are all doing an ergonomic job. That is for certain”. When it was suggested that his report was therefore “nonsense” on this point, he replied “That must be a mistake in my report”. He gave no explanation for that mistake.
85. There were some other interesting exchanges in the course of Mr Sajid’s cross-examination. At one point, when he was being asked about a version of one of the third panel piece shapes, he said “It is a very streamlined version – I would say it is the G-Star Arc, from my understanding”. In fact, it was a panel piece “reverse engineered” by Ms Van Der Tol from the “Iceman” style. At another point, when Mr Sajid was being asked whether he had been told the whole story of the 2010 proceedings, he said that it had been brought to his attention that “they did copy previously” and that he believed that he had been instructed that the “Iceman” and “Mavrick” were copied from G-Star.
86. Mr Hill attached a detailed Schedule to his opening Skeleton Argument, in which, building in large part, but not exclusively, on Mr Sajid’s comparisons, Mr Hill submitted in respect of each of the “Capel”, “Carton”, “Jurien”, “Maleny”, “Vale”, “Vobar” and “Winton” styles that it is clear that “none of the 5 claimed designs are reproduced exactly or substantially in the shape or configuration of [that style] or in any composite part of it”.
87. Mr Hill did not repeat that submission with regard to the “Bowral” and “Ibaraki” styles, in respect of which he accepted that there is “a greater level of similarity to the Arc Pant”. However, he submitted (a) that these similarities were “at the level of ideas, concepts and general shape”, which is not protected by the rights claimed by G-Star, and (b) that, when considered at the proper level of detail and having regard to the ambit of G-Star’s claimed rights, these styles, also, were not made exactly or substantially to the Arc Pant Designs.
88. It is clear from section 226(2) of the CDPA, and was not in issue between the parties, that the test of infringement of unregistered design right is different to that of infringement of copyright. As Aldous J said in *C & H Engineering v F Klucznik & Sons Ltd* [1992] FSR 421 at 428: “Under section 16 copyright will be infringed if the work, or a substantial part of the work, is copied. Under section 226 there will only be infringement if the design is copied so as to produce articles exactly or substantially to the design”. That passage was approved by the Court of Appeal in *L. Woolley Jewellers Ltd v A & A Jewellery Ltd* [2003] FSR 255 (Arden LJ at [19]). Accordingly, it would not be right to say that reproducing a substantial part of a design will, without more, amount to an infringement.

89. In my judgment, however, the extent to which the two different approaches will produce a different result in practice will often depend upon how the design right claim is framed.
90. The *C & H Engineering* case provides an illustration. That case concerned pig fenders, which have the purpose of providing open-air spaces in which piglets are retained while the sows are able to step out. The design in issue concerned a commonplace pig fender which incorporated a tube around the top edge (the purpose of which was to protect sows from injury when stepping over the side). This was the subject of a counterclaim by the defendant. Aldous J held that the defendant had not established that it was the owner of that design, and the counterclaim therefore failed on that ground.
91. Aldous J went on to say (at p429) that even if the defendant had established that it owned that design, he would have held that the plaintiff had not infringed that design because the plaintiff's pig fenders were not made exactly or substantially to that design. This was because, although the two designs had in common "a tube as the roll bar" and in that respect were "substantially the same", nevertheless "taken as a whole the two designs are not substantially the same" because of "the design features which enable the plaintiff's pig fender to be stacked" which "contrast with the overall design features of the defendant's pig fender". If the defendant had identified the roll bar as being the part of its design which it claimed to have been taken exactly or substantially, and had established ownership of design right in that part of its design, the result might have been different.
92. I am therefore broadly in agreement with the analysis of the author of *Russell-Clarke and Howe on Industrial Designs*, 8th edn, para 4-096A and, in particular, with the suggestion that, in the case of unregistered design rights: "The question of "part" thus comes in at the stage of subsistence of the right, rather than at the stage of infringement".
93. I also agree with the authors of *The Modern Law of Copyright and Designs*, 4th edn, para 48.5 that the *C & H Engineering* case "illustrates the importance of carefully defining the scope of the unregistered design which is sued upon. The owner should restrict its claim to the part(s) of its design which (a) is arguably not commonplace, and (b) appears to have been copied by the alleged infringer".
94. Although Mr Cuddigan accepted that there is a conceptual difference between the test of infringement of copyright and that of infringement of design right, he nevertheless submitted that reasoning concerning substantiality and copyright works is helpful for purposes of the present case. His argument, in outline, went as follows:
- (i) As Aldous J held in *C & H Engineering v F Klucznik & Sons Ltd* [1992] FSR 421, "original" has the same meaning for design right as it does for copyright.

- (ii) It is that quality of originality which is relevant when determining the question of substantiality (see *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2003] 1 AC 551, Lord Hoffmann at [19]).
- (iii) That is not merely a matter of United Kingdom copyright law, but is consonant with the Berne Convention and is reflected in the jurisprudence of the CJEU (see *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, for example at [39]: “the various parts of a work thus enjoy protection ... provided that they contain elements which are the expression of the intellectual creation of the author of the work”; and *Football Dataco Ltd v Yahoo! UK Ltd* [2012] 2 CMLR 24, for example at [37]: “the notion of the author’s own intellectual creation refers to the criterion of originality”).
- (iv) Accordingly, it is the original skill and labour or the intellectual creation of the author which is protected, and if that is taken then infringement will follow. Mr Cuddigan submitted that, in the present context: “This reasoning is applicable by compellingly close analogy with the issue of substantiality”.

95. Mr Hill disputed the validity of this approach. He submitted, in outline, as follows:

- (i) It is inappropriate to import the copyright test into design right law, given that a design right claimant is able to tailor the design relied upon to the specific part of the product which is alleged to infringe. This means that a very low level conception of what counts as “substantial”, such as that adopted in copyright law, is not appropriate in the case of design rights.
- (ii) G-Star’s argument does not do justice to the fact that the purpose of design right law is not to restrain competitors from using the same general design ideas, but to prevent them from taking short cuts when actually producing the detailed shape and configuration of their own products. Accordingly a relatively strict approach to the issue of substantiality is appropriate. This is demonstrated by (a) the exclusion of the method or principle of construction from design right protection, and (b) the case law (see *Dyson v Vax* [2011] EWCA Civ 1206, Jacob LJ at [30], saying, in the context of Community designs: “You cannot take features of a design, turn them into general words and then treat those words like a patent claim”; and *Magmatic v PMS International* [2013] EWHC 1925 (Pat) (overturned on other parts in the Court of Appeal) Arnold J at [82] (summarising his own findings in *CliniSupplies Ltd v Park* [2012] EWHC 3452 (Ch)), explaining that section 213(3)(a) of the CDPA “precludes a claim to what Parker J described in *Pugh v Riley Cycle Company Ltd* (1912) 29 RPC 196 at 220 as “general characteristics of shape or configuration” which cover a variety of different specific appearances”).
- (iii) G-Star’s attempt to import the *Infopaq* approach where that derives from the CJEU’s interpretation of the Information Society Directive, enacted much later than the CDPA, cannot be right, even if one was to seek to transpose the

copyright approach into design right law, given that the *Infopaq* approach was not that taken in English copyright law in 1988.

- (iv) G-Star’s approach would also point to the conclusion that the approach adopted in *C&H Engineering* case was wrong, as it would mean that the commonplace part of the pig fender ought to be ignored (because no relevant skill and labour had been expended upon it) when assessing whether the design had been substantially reproduced in the alleged infringement. Further, the argument that the outcome in that case followed because only the whole pig fender was relied upon would fail, as, on that approach, that fact should have made no difference to the outcome.
 - (v) The Defendants contend that “the correct approach is to adopt a strict test, which recognises that there is a fuzzy penumbra to the scope of protection of a design by recognising that insubstantial changes to a design will not mean there is no infringement. Insubstantial changes are those which will not be taken to be significant by the person assessing the design. That person will not be a simple purchaser, as the *C&H Engineering* case suggests, where the designs are claimed at a level of detail which will not be appreciated by such a person (who in all of these cases probably sees nothing more than creased jeans with twisting legs and flap of fabric at the inner ankle). This applies to all of the designs relied upon by G-Star, given its recognition that it cannot rely upon the general features of the designs referred to in the Particulars of Claim (as these would cover more than one appearance) but has to rely upon the specific shapes. *Ocular Sciences v Aspect Vision* [1997] RPC 289 (section 9 of the judgment from p421, particularly pp422-424) establishes that details which are invisible to the consumer count”.
 - (vi) “A further point on infringement is that whatever approach one adopts to whether a copy is substantially the same, there is more likely to be infringement the greater the level of detail that has been taken. Where detail is not taken, copying will amount to the sharing of generalised ideas, and that is not infringement. This is a point which applies just as much in copyright law as in design law, due to the idea/expression dichotomy applicable in copyright law”.
96. Mr Cuddigan countered Mr Hill’s submission based on *Ocular Sciences v Aspect Vision* [1997] RPC 289 by saying that this decision does not establish that details which are invisible to the consumer count, but instead establishes that such details can, in particular circumstances (where the consumer would be blind to any design features), be relevant. Mr Cuddigan also submitted that, on proper analysis, the CJEU’s reasoning in *Infopaq* is derived expressly from the Berne Convention, to which the United Kingdom is a signatory, and pursuant to which the CDPA was enacted.
97. In my judgment, the similarities between the Arc Pant and the Rhodi Styles are striking.
98. Assessing the level of similarity by comparing the shape of the respective pattern pieces, I consider (in agreement with Mr Browne) that (a) the cutting patterns for the Arc Pant and the “Bowral” and “Ibaraki” styles (and, coming before them in time, the “Iceman” and “Mavrick” styles) are almost identical and (b) although the cutting patterns for the “Capel”, “Carton”, “Jurien”, “Maleny”, “Vale”, “Vobar” and “Winton”

styles manifest alterations to the precise shapes of the three panels, these differences are relatively minor, such that the differences to the shapes of the panel pieces is slight, and the shape and configuration of those parts of the garments are substantially the same as the Arc Pant Designs - and, indeed, the garments overall are substantially the same as the Arc Pant.

99. Paraphrasing Mr Hill's submissions, I consider that any changes are insubstantial, in that they will not be significant in the eyes of consumers to whom the designs are directed.
100. In my judgment, a consideration of the shape and configuration of the garments by conducting a detailed examination of the garments, in particular as shown by the photographs to which I have referred, leads to the same conclusion in respect of all the Rhodi Styles. In short, the substantial reproduction of the shape and configuration of the Arc Pant Designs and, indeed, the Arc Pant, is evident from comparing the photographs of the Arc Pant and the photographs of each of the Rhodi Styles with one another.
101. In reaching these conclusions I have not lost sight of Mr Hill's submission that the first of the Arc Pant Designs, namely "the shape of each of the legs of the Arc Pant, that is to say the shape of the legs in the most capacious arrangement that the arrangement of their fabric allows" is one that is for practical purposes impossible to determine, because (he submits) no evidence has been provided showing the "most capacious arrangement" of the Arc Pant and it is not possible to place the sample in such an arrangement by hand. I consider that it is possible to determine this shape from the arrangement of the Arc Pant on the mannequins (as shown in the photographs). However, even if that was wrong, such that this claim ought not to succeed, that would not affect G-Star's other bases of claim.
102. In addition, these conclusions do not depend upon the validity of Mr Cuddigan's argument that the reasoning which underlies the approach to substantiality in copyright cases is of assistance for purposes of a design right case such as the present. I have reached my conclusions without the need to have recourse to that reasoning.
103. I consider that this is as it should be, as I am not convinced that this reasoning takes matters any further in the context of unregistered design rights claims. Provided the claimant identifies correctly the part(s) of his design which he claims to have been taken exactly or substantially, he will obtain protection against unfair misappropriation of the time, skill and effort that he has expended on creating that design. In those circumstances, no purpose is likely to be served by investigating the extent to which other aspects of his design are also "original". Conversely, if he pleads his design right case too widely, that may cause the claim to fail even if it might have succeeded if it had been advanced on a narrower basis, and the day will not be saved by saying that there are some aspects within the claimed right that are "original". The *C&H Engineering* case appears to be an example of this. In my view, all this is the corollary of the proposition, which I believe to be correct, that, in the case of unregistered design rights: "The question of "part" comes in at the stage of subsistence of the right, rather than at the stage of infringement".

104. In any event, I agree with Mr Hill that, whatever the rights and wrongs of that argument, the less detail that is taken, the more likely that any copying relates to generalised ideas, and that would not be infringement. In the present case, my conclusion is that a large amount of detail is replicated in each of the Rhodi Styles. It is that consideration which impresses me. However, if the test also embraced whether protection should be accorded to the product of intellectual creation, I consider this would weigh heavily in favour of G-Star, in particular in light of the evidence of Ms Van Der Tol.

Whether the Rhodi Styles were copied from the Arc Pant

105. The nature and extent of the similarities in the present case, coupled with the opportunity which the Defendants had for access to the designs in suit, raises a rebuttable inference that the Rhodi Styles were produced by copying those designs.

106. The expert evidence as to the similarities and differences between the Arc Pant and the Rhodi Styles is sufficiently rehearsed above. In line with my conclusion that the evidence of Mr Browne is more reliable and of more assistance than that of Mr Sajid on the issue of whether the Rhodi Styles were made substantially to the Arc Pant Designs, I consider that Mr Browne's reasons for believing that there was copying in the present case are far more coherent and persuasive than Mr Sajid's reasons for suggesting the reverse.

107. However, the more important evidence is that of the Defendants' witnesses of fact.

108. The starting point is the Defendants' pleaded case that the Rhodi Styles were "the product of the Second Defendant's designers' own skill and judgment, and involved their own design ideas as well as the application (in particular forms created by them) of general design ideas fashionable in the design field in 2011 and 2012" (see paragraph 11 of the Amended Defence and Counterclaim).

109. The Defendants' main witness in support of this case was Salim Bux. In his witness statement, he describes himself as being "of Rhodi Inc. Imports Limited" (i.e. the Second Defendant, and the distributor of the Rhodi Styles), but says that he is currently employed by RMS Limited (which is not a Defendant) and provides services as a designer to Rhodi Suppliers Limited (i.e. the Fifth Defendant, and the importer of the Rhodi Styles), which he refers to as "Rhodi". He says he has been employed by Rhodi for 11 years, and that: "For the last 5 or 6 years I have been involved in the design of jeans for the company".

110. According to his witness statement, between about 2009 and August 2013 Salim Bux worked with another designer, Dale Thorpe, who left the company around November 2013. They generally worked together on the designs of jeans, and did so in respect of the Rhodi Styles. They both had input into the design process, they discussed the designs with each other, and they both instructed their colleagues who operated the

CAD (computer assisted design) software to produce drawings. The design process is generally the same for each style of jeans, and includes the following:

- (i) In order to obtain inspiration for new designs and to find out what else is on the market and upcoming trends, the CAD designers undertake research by looking at websites and the CAD designers and other employees attend fashion shows.
- (ii) The process for each individual design generally starts with a meeting at which representatives from the sales team provide feedback on what is currently in demand and information on what the Defendants' current best-selling styles are based upon their sales figures, and the CAD designers discuss their research into market trends and indicate the styles that they think are likely to be popular. This meeting will decide how many styles the Defendants need for the range, and the different shapes, colours and washes. This meeting will be attended by Salim Bux, and, when he was with the Defendants, Dale Thorpe.
- (iii) The CAD designer who would have conducted the research relating to the designs at issue in this case and who would have produced most of the CAD drawings is Leigh Manton, who is no longer employed by the Second Defendant and with whom the Defendants are no longer in contact.
- (iv) Following the meeting, Salim Bux would generally buy and review samples of other products on the market. Once these samples have been used to create a particular style which is then put on the market by the Defendants, they are not generally kept. In addition, Salim Bux would often go back to the Defendants' current or previous styles and use those as a starting point, updating the style in line with the feedback received from the sales team (about the styles which have been selling well and so forth).
- (v) Having reviewed the samples and looked at what was available on the market, the design team will then come up with the designs. Salim Bux will explain to a CAD designer the look he wants and may produce some hand drawings to demonstrate this. However, these drawings are just on scrap paper and are thrown away. The main drawings are done using CAD. From his instructions and their discussions, one of the CAD designers will produce final detailed drawings. For each different style a CAD file is opened on the system. If amendments are made on the CAD system this will be updated on the file. The Defendants only retain the final drawing.
- (vi) Once the CAD drawings are right, they are incorporated into a larger document called the technical sheet which also includes details as to (a) the colour/wash to be used, (b) pockets, buttons, rivets, waistband and fly and (c) inside labels, waistband patch, swing tags and everything else relating to the jeans.
- (vii) The technical sheet is sent to the factory that is being used to manufacture the jeans, along with an Excel specification spreadsheet for each design, which sets out the measurements in centimetres for each size. Sometimes fabric samples and cuttings are also sent, to demonstrate to the factory the colour and type of

fabric to use for the designs. The factories that are used include Scotts Garments in India, JMB in China, and Artistic Mills in Pakistan, and Salim Bux chooses whichever he considers the most appropriate for any particular design.

- (viii) Because the Defendants have been dealing with the factories for many years, they “know how we want the jeans to look so to a certain extent some of the finer details of the design are left to discretion of the manufacturers”. Further: “From their previous experience and knowledge of the designs, the factories know what to do when they receive the CAD drawings and the technical sheet. From these documents, the factory produces pattern cuts for each design, and from the pattern produces proto samples, which they send to us to review. If the factory have any queries over anything on the technical sheets or are not sure on any particular details they will contact me to clarify this, over the ‘phone or by email”.
 - (ix) On receipt of the proto samples there is another meeting between the design team and the sales team to decide which designs will make it to production, and to discuss any amendments that need to be made to the proto samples. Salim Bux communicates these matters to the factory, whether by ‘phone, by email or by marking up with chalk amendments on the samples themselves. He then returns these samples to the factory, and matters go back and forth until the factory produces a sample that he is happy with.
 - (x) The initial samples do not include the finer details, although sometimes they do include the pocket detail. Once the overall design is agreed, the process moves on to surface decoration, such as the detail on the rivets, buttons and labels which are integral to “the “Voi” look”. The factory produces a further sample (known as a “salesman sample” or “sms”) which includes these elements. Once Salim Bux is happy with that sample he approves production.
 - (xi) Prior to full production starting, the factory sends out a further sample to ensure that all the finer details are agreed. These samples are known as “pre-production samples” or “pp samples”. A final sample is sent out once the goods have been made but prior to shipment. These samples are known as “shipment samples”.
 - (xii) The Defendants do not tend to keep copies of the samples that are sent in and out, once the styles have been finalised and put on the market.
111. Salim Bux states that “In total Rhodi put around 250-300 styles on the market each season; this includes t-shirts and other lines. There are two seasons for each year, Spring/Summer and Autumn/Winter. Rhodi puts 40 plus styles of jeans on the market per season. Additional to this Rhodi also produces around 100 styles for two mid-season ranges, otherwise known as ‘injections’”. He explains that the Rhodi Styles were produced over a number of different seasons, and for this reason, and in light of the number of designs produced each year, that “it is difficult for me to remember specific details about particular styles, for example exactly what designs we would have researched and sampled or which fabric samples we would have sent to the factory”.

112. Nevertheless, he explains that as part of the design process for the Autumn-Winter 2012 season it became clear that a very popular general trend was jeans with a twisted leg effect, and that various examples of twisted leg styles were on the market sourced from various different designers and retailers. Accordingly, the Defendants “decided that it would be important to incorporate this into our range to keep pace with the market”.
113. He further states: “All of the designs at issue in this claim were created by cutting the seam at a bend, additionally often using a dart at the knee and an additional panel. This method was used by a number of other designs on the market to create this effect. For example, jeans by Jack and Jones, Michiko Koshino and River Island would have used this method. We would have looked at samples of these types of jeans, although we do not tend to retain them after the style has been completed and gone on to the market, as I have explained above”.
114. Salim Bux then addresses each of the Rhodi Styles, stating in respect of each (a) that he created the design for this style working with Dale Thorpe and (b) that the design process which was followed accorded with the general pattern described above.
115. In cross-examination, Salim Bux confirmed that he had no training as a designer, and said at one stage that he did not consider himself a designer although he did contribute his input and his ideas. When asked about the creation of the Rhodi Styles, he confirmed that Dale Thorpe was the “lead designer” and said “mainly, it was just Dale Thorpe, obviously, and then, obviously, I was just liaising with the factories”.
116. He stated, further, that he was not knowledgeable about computers and that he was bad at drawing. When asked to explain how he communicated his design ideas he said: “Obviously, with the samples that we have”.
117. A series of questions were put to Salim Bux concerning the Defendants’ disclosure.
118. One of the documents disclosed by the Defendants is an email dated 1 September 2011 from Salim Bux to Scotts Garments, commenting on “pp samples” for (among other things) the “Ibaraki” style. In accordance with the design process described in Salim Bux’s witness statement, this email must have been preceded by other documents which would have been sent to Scotts Garments concerning the “Ibaraki” style. Salim Bux confirmed that a technical note would have been sent, and that he would have sent it. When asked whether he knew of the whereabouts of the email by which this technical note was sent, Salim Bux explained that he always deletes his emails (both incoming and outgoing) at, probably, the end of the year; and that he also deletes them from his deleted email folder. He also confirmed that he did not have a CAD which reflects the “Ibaraki”.
119. Similarly, when asked for an explanation as to why the Defendants had not disclosed any email or document which pre-dates the provision of pre-production samples for any of the “Bowral”, “Capel”, “Ibaraki”, “Maleny”, “Vobar” and “Winton” styles, Salim Bux replied “I could have deleted them. I cannot recall”.

120. When asked why, if he deleted his emails as he claimed, an email from him dated 20 November 2011 had been disclosed, he initially replied “I must have left that one. I have no idea. I cannot recall ...” He later suggested that: “Probably this factory I did not delete the emails ... because mostly they are all Scott garments”.
121. When asked how it had come about that an email from Dale Thorpe dated 18 November 2011 which includes “sms requests” concerning the “Capel”, “Jurien”, “Maleny”, “Vale” and “Winton” styles had been disclosed by the Defendants when at the same time they had disclosed no other earlier documents relating to any of these styles, Salim Bux replied “You will have to ask [Dale Thorpe] that”.
122. The documents disclosed by the Defendants include a Rhodi plc “Technical Sheet” dated 14 October 2011 relating to the “Bowral” style, the third page of which depicts a third panel piece which ends at the crotch, and the fourth page of which depicts a third panel piece which ends well below the crotch. It was suggested to him that, in particular in light of this inconsistency, and having regard to the actual configuration of the Defendants’ “Bowral” style garments, the factory must have been sent another document recording the actual shape that it was expected to produce. Salim Bux did not accept this, saying among other things, “We were not really bothered about the shape of the inside panel, as long as the panel was there ... As long as it had an inside panel it was good enough for us”.
123. When asked about the “Technical Sheets” disclosed by the Defendants relating to the “Bowral”, “Capel”, “Ibaraki”, “Maleny”, “Vobar” and “Winton” styles, Salim Bux accepted that they all showed a similar shape for the third panel piece, but maintained that “The inside panel piece will be all different if you cut them all up”. He denied that this was because the shape was recorded on another document sent to the factory, and claimed that “the actual shape the factories have done it” and that the shapes would differ according to the factory the documents went to.
124. Salim Bux confirmed that no document had been disclosed in respect of the “Jurien” style. When asked why not a single email had been disclosed relating to JMB and Artistic Mills, in spite of the fact that similar processes would be followed with them and Scotts Garments, Salim Bux said: “On those styles we probably only sent it to one factory”.
125. In his witness statement, Salim Bux explains that he and other staff were told by Yusuf Valli that Rhodi had previously been involved in litigation with G-Star and that they should not base designs on G-Star jeans. When he was buying in and reviewing samples he therefore made a deliberate effort not to look at jeans originating from G-Star.
126. However, the technical sheet disclosed by the Defendants relating to the “Bowral” style includes the words “Colourway2: Dark Sand as G-Star Riley Loose”. Salim Bux explains that this is a reference to the colour way that Rhodi wanted to produce and was not a reference to the shape and configuration of the design, and he adhered to that explanation in cross-examination. He also states “As far as I can remember I had a sample of the G-Star Riley from before the original proceedings brought by G-Star. I did not buy this in specifically”. It appears that this recollection is wrong, because it

was G-Star's evidence that the "dark sand" G-Star Riley was not shipped to retailers until 26 May 2011.

127. The G-Star Riley was an Arc Pant, and, according to Ms Wittkamp's second witness statement: "the Riley is made from the same cutting pattern as the ARC pant that is the subject of these proceedings. It differs from the ARC only in relation to trim details ... and so it has the same shape and configuration as the ARC".
128. Mr Hill submitted that this evidence should be discounted because G-Star did not adduce evidence of the pattern cuts of the G-Star Riley, and in light of Ms Wittkamp's evidence in cross-examination, which, it was suggested, showed that she could not say how close the design of the G-Star Riley was to the Arc Pant. I do not accept those contentions. Ms Wittkamp's evidence is supported by the redacted copy of G-Star's original production file for the "Riley Loose Tapered Style" which is exhibited to her second witness statement. If the Defendants considered that further documents ought to have been disclosed by G-Star, they could and should have sought further disclosure. I consider that, viewed compendiously, the answers which she gave in cross-examination (including her acceptance that G-Star Riley "may not have exactly the same dimensions as the original Arc put on sale in 2008") do not undermine her written evidence.
129. The description of the design at the top of the same technical sheet is "ARC FIT DENIM WITH EMBOSSED SWIRL". Salim Bux explained that the word "ARC" is a reference to the arc shape of the leg and the fit of the jean, and not to the Arc Pant. He referred to Internet searches in support of his contention that, at the material time, ARC was a well-known and commonly used word in the industry to refer to this shape generally. However, it was put to him in cross-examination that the fruits of those searches related to data that was available in 2014, not 2011.
130. During the cross-examination of Mr Browne, there was a revealing exchange concerning the thrust of the Defendants' case as to how the Rhodi Styles were created. Mr Hill asked Mr Browne the following question: "If, for example, one were to give the following instructions to an experienced jeans factory: "(1), give us jeans with Arced legs, with twisting seams, which corkscrew around the leg when worn, bending inwards and backwards from the knee; (2) use three pattern pieces, with the third pattern piece tapering up the inside leg; (3) add a dart on the knee to help gather fabric there and; (4) foreshorten the back panel using the seam between the back panel and the third panel", would it not be likely that the factory would come up with something looking very like the Arc Pant?" Mr Browne disagreed. He replied: "Where would that factory be, because in my experience they would not understand those instructions without reference to some form of garment or detailed tech packs or diagrams". He later said of the documents disclosed by the Defendants comprising the written instructions that they say they provided to the factories "I think if you were to give this tech pack as it stands, you would receive a two-dimensional garment with panelling and darts, and I do not believe that you would have the corkscrew effect". When Mr Hill asked about combining those documents with the verbal instructions which he had earlier suggested, Mr Browne replied "I do not think that is enough, certainly not dealing with China, Pakistan and India, no".

131. In answer to a question from me as to whether it was the Defendants' case that verbal instructions of that sort were in fact given to the factories, Mr Hill replied: "We do not know precisely what happened because they give evidence that they cannot recall because there are many designs, so what I am not seeking to understand is whether it is possible that a factory can [make garments on the basis of such instructions]".
132. Salim Bux's evidence about the Defendants' design process was confirmed by a witness statement of Jan Vincent Goddard, who states that he is employed by RMS (Preston) Limited, but that he has worked for the Second Defendant for several years, at one time as UK Account Manager and more recently as made Head of Sales. However, he gives no detail of any involvement that he may have had in the design process for the Rhodi Styles.
133. Salim Bux's evidence that, following the 2010 proceedings, instructions were given to the Defendants' staff that no G-Star designs were to be used is confirmed by Yusuf Valli, whose duties are to manage the legal and financial matters of the corporate Defendants. He explains that "Having paid out heavily financially, it was of paramount importance that appropriate safeguards were put in place so as to minimise the risk that G-star would sue again". Mr Valli also said in cross-examination that before requesting a statement from Pakistan he had checked that they had done a production run of the "Vale" style. However, this check was by reference to a document that had not been disclosed.
134. Finally, on this aspect of the case, the Defendants relied upon the evidence of Syed Muhammad Jasimullah. He is employed as "head general" by Freeway Exports, of Karachi, Pakistan, which has been producing Voi jeans garments for over 4 years. He states that "We have never copied, nor have been requested to copy, any G-Star jeans for Voi in over 4 years of working with them".
135. Mr Jasimullah describes Freeway's processes in a way that broadly mirrors Salim Bux's description of the Defendants' processes, and illustrates them by reference to one of the Rhodi Styles which Freeway was involved in making, at least at the sample stage, namely the "Vale" style. He states: "The process follows a very basic concept of cutting the front and back panel into a bow shape rather than straight, in order to achieve a bow shaped leg. Voi also requested that they would like the design to contain an inside panel, this was created merely by taking some of the fabric from the front and back panels, in the same bow shape as the front and back panel which resulted in the creation of an extra panel in the middle. This is a very basic concept and the way we created a bow legged, 3 panel pieced jean where the additional panel is on the inside of the leg".
136. Mr Jasimullah ends by stating that Freeway definitely produced styles containing the concepts complained of in the present claim, and that the last such style which they produced for Voi was the "Vale" style, but "we do not retain records of product samples or designs from our customers unless they are for items which are currently in production".
137. In cross-examination, Mr Jasimullah confirmed that he deals with Mr Salman Valliani, who is Rhodi's exclusive agent in Pakistan. He said that he had received the sketches,

specifications and designs relevant to the present case by email from Mr Valliani, that he had communicated by email with Mr Valliani, and that he had retained copies of those emails but had not been asked to produce them for the purposes of this litigation. He said that he had retained the cutting patterns for the various pairs of jeans that Freeway had made for Rhodi (which existed in physical form only, as Freeway did not use computers for patterns), that he had been asked to return them to Rhodi for the purposes of the present case, and that he had sent them to Salim Bux through the medium of Mr Valliani.

138. Mr Jasimullah agreed with Salim Bux's description of the design process, but when it was suggested to him that Rhodi therefore has control of the shape of the garments that are produced at the end of that process he replied "Maybe, I do not know". He said that he did not think that he would put the label "Made in India" on any products that were made by Freeway in Pakistan, but when it was suggested to him, on the basis that the "Vale" style garments in the present case were labelled "Made in India", that the production run of those garments had come from India, he replied that he did not know about it. On the face of it, these answers are a little surprising. However, Mr Jasimullah gave evidence by video link and through an interpreter. Allowance needs to be made for those factors. In addition, those factors made it difficult to form a reliable assessment of his demeanour.
139. Pulling all these strands together, I do not consider that the Defendants have provided a satisfactory explanation of how the Rhodi Styles were produced, or come anywhere near rebutting the inference that they were produced by copying the Arc Pant Designs. In my judgment, the similarities between the Arc Pant and the Rhodi Styles arose from copying.
140. My principal reasons for reaching these conclusions may be summarised as follows:
 - (i) Although the main designer of the Rhodi Styles was Dale Thorpe, he was not called to give evidence, and nor was any hearsay statement adduced from him. An explanation was given for this by Mr Valli, to the effect that Dale Thorpe was initially willing to provide a witness statement, but he then had to go to the USA in connection with his son's treatment for cancer; on his return from the USA he left the Defendants' employment; and although he was working in the United Kingdom, and contact had been made with him, he wanted nothing to do with the present litigation because he had a lot on his plate with other personal issues. In light of that explanation, and perhaps too kindly because of the way it emerged so late in the day, I am prepared not to draw an adverse inference from the Defendants' failure to call him, in spite of the centrality of his evidence to their case on independent design (see *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324). However, his absence leaves a big gap in their case.
 - (ii) The CAD designer who conducted the research relating to the designs at issue in this case and who produced most of the CAD drawings is Leigh Manton, who also was not called, and whose absence adds to the size of that gap.

- (iii) The “designer” who the Defendants did call, Salim Bux, has no training, is bad at drawing, and cannot make material use of a computer. It seems to me, therefore, that the main design input emanating from the Defendants must have come from others, from whom no evidence has been adduced. So far as concerns Salim Bux, however, he explained that he communicated his design ideas with the samples of garments produced by other manufacturers which the Defendants had acquired. The Defendants’ evidence is that none of those samples were kept, but it seems clear from their disclosure and from Salim Bux’s evidence that one sample that undoubtedly was acquired and used in the context of placing orders for the Rhodi Styles was the G-Star Riley (which is an Arc Pant). This is in spite of the fact that, on the Defendants’ evidence, their personnel, including Salim Bux, were told following the 2010 proceedings that they were not to use G-Star designs. In circumstances where he had acquired or retained a sample of an Arc Pant well after the 2010 proceedings had concluded, where he lacked any other concrete means of communicating his design ideas, and where that sample was undoubtedly being utilised for some purposes in the “Bowral” Technical Sheet, I consider it more likely than not that Salim Bux did in fact use that sample to communicate his design ideas in connection with the production of the Rhodi Styles. Another possibility, supported by the fact that under cross-examination Salim Bux changed the emphasis of his evidence to say that he did actually look at the River Island jean at the material time, is that Salim Bux used a sample of that jean. However, that would not help the Defendants on the issue of copying, because, on the evidence, the River Island jean was itself a copy of the Arc Pant.
- (iv) I do not accept either (a) that the Defendants were as unconcerned about the details of the garments that they were ordering from their manufacturers as Salim Bux claimed (“As long as it had an inside panel it was good enough for us” and so forth) or (b) that the manufacturers would have been able to produce the Rhodi Styles based on the kind of rudimentary indications alone that the Defendants allege that the manufacturers were given. This whole account makes no sense.
- (v) Even if the manufacturers were initially provided with the Technical Sheets alone, the elaborate design process described by Salim Bux and confirmed by Mr Jasimullah clearly provided the Defendants with the opportunity to give careful consideration to the details of the proposed products. It would make no commercial sense for them to pass that up. Also, at the end of the day, the orders which they placed were for garments to be manufactured exactly as they wanted.
- (vi) I consider it improbable that the Defendants’ manufacturers could have produced the garments that they did on the basis of such rudimentary instructions from the Defendants, and unlikely in the extreme that they would have produced the Rhodi Styles or any of them independently from the Arc Pant Designs. I accept Mr Browne’s evidence on these points. I consider that the evidence of Ms Van Der Tol provides a freestanding, and certainly an additional, basis for reaching the same conclusions. What that evidence makes very clear is that the approach that she adopted was, first, inspired by an unusual and quite complex idea, second, highly creative, and, third, idiosyncratic (in her words her work was “particularly drawn by me and cut”). It beggars belief that other pattern cutters working

independently, and off the instructions the Defendants say they gave alone, would have either the ability or the inspiration to follow the same path as she took.

- (vii) Mr Jasimullah's evidence does not help the Defendants. First, on the basis of the labelling issue and the oral evidence of Salim Bux which suggested that the orders for the Rhodi Styles had been placed with Scotts Garments alone, I am not persuaded that Freeway in fact manufactured any of the "Voi" garments in suit. Second, the fact that Mr Jasimullah was called while no one from Scotts Garments was called served to highlight another gap in the Defendants' case. I appreciate that the Defendants have no control over witnesses from the manufacturers, any more than they are able to demand from the manufacturers delivery up of the only patterns that, on their case, exist for the Rhodi Styles. That does not affect the fact that the absence of this evidence leaves a gap in their case. Third, it was clear from Mr Jasimullah's evidence that he had provided the Defendants with documents which were highly material to the issues in the case and which they ought to have, but had not, disclosed and produced – and, indeed, that he had other material documents which he had not been asked to provide.
- (viii) Finally, these are not the only glaring gaps in the Defendants' disclosure. Nor is this a recent development. The lengthy Schedule to the Order of Master March dated 11 March 2014, made on G-Star's application for specific disclosure, demonstrates the extent to which, at that time, the Defendants' disclosure seemed incomplete, although I accept that matters moved on after that.
- (ix) Mr Cuddigan invited me to find that the defects in the Defendants' disclosure were deliberate and/or sinister: as he put it, their disclosure was "methodically incomplete". Among other things, he submitted (a) that Salim Bux's evidence about deletion of emails was implausible and inconsistent with the fact that some of his emails had been disclosed, or at the very least reflected a cavalier approach by the Defendants in that (on Salim Bux's evidence) no one told him not to do this, and (b) that similar points applied to Mr Valli's evidence that Dale Thorpe's email account was deleted "by the IT department" when he left the Defendants' employment, which was 7 months after the present proceedings had begun. Mr Hill contended that there was an innocent explanation for any gaps in the Defendants' disclosure, and I should be slow to find the contrary in any event.
- (x) While some gaps may be explicable on grounds such as lack of organisation and rapid expansion of their business, I do not see how this can apply to, for example, the failure to disclose the cutting patterns that Mr Jasimullah says that he returned to the Defendants for the purposes of this very case. In addition, having gone through the 2010 proceedings, in which the importance of retaining relevant documents must have been brought home to them, and no doubt wanting to protect themselves against future possible claims by G-Star, I would have expected the Defendants to take care to preserve a full paper trail of the alleged independent design process of the Rhodi Styles, not least as they would want to demonstrate, if sued, that (in the words of Mr Valli's "due diligence" letter to Habib Bank concerning the 2010 proceedings): "the problem we suffered in the past, we were not careful or fully experienced with laws in the limitations of

taking influence from other products” (emphasis added). Instead, it seems that there was wholesale deletion of the email account of the lead designer, Dale Thorpe, and substantial deletion of the email account of Salim Bux, and that, for these and maybe other reasons, the documents concerning the Defendants’ design process are incomplete, as was properly put by Mr Cuddigan in cross-examination. Accordingly, I am very sceptical about the Defendants’ good faith.

Which Defendants were involved in the acts of secondary infringement

141. It is accepted that the Second and Fifth Defendants, respectively, marketed and imported the Rhodi Styles. According to the evidence of Mr Valli, and the records at Companies House, the Third Defendant is a dormant company that does not trade, and the Sixth Defendant is the parent company of a trading group that holds property and does not itself trade. It is for these reasons that I said near the beginning of this judgment that G-Star did not appear to have any real case against the Third and Sixth Defendants. I shall address the individual Defendants separately below, when considering overall the case against them of common design. Therefore, the live issues under this heading concern the First Defendant, Rhodi Limited, and the Fourth Defendant, Rhodi Marketing LLP.
142. Rhodi Limited was formerly called Rhodi Plc. According to the records at Companies House, the turnover of Rhodi Limited for the year ended 30 September 2013 was £12,120,072, made up of (a) the supply of management services of £10,880,072 to the Second Defendant (b) the supply of management services of £1,135,000 to the Fifth Defendant and (c) an additional sum of £105,000. According to the records of other group companies at Companies House in 2012 (a) the Second Defendant paid £10,880,072 to another group company, RMS Preston Limited, for administration services and (b) the Fifth Defendant paid £1,135,000 to RMS Preston Limited for administration services. It seems that RMS Preston Limited simply paid these sums on to Rhodi Limited.
143. In addition, it appears that both the Second and Fifth Defendants have no staff costs, because they have no staff. Mr Valli was asked about this in cross-examination. He accepted that the Second Defendant has no staff, but he said that Rhodi Limited is only providing management services and did not accept that Rhodi Limited is running the Second Defendant’s business. He said that the Second Defendant’s business is run by the Second Defendant, albeit (of necessity) entirely with staff provided by Rhodi Limited.
144. In substance, therefore, as Firoz Bux accepted in cross-examination, the entire turnover of Rhodi Limited is attributable to administrative services charged to the Second and Fifth Defendants. Further, the Second and Fifth Defendants effectively divest themselves of all profits by these means: for example, the Second Defendant’s gross profit on turnover after cost of sales for 2012 was £11,783,834, but after deduction of administration expenses, and certain other minor adjustments, its operating profit was only £16,247.
145. As reflected in the evidence of Salim Bux and Mr Valli concerning the companies that they are employed by and the companies they work for, and by Salim Bux’s acceptance

in cross-examination that in reality there is no distinction between group companies so far as the staff are concerned and effectively they are all just working for “Rhodi”, and whatever the niceties may be for tax purposes, I consider that the substance of the matter is that Rhodi Limited is part of the same operation as each of the Second and Fifth Defendants.

146. According to Mr Valli’s witness statement, Rhodi Marketing LLP was incorporated on 17 October 2012 and “It is a newly incorporated company and the registered owner of the domain www.voijeans.com so as to promote our products”. Mr Valli did not suggest, and nor is that my understanding from any other evidence, that this excludes the Rhodi Styles. In cross-examination, Mr Valli confirmed that Rhodi Marketing LLP (a) trades from the same premises as the Second and Fifth Defendants and (b) had that domain name transferred to it by the previous owner, that is to say the Second Defendant.
147. The evidence before me included pages from that website. Those pages offer the “Voi” range of garments for sale, bear the name and address of Rhodi Marketing LLP, and include a copyright notice asserting that “All content and images” are the copyright of Rhodi Marketing LLP.
148. On this basis, I consider that both Rhodi Limited and Rhodi Marketing LLP participated in the material acts of secondary infringement. However, the extent of their participation is, in my judgment, a matter that is at large on the inquiry as to damages or account of profits (depending on which avenue of recovery G-Star elects to pursue). In particular, if Rhodi Marketing LLP did not begin operating the website until part way through the events of which G-Star complains, its liability may be limited accordingly.

The knowledge of the First, Second, Fourth and Fifth Defendants

149. Section 227 of the CDPA provides:

“(1) Design right is infringed by a person who, without the licence of the design right owner—
(a) imports into the United Kingdom for commercial purposes, or
(b) has in his possession for commercial purposes, or
(c) sells, lets for hire, or offers or exposes for sale or hire, in the course of a business, an article which is, and which he knows or has reason to believe is, an infringing article”.

150. Section 228 of the CDPA provides:

“(1) In this Part “infringing article”, in relation to a design, shall be construed in accordance with this section.

(2) An article is an infringing article if its making to that design was an infringement of design right in the design.

(3) An article is also an infringing article if—

(a) it has been or is proposed to be imported into the United Kingdom, and

(b) its making of that design in the United Kingdom would have been an infringement of design right in the design or a breach of an exclusive licence agreement relating to the design”.

151. It was common ground before me (a) that, pursuant to section 227 of the CDPA, in order to succeed against any Defendant, G-Star has to prove either actual knowledge that the Rhodi Styles comprised infringing articles or that, objectively, that Defendant had “reason to believe” that this was so and (b) that the correct legal approach to the latter issue is as stated in *LA Gear Inc v Hi-Tec Sports plc* [1992] FSR 121, per Morritt J at 129:

“Nevertheless, it seems to me that “reason to believe” must involve the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief. Facts from which a reasonable man might suspect the relevant conclusion cannot be enough. Moreover, as it seems to me, the phrase does connote the allowance of a period of time to enable the reasonable man to evaluate those facts so as to convert the facts into a reasonable belief.”

152. Mr Cuddigan also referred me to *Nouveau Fabrics Ltd v Voyage Decoration Ltd* [2004] EWHC 895 (Ch) at [47], where Mann J first cited the above passage from the judgment of Morritt J and then continued as follows:

“Accordingly, “reason to believe” requires more than “reason to suspect”, and it requires an evaluation of all factors known to the defendant in order to see whether he fulfils the test. He does not have to accept a claimant’s assertions at face value, but he cannot ignore them either. Having been made aware of the claim of copyright and copying, he has to evaluate it. What starts as grounds for suspicion have to harden into grounds for belief, whether or not the defendant actually believes it. His evaluation will, in many cases (and certainly in the present) have to include making reasonable inquiries, and the answer to the question of whether he has reason to believe will have to take the result of those inquiries into account”.

153. The parties’ opening submissions on these topics were relatively brief.
154. Mr Cuddigan submitted that: “The corporate Defendants’ objective knowledge for the purposes of secondary infringement must result from their involvement (or the involvement of their directors) in the [2010] proceedings. The Particulars of Claim in those proceedings asserted unregistered design right in the Arc Pant. That must be sufficient to fix all the Defendants with knowledge”. He observed that Asif Ibrahim Bux and Firoz Ibrahim Bux were Defendants to the 2010 proceedings, and that they were personally served with the Order recording the terms of settlement of those proceedings.
155. Mr Hill submitted that “[all the Defendants] say they did not know the articles were infringing, and G-Star have advanced no direct evidence to say that they did”. He also submitted: “specific steps were taken to avoid the influences of G-Star on the Rhodi design process after the conclusion of the [2010 proceedings]. This is strong evidence against knowledge or reason to believe that styles produced after that first claim were infringing. This evidence serves to underscore the implausibility of [the corporate Defendants] having actual knowledge that the articles in question were infringing, and what they could reasonably be expected to have known in the circumstances”.

156. Mr Cuddigan’s oral closing submissions did not take matters significantly further.
157. Mr Hill’s oral closing submissions were replicated in a written Closing Note. His main arguments were as follows:
- (i) An infringing article exists in relation to a specific design. Accordingly, in light of section 228 of the CDPA, the claimant needs to show knowledge or reason to believe (from objective facts known to the relevant individual) that (a) the article is made to a particular design; (b) design right subsists in that particular aspect; (c) making the article involved copying that design; and (d) the copying was close enough to amount to use of exactly or substantially the same design.
 - (ii) The relevant individuals whose state of mind has to be considered in a case of corporate liability are usually the directors of the company, although, depending on the statute in question, sometimes the state of mind of more junior individuals may be relevant. In this case, it is the directors that count. An alternative case could be based on vicarious liability through the medium of more junior employees, but G-Star did not advance any such case. In any event, the individuals would have to be those who carried out the specified acts of alleged secondary infringement on behalf of the Defendants, and G-Star had put forward no evidence as to who these individuals were, other than contending (as Mr Hill submitted, without foundation) that they were Asif Ibrahim Bux and Firoz Ibrahim Bux.
 - (iii) The 2010 proceedings provide no basis for holding that the Defendants had the requisite knowledge or reason to believe. The letter before action in the 2010 proceedings made no complaint of design right infringement. Although the Particulars of Claim which followed, dated 30 June 2010, include claims based on unregistered design right, these claims (a) are only set out after claims based on Community registered and unregistered designs, and (b) lack particularity, because they rely upon a claim that G-Star owns unspecified design rights “subsisting in and relating to” the “G-Star Arc Pant”, and do not specify the Arc Pant Designs. Such vague information was insufficient to give anyone at the Defendants “reason to believe” that the design rights relied upon in the present claim did indeed subsist and/or were infringed in any of the Rhodi Styles.
 - (iv) Further, any knowledge from the 2010 proceedings would not have percolated down to the Defendants’ staff. On the evidence of Salim Bux and Mr Valli, they were just told to stay away from G-Star. They were not given specifics of G-Star’s unregistered design rights or anything like that.
 - (v) As Asif Ibrahim Bux and Firoz Ibrahim Bux were clearly not involved, and as no “reason to believe” existed at a lower level within the Defendants, G-Star had failed to establish knowledge or reason to believe.
158. Mr Cuddigan countered these points in a written Reply Note, as follows:

- (i) The 2010 proceedings relied on the shape/configuration of the whole Arc Pant. The assertion of that broad design plainly provides knowledge, or at least a reason to believe, in respect of narrower designs that fall within the whole.
- (ii) As to the Defendants' knowledge generally, G-Star also relies on knowledge in the clothing business that designs are protected.
- (iii) Corporate defendants are possessed of the knowledge of the employees carrying out the acts of importing and distribution (in the present case, Salim Bux) and the directors controlling those acts (in the present case, Asif Ibrahim Bux).
- (iv) Dale Thorpe must have known everything. He designed "Iceman" and "Mavrick", which were "complete knock-offs". He was told not to go near G-Star because of the 2010 proceedings. He was subsequently lead designer for the Rhodi Styles.
- (v) Mr Valli's evidence in his witness statement is that he told Rhodi staff (a) not to "take heavy influence from the finer details of other brand's styles", and (b) that "no G-Star designs were to be used". This gave the employees a further reason to believe that G-Star had rights in their designs that might otherwise be infringed.
- (vi) It was clear from the oral evidence of Asif Ibrahim Bux, Firoz Ibrahim Bux, Salim Bux and Mr Valli that all of them knew about G-Star's complaints of infringement of the Arc Pant which formed the subject of the 2010 proceedings (although Mr Valli did make the point that those proceedings did not relate solely to the "Iceman" and "Mavrick" styles).
- (vii) Accordingly, the Defendants "knew everything".
- (viii) Furthermore, the Defendants were involved in a business which intended to copy trends in the marketplace. From time to time this involved stepping over the line, as was acknowledged in the "due diligence" letter sent to Habib Bank by Mr Valli on behalf of the Second Defendant following the 2010 proceedings. The Defendants must be held to have knowledge of the dangers generally associated with such copying, and that must be enough to provide for a general "reason to believe" in relation to copied articles and parts thereof. The only alternative is that the Defendants would be always able to rely on a lack of knowledge notwithstanding an overarching practice of copying and an intention to sail close to the wind. It is not the purpose of the secondary infringement and knowledge provisions of the CDPA to protect such practices.

159. It seems to me that the heart of the matter is as follows.

160. First, the Defendants accept that, although infringement was neither found nor admitted, as a result of the 2010 proceedings they were well aware that G-Star claimed (a) subsistence and ownership of unregistered design right in the Arc Pant, and (b) that the "Iceman" and "Mavrick" styles infringed that design right.

161. Second, there is a difference between the 2010 proceedings and the current claim, in that if design right is claimed in respect of the design of the whole of an article (in the 2010 proceedings, the Arc Pant), it is the design of the whole of the allegedly offending articles (in the 2010 proceedings, the “Iceman” and “Mavrick” styles) which must be considered, whereas if design right is claimed only in respect of parts of an article (in the present case, the Arc Pant Designs), it is the design of the equivalent parts in the allegedly offending articles (in the present case, the Rhodi Styles) which must be considered.
162. Third, however, the greater includes the lesser in the sense that, if there is a case of subsistence and ownership in respect of the design of the whole of the Arc Pant and of infringement of design right by the design of the whole of the “Iceman” and “Mavrick” styles, there must be or is at least very likely to be a case of subsistence and ownership in respect of some parts of the Arc Pant and of infringement by the design of the equivalent parts of garments made to or substantially to the design of the whole of the Arc Pant.
163. Fourth, the fact that the Rhodi Styles were made substantially to the design of both the Arc Pant and the Arc Pant Designs was, in my judgment, apparent from comparing the shape and configuration of the Rhodi Styles with those of the Arc Pant, versions of which were available to the Defendants, and at least one version of which (the G-Star Riley) was either acquired or retained by Salim Bux after the conclusion of the 2010 proceedings.
164. Fifth, the making of the Rhodi Styles involved copying the Arc Pant Designs.
165. Sixth, in my judgment, this would have been apparent from a comparison of the Arc Pant Designs with the equivalent parts of the Rhodi Styles, bearing in mind the unusual shape and configuration of the Arc Pant Designs and the extent to which those aspects of the Arc Pant were replicated in the Rhodi Styles, and *a fortiori* from a comparison made by someone with knowledge of the 2010 proceedings and who was concerned to avoid importing and marketing garments which G-Star might claim to be “infringing articles”.
166. Seventh, these matters were sufficient to give those who could and should have made such a comparison at least “reason to believe” even if (a) I had not rejected, as I have, the Defendants’ case that they did no more than adopt a trend that was already being followed by other High Street brands such as River Island, leaving it to their manufacturers to decide upon and create the precise pattern shapes in response to general “high level” design input from the Defendants, (b) I had not found, as I have, that, on the balance of probabilities, Salim Bux used a sample of the G-Star Riley to communicate his design ideas in connection with the production of the Rhodi Styles, and (c) Salim Bux’s design input was based on the River Island jean, and neither he nor Dale Thorpe realised from the similarity of this jean with the Arc Pant that it had been plagiarised from the Arc Pant.

167. Eighth, I consider that the individuals whose state of knowledge is material in the present case are those to whom the Defendants delegated responsibility for the relevant activities, namely carrying out the design process, liaising with manufacturers, placing orders, and importing and marketing, all in respect of the Rhodi Styles (see *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037). Those individuals were, or included (as Leigh Manton may also form part of his cohort), Dale Thorpe and Salim Bux. In my judgment, Salim Bux, and, I infer, Dale Thorpe (a) knew that the Rhodi Styles were infringing articles, and (b) in any event, knew facts (including that G-Star had brought the 2010 proceedings, and the existence of the similarities referred to above) from which a reasonable man would arrive at the belief that they were infringing articles.
168. In substance, I agree with Mr Cuddigan's reply submissions made in closing. I do not go all the way with him on his final submission, in particular. However, I consider that there is force in the argument that it would be an unfortunate result, and one which I do not believe is produced in the present case, if a person who is aware of the risk that his mode of conducting business may result in copying other people's designs could escape liability for infringement by giving general instructions to foreign manufacturers to produce articles similar to popular designs and then say that if those manufacturers choose to fulfil those instructions by copying other people's designs that is not something that can be laid at his door if he has not looked to see whether copying has occurred. That would seem to be the reverse of making reasonable enquiries - and, if the making of inquiries is relevant, even on their own case the Defendants did not do that in this case.
169. I am not impressed with Mr Hill's submission that while the directors of the First, Second, Fourth and Fifth Defendants may have known the details of G-Star's claims in the 2010 proceedings, other individuals, such as Mr Valli and Salim Bux, had no such knowledge. In particular, in his letter to Habib Bank, Mr Valli wrote "As we have implemented many improvements and changes, we can guarantee and reduce any possibility of such proceedings ever being experienced by us in the future". I consider that Mr Valli must have had an understanding of the details of those claims in order to be able to write as he did. Further, it would not accord with that letter, and would not make sense in terms of protecting the Defendants and minimising the risk of future claims, for Mr Valli and Salim Bux (and other staff) to be given only general instructions to "stay away from G-Star", without being told why they should do that and what problems they should be trying to avoid. On the basis that the Defendants gave instructions, I consider that it is probable that they were more detailed than Mr Hill suggests. The other possibility is that, contrary to the Defendants' case, no such instructions were given. In any event, I do not consider that the Defendants' employees did "stay away from G-Star". Even if they did, they could and should have looked at the garments which were coming back from their manufacturers and seen that their manufacturers had not "stayed away from G-Star".
170. For these reasons, I hold that G-Star has made out the knowledge requirement in section 227(1) of the CDPA in respect of the First, Second, Fourth and Fifth Defendants.

Whether the Seventh and Eighth Defendants are liable as joint tortfeasors

171. As Mr Cuddigan submitted, the authorities on common design are well-known, and are helpfully summarised in *L'Oreal SA v eBay International AG* [2009] EWHC 1094 (Ch), per Arnold J at [347]-[352]. In a nutshell, the question is whether there was a common design between the alleged joint tortfeasors to do acts which amounted to infringements, and, if so, whether those sought to be made liable acted in furtherance of that design.

172. Another helpful summary of the law as to who may be sued either as joint tortfeasors or as company directors is contained in *Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs, 4th edn* at paragraphs 62.20 and 62.21 respectively. With regard to joint tortfeasors, the authors state (among other things) that “the underlying concept is that the joint tortfeasor has made the infringing act his own”. With regard to company directors, they state (among other things):

“Directors are not liable, as such, for infringements committed by their company without their sanction or involvement; but they are liable if they procure the infringement by the company or the company acts pursuant to a common design to which they are a party; in essence, liability arises if it would arise regardless of the fact that the relationship is one of director and company”.

173. The case which is, perhaps, most often cited in the context of claims against directors is *MCA Records Inc v Charly Records Ltd* [2002] FSR 26. In that case, Chadwick LJ (with whom Tuckey LJ and Simon Brown LJ agreed), while acknowledging that it is dangerous to take an overly prescriptive approach, identified the following propositions at [48]-[53]:

“First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. ...

Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. ...

Third, the question whether the individual is liable with the company as a joint tortfeasor – at least in the field of intellectual property - is to be determined under principles identified in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 and *Unilever Plc v Gillette (UK) Limited* [1989] RPC 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *CBS Songs v Amstrad* at page 1058E to which I have already referred, the individual “intends and procures and shares a common design that the infringement takes place”.

Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does “intend, procure and share a common design” that the infringement should take place may be liable as a joint tortfeasor. ...”

174. Further, Mr Cuddigan accepted that, in light of the reasoning of the Supreme Court in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, in a case in which the alleged joint liability relates to secondary infringement, it is necessary to prove actual knowledge or “reason to believe” against the accessory as well as his principal.
175. At the outset of the case, Mr Cuddigan put at the forefront of his submissions the fact that the group accounts of the corporate Defendants show that of the turnover of Rhodi Limited of £12,120,072 to which I have referred above, Rhodi Limited paid £3,733,333 to each of the Seventh Defendant, Asif Ibrahim Bux, the Eighth Defendant, Firoz Ibrahim Bux, and Rizwan Ibrahim Bux (a fellow director until September 2013). Those accounts state that “During the year the services of [each of those individuals], other than his fiduciary duties, have been supplied to the company under a separate distinct contract”. Those accounts also show that the group had additional staff costs not far in excess of £1m. When G-Star requested copies of the contracts with these individuals, the Defendants’ solicitors replied on 23 October 2014 stating that “there are no written contracts for services”, and that “the payments were a means of profit extraction”.
176. In essence, therefore, the position disclosed by the company accounts is that, at least in 2012, one-third of the profits generated by the importing and marketing operations of the Second and Fifth Defendants was paid to each of the above individuals (albeit that there are no written “separate distinct contracts” which explain the basis for these payments).
177. These points were taken up in cross-examination. Firoz Ibrahim Buz was called first, and, in answer to questions about the sum of over £3.7m apparently paid to him, he said that (a) the payment was a “tax scheme”, (b) “Basically, we have not seen a single penny of that money. It just comes through”, (c) he did not know where it had gone, because it was in an EBT (i.e. employee benefit trust), and (d) it was not held for his benefit.
178. Asif Ibrahim Bux’s evidence was different. He accepted that he and his two brothers, Firoz and Rizwan, were, in 2012, the ultimate controlling parties of the Second and Fifth Defendants. He also accepted that the sum of over £3.7m was paid to each of them for running the companies in the Defendants’ group. Although he said that the way of showing the profits was “a tax scheme”, and although he said that he could not say whether the same applied to his brothers, he accepted that the sum of £3.7m that was shown in the accounts as paid to him had gone into a fund that was under his control.
179. Of these different accounts, I have no hesitation in preferring that of Asif Ibrahim Bux. I did not consider that Firoz Ibrahim Bux was a satisfactory witness. He was argumentative at times, and did not give straightforward answers to a number of the questions that were asked of him. He also accepted that he and his brother Rizwan had been convicted of 4 offences of perverting the course of justice, which involved signing documents which indicated that individuals other than the true drivers were driving vehicles for their employers, apparently to avoid speeding fines. However, he said that

this related to employees of a property company, and not the Defendant companies, and that the description of the two brothers as the “lynchpins of the company” which was apparently deployed in mitigation before the criminal court also referred to the property company and not the Defendant companies. G-Star could not gainsay those answers. It seems that this episode resulted in both Firoz and Rizwan receiving immediate custodial sentences. In any event, it indicates that both of them have a propensity for dishonesty.

180. That said, it emerged in evidence that the reason why both Asif Ibrahim Bux and Firoz Ibrahim Bux had resigned as directors of the corporate Defendants on 13 September 2013 was because they had been disqualified from acting as company directors for a period of 8 years. The background to their disqualification concerns a property company called Goldace Estates Limited. Although this company had sold a property and charged VAT in the sum of £1.3m on the sale, none of that sum had been paid to HMRC, and the company went into administration on 6 July 2011. In addition, HMRC had a further contingent claim against the company for £1.46m. So Asif, also, does not have a clean copybook.
181. The other main points which were put to Firoz Ibrahim Bux in cross-examination were (a) that he knew the subject of G-Star’s complaint in the 2010 proceedings, (b) that he had sworn an Affidavit confirming that neither he nor any of the 5 corporate Defendants to the 2010 proceedings had in their possession, custody or control various products, materials and implements, and (c) that he was personally served with certain documents on 3 October 2011 at the premises of the First Defendant (which was formerly called Rhodi plc). He accepted all these matters. However, he denied that he was involved in running the Defendants’ clothing business, or, indeed, had any involvement in that business.
182. Firoz Ibrahim Bux repeated more than once that he and his wife and children had moved to Dubai in 2007. He also said that his brother Rizwan was running everything on the clothing side, and had been doing so since 2011, although Rizwan was not a director of the clothing companies in 2011, and the directors at that time were him and Asif. Although I have expressed reservations about his reliability in other regards, I accept his evidence that he was not involved in running the Defendant clothing companies at any time material to the present action. I do not consider that the points that were put by Mr Cuddigan outweigh the fact, which I accept, that Firoz has been based in Dubai for years.
183. Turning to the case against Asif Ibrahim Bux, in his oral closing submissions Mr Cuddigan said that the best points that G-Star had on knowledge were derived from Asif’s acceptance in cross-examination that (a) he knew that in the 2010 proceedings G-Star was asserting infringement of its rights by copying the Arc Pant, (b) he was involved in the decisions running up to the settlement of the 2010 proceedings, (c) he was personally served with the Order which resulted from those proceedings at the premises where the clothing business is based, (d) in 2012, he was in charge of (at least) “a small percentage” of the clothing business, and (e) he was one of those “at the top of

the tree” (although he denied that he was an equal in that regard, and said that Rizwan was “the main man”).

184. Other points that Mr Cuddigan put in cross-examination, and relied on in closing, with regard to Asif Ibrahim Bux were to the effect that (a) he had stopped being involved in property when Goldace Estates Limited went into liquidation (and was therefore able to concentrate on other businesses, such as clothing), (b) he had spotted the potential in Dale Thorpe and had promoted him to designer (which indicated his involvement in the clothing business), (c) when Firoz and Rizwan were sent to prison at the end of 2009, that left Asif to run the clothing business (to which he said “I did not run the business, the business ran itself. We had the right people, the right infrastructure”), and (d) although he denied having relationships with wholesale and retail outlets in the United Kingdom at the day-to-day buying level, and also denied being involved in ensuring the distribution of “Voi” jeans, he accepted that “because I have been in the industry so long, I have made a lot of friends. So, I do have contacts with the CEOs of a few of the companies”.
185. Asif Ibrahim Bux is blind. I agree with Mr Hill that, on the face of it, this makes it less likely that he would have any role in choosing designs for the “Voi” range or placing or otherwise dealing with any orders placed with manufacturers in respect of them.
186. I also bear in mind the unchallenged evidence of Salim Bux to the effect that the Defendants put around 250-300 styles on the market each season, and around a further 100 styles for mid-season ranges, and this includes over 40 styles of jeans. Further, according to the evidence before me, Asif Ibrahim Bux played no part in the design process concerning the Rhodi Styles described by Salim Bux. These facts support the conclusion that Asif Ibrahim Bux had no direct involvement with the infringing acts.
187. In any event, I accept Asif Ibrahim Bux’s evidence to the effect that he was not involved in the corporate Defendants’ clothing businesses at any material time except at a high level, which was detached from its day to day operations. I do not consider that, in the language of Mr Cuddigan’s oral closing submissions, this amounts to “encouraging” the “activities of employees, which happen to be infringing”, and still less that this enables G-Star to establish that Asif “knows about it” so that “he is personally liable”.
188. For these reasons, I do not consider that G-Star has established with regard to either Firoz Ibrahim Bux or Asif Ibrahim Bux that (a) he intended or procured or shared a common design with the corporate Defendants that the infringements of G-Star’s design rights complained of in this action should take place, (b) he exercised control other than through the constitutional organs of the Defendant companies, (c) the circumstances are such that he would be liable as a joint tortfeasor if he were not a director or one of the persons by which those companies were (ultimately) owned and controlled, or (d) that he had actual knowledge or “reason to believe” as Mr Cuddigan accepted G-Star bears the burden of proving. The claims against the Seventh and Eighth Defendants therefore fail.

The counterclaim

189. In substance, both sides accepted that the counterclaim stands or falls with G-Star's claim that its design rights were infringed. Mr Hill suggested that this is subject to an argument that G-Star did not provide satisfactory evidence of breach of its rights at the time when it obtained payment under the bank guarantee. Mr Hill says this would sound in interest for the period between the date of payment and the date when evidence was produced. However, as at present advised, and without ruling that there is nothing in this point without affording the parties an opportunity to make further submissions, it seems to me that to argue further over it would be a case of "the game is not worth the candle".

Conclusion

190. In summary, G-Star's claims against the First, Second, Fourth and Fifth Defendants succeed, but the claims against the Third, Sixth, Seventh and Eighth Defendants fail. The counterclaim fails and must be dismissed. Counsel should agree a form of order. Naturally, I will hear submissions on any points on which they are unable to agree.

J C van der Tol
Made on behalf of the Claimant
1st
16 January 2014
Exhibits JCVDT-1 to JCVDT-6

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

HC13 F01225

B E T W E E N:

G-STAR RAW C.V.

(a company incorporated under the laws of the Netherlands)

Claimant

and

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(4) RHODI MARKETING LLP

(5) RHODI SUPPLIERS LIMITED

(6) RHODI GROUP LIMITED

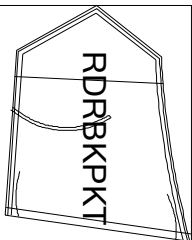
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(8) MR FIROZ IBRAHIM BUX (FORMERLY FIROZ IBRAHIM PATEL)

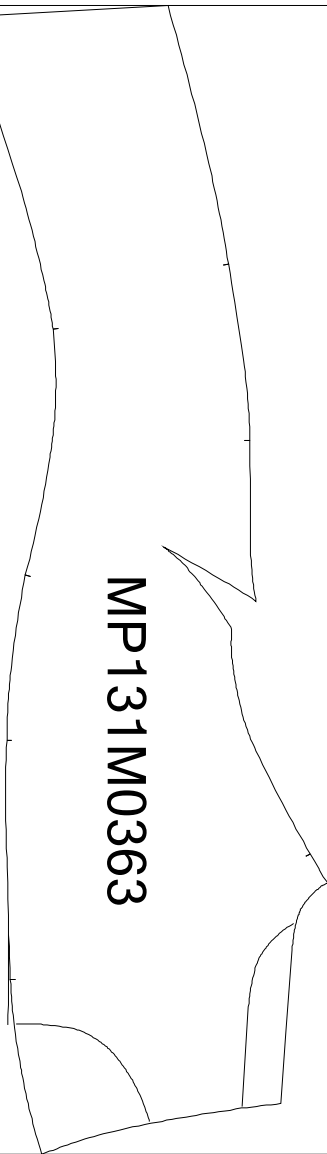
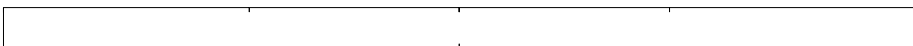
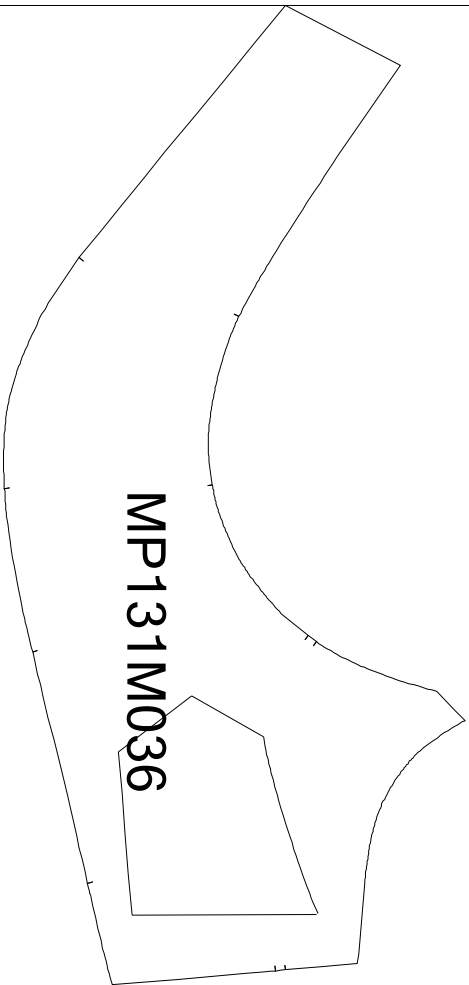
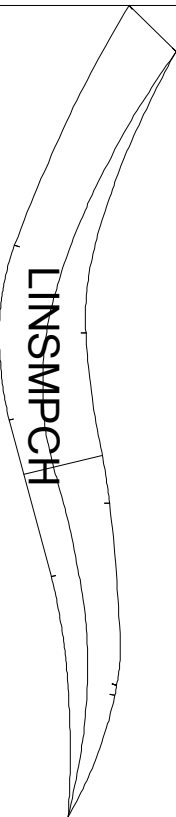
Defendants

EXHIBIT JCVDT-5

This is Exhibit JCVDT-5 to the First Witness Statement of Jourica Catharina van der Tol.



MP131M0362



M E Pettersson
Made on behalf of the Claimant
1st
12 May 2014
Exhibits MEP-01 to MEP-03

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

HC13 F01225

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(7) MR ASIF IBRAHIM BUX (FORMERLY ASIF IBRAHIM PATEL)

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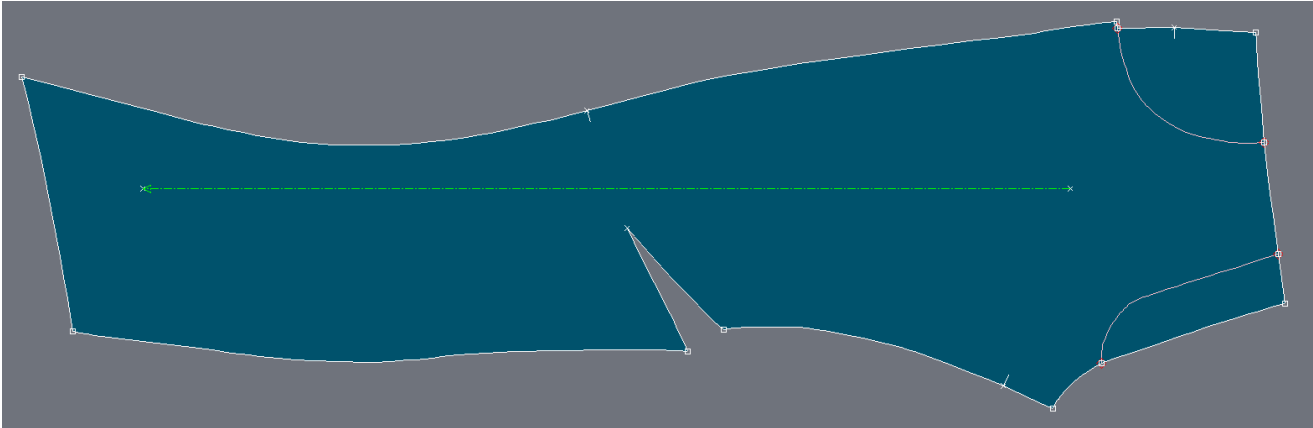
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EXHIBIT MEP-02

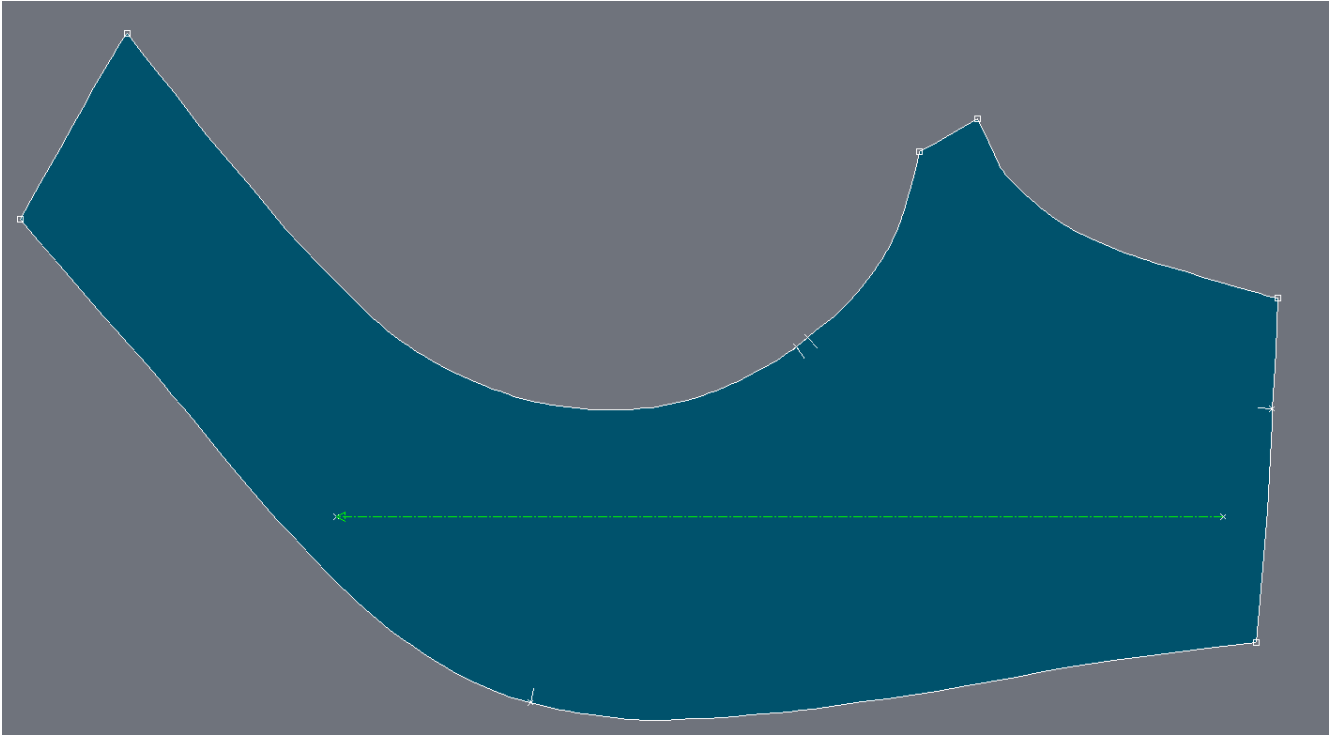
This is Exhibit MEP-02 to the First Witness Statement of Marie Emma Pettersson.

ICEMAN PATTERN

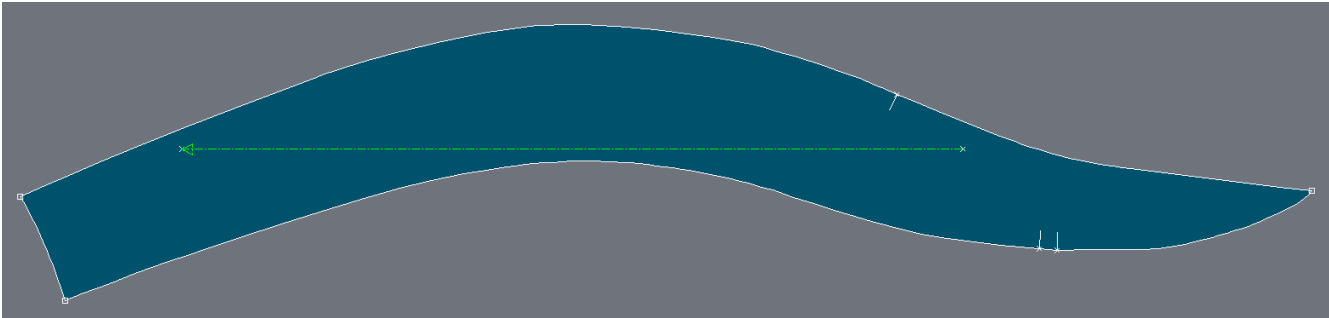
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Back leg

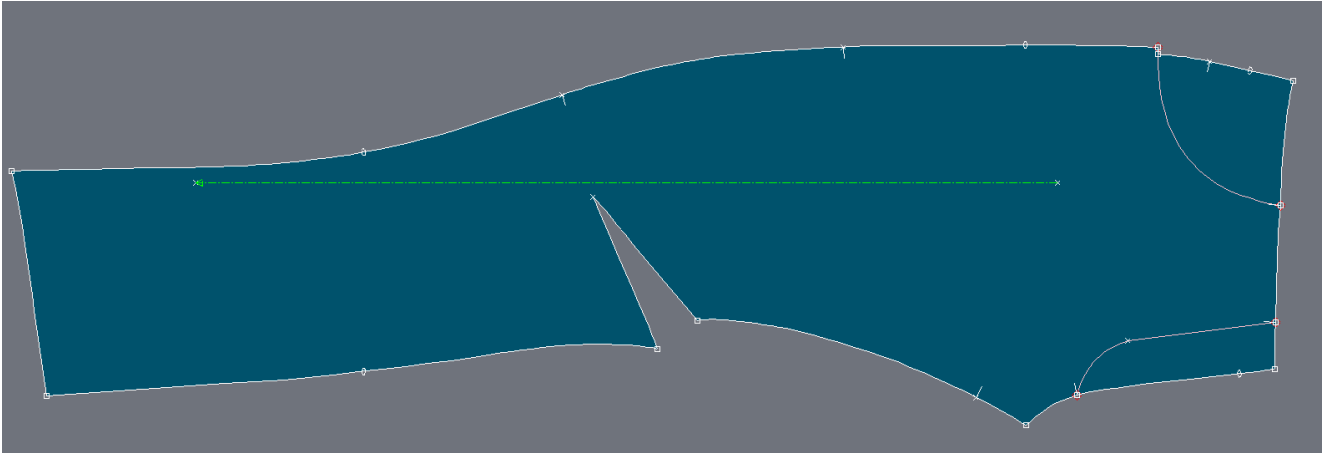


Inseam panel

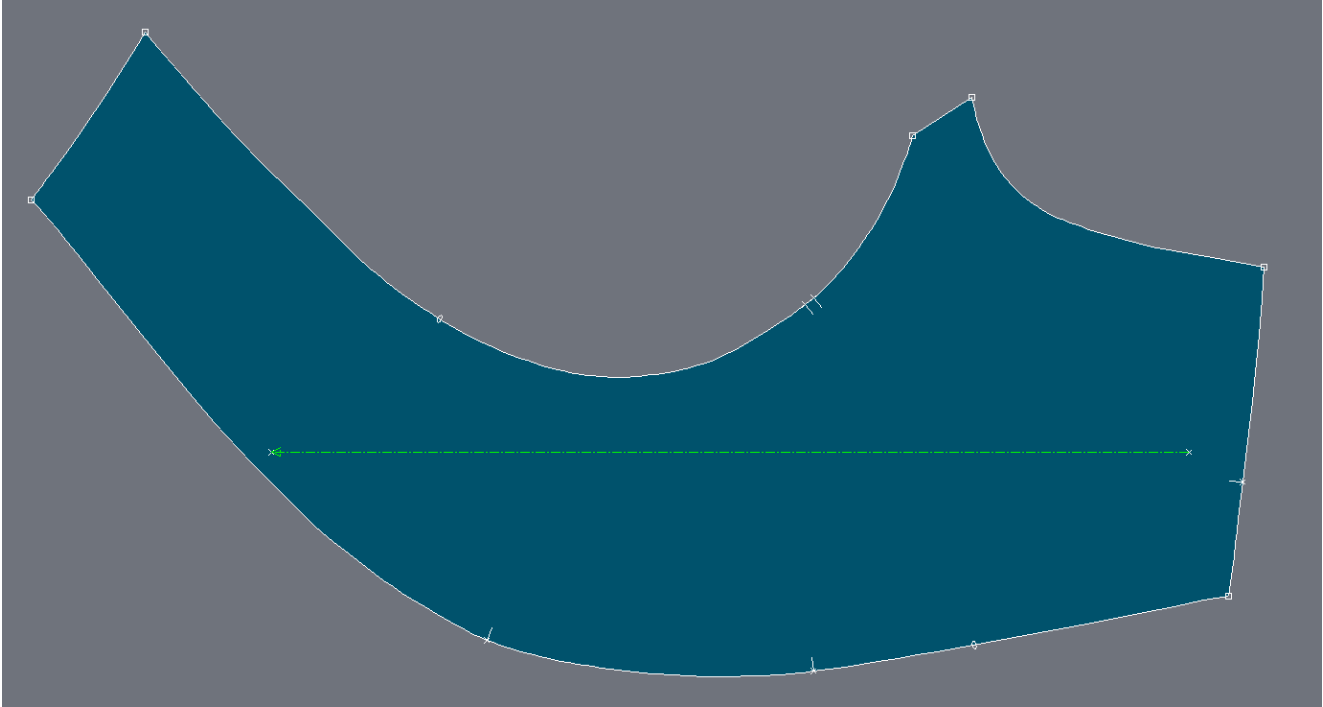


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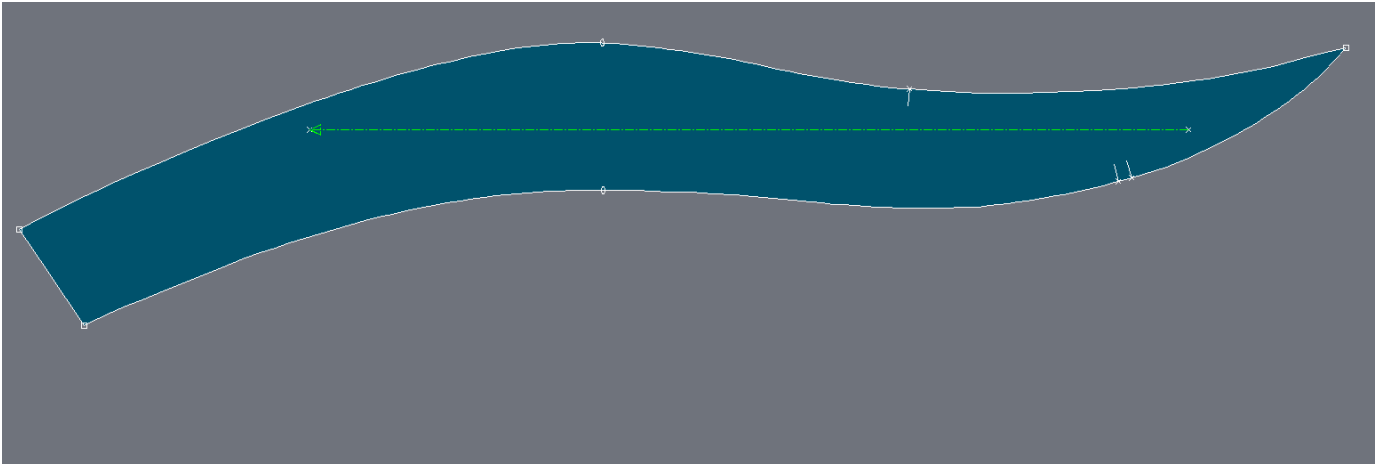
Front leg



Back leg

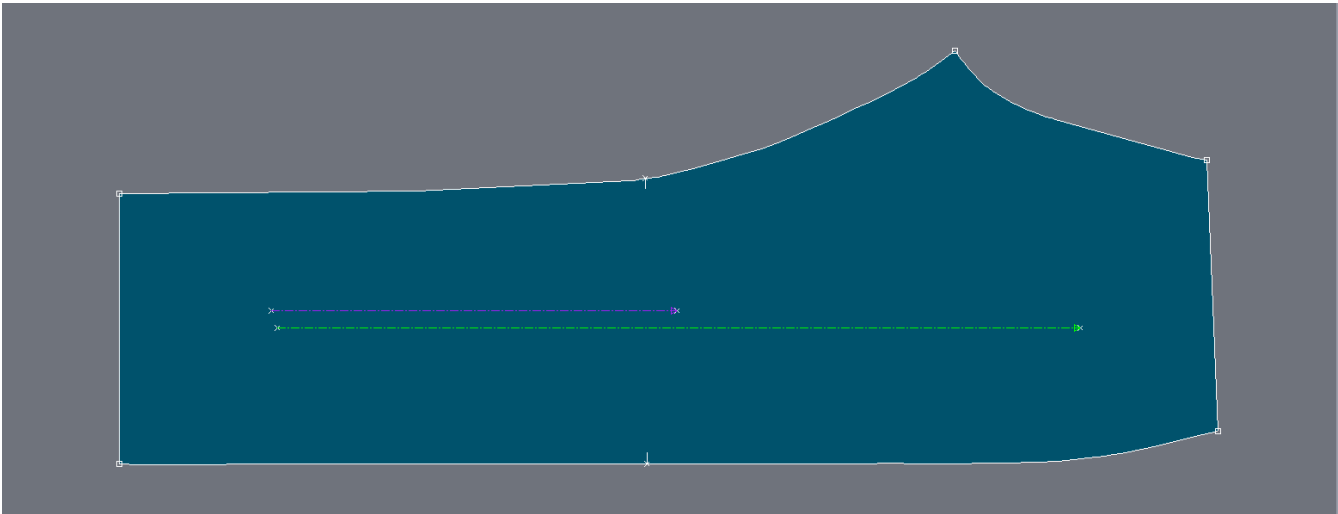


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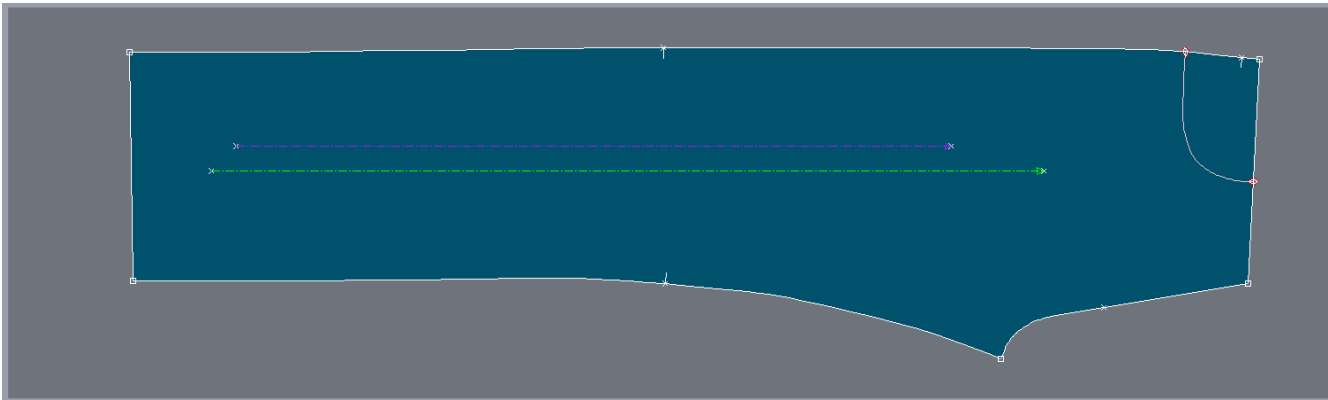


Levi's 501 pattern

Back leg

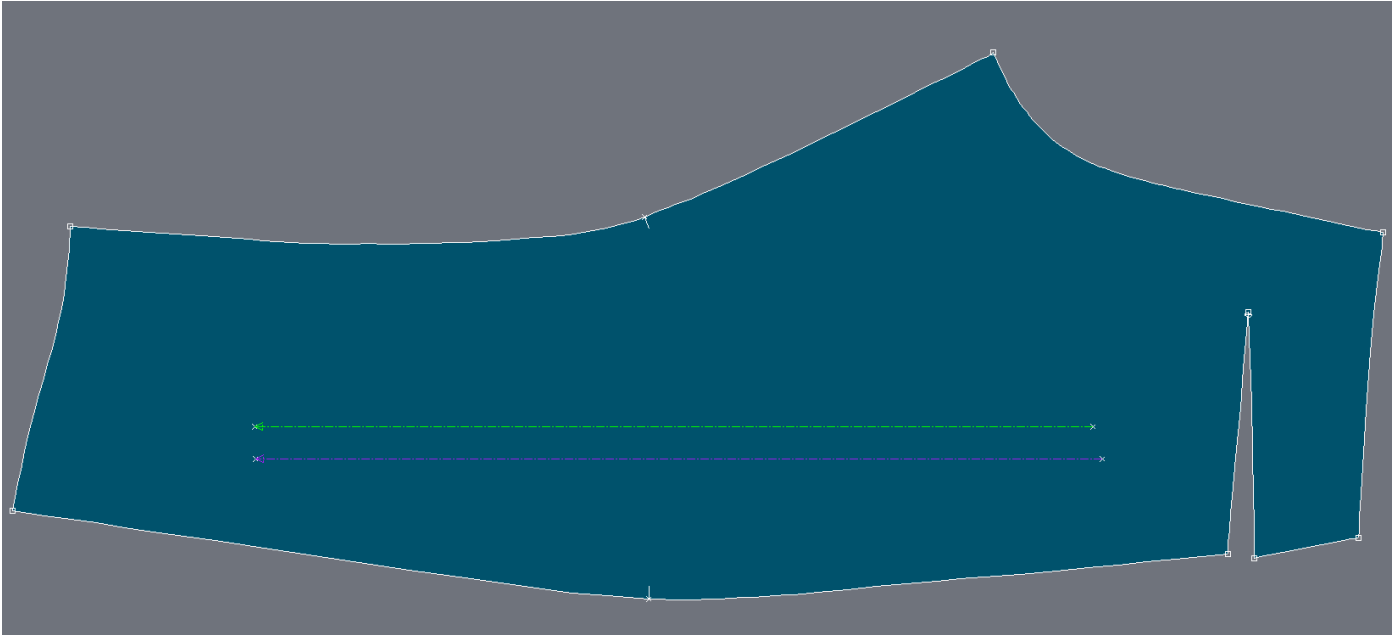


Front leg

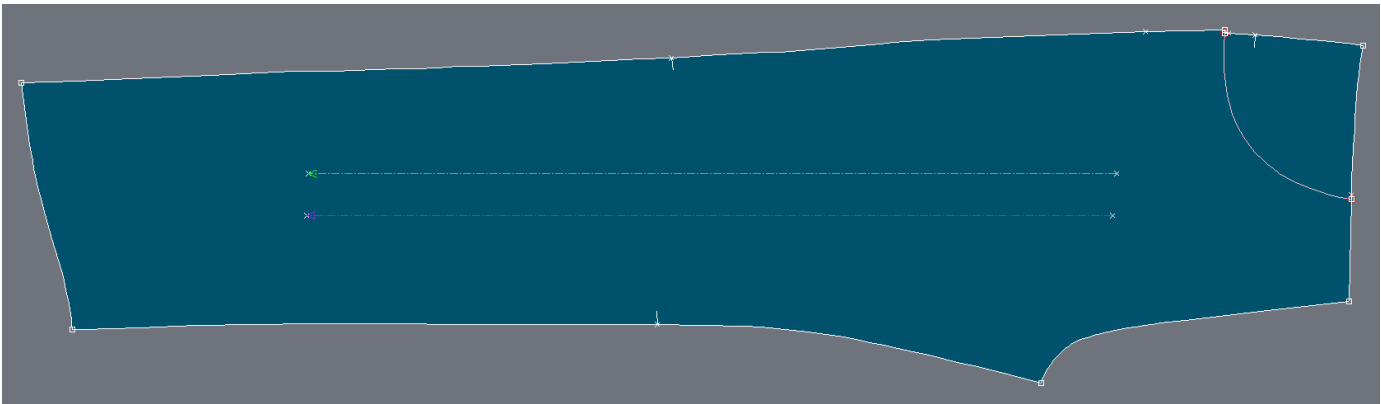


Levis Twisted

Back Leg



Front leg



J D Coldham
Made on behalf of the Claimant
4th
8 October 2014
Exhibit JDC-11

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

HC13 F01225

B E T W E E N:

G-STAR RAW C.V.

(a company incorporated under the laws of the Netherlands)

Claimant

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(5) RHODI SUPPLIERS LIMITED

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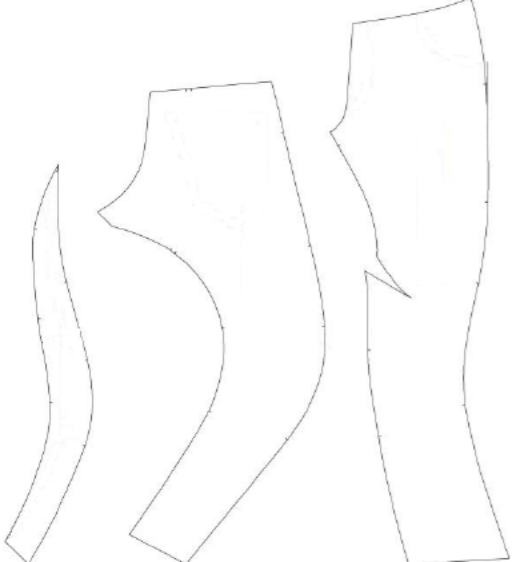
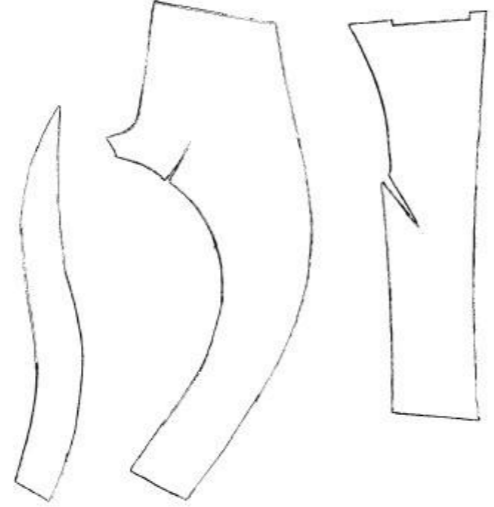
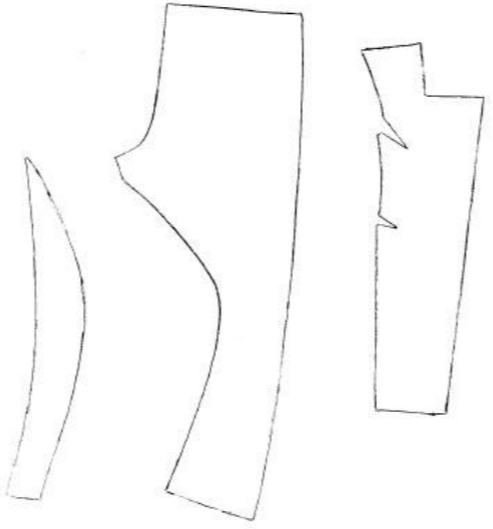
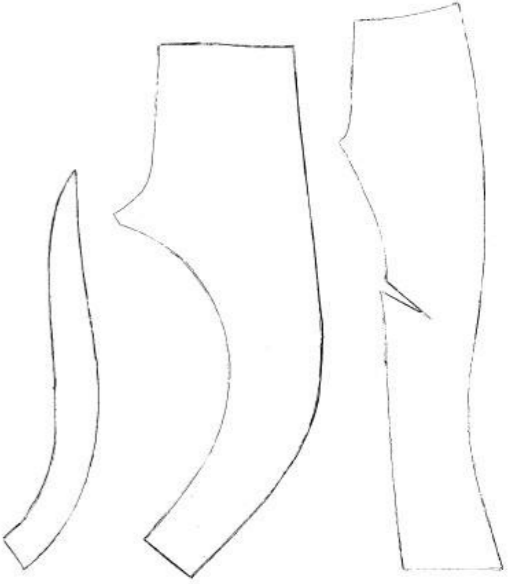
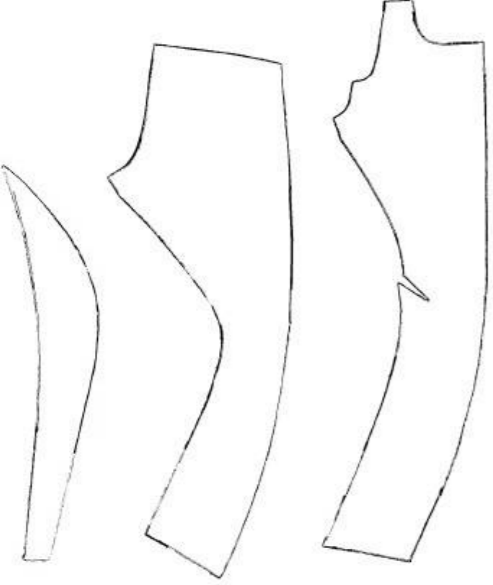
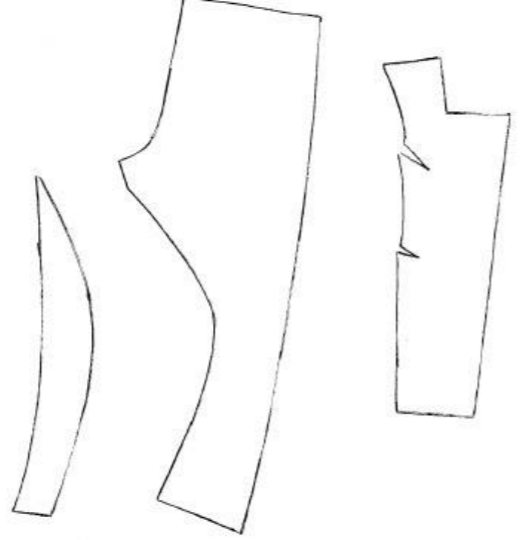
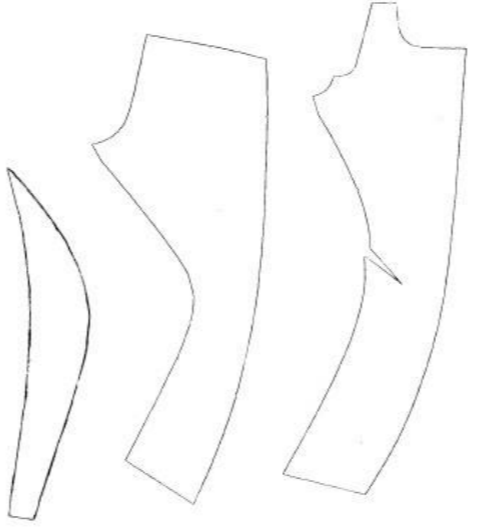
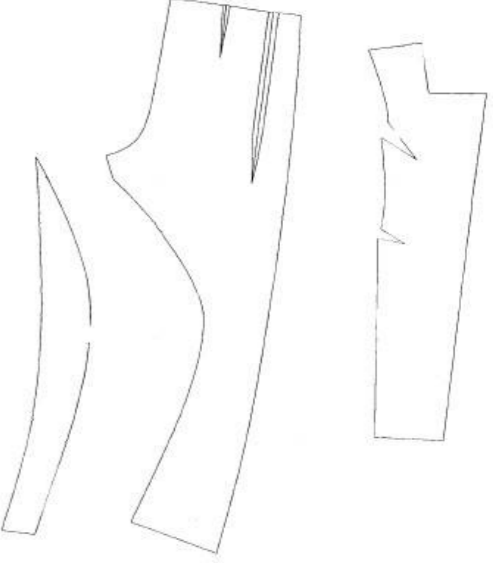
(7) MR ASIF IBRAHIM BUX (FORMERLY ASIF IBRAHIM PATEL)

(8) MR FIROZ IBRAHIM BUX (FORMERLY FIROZ IBRAHIM PATEL)

Defendants

EXHIBIT JDC-11

This is Exhibit JDC-11 to the Fourth Witness Statement of John David Coldham.

Arc	Bowral	Capel	Carton	Ibaraki
			<p>[NOT AVAILABLE]</p>	
Jurien	Maleny	Vale	Vobar	Winton
			<p>[NOT AVAILABLE]</p>	

C C H Wittkampf
Made on behalf of the Claimant
1st
12 May 2014
Exhibits CW-01 - CW-07

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

HC13 F01225

B E T W E E N:

G-STAR RAW C.V.
(a company incorporated under the laws of the Netherlands)

Claimant

and









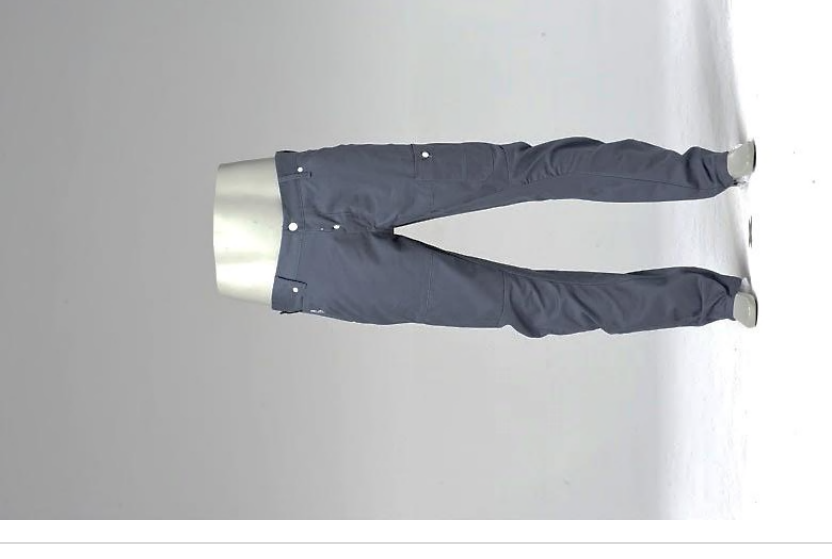

- (1) RHODI LIMITED
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- (7) MR ASIF IBRAHIM BUX (FORMERLY ASIF IBRAHIM PATEL)
- (8) MR FIROZ IBRAHIM BUX (FORMERLY FIROZ IBRAHIM PATEL)

Defendants

EXHIBIT CW-03

This is Exhibit CW-03 to the First Witness Statement of Charlotte Christine Heleen Wittkampf.

Mannequin – Front view

<p>Arc</p> 	<p>Bowral</p> 	<p>Capel</p> 	<p>Carton</p> 	<p>Ibaraki</p> 
<p>Jurien</p> 	<p>Maleny</p> 	<p>Vale</p> 	<p>Vobar</p> 	<p>Winton</p> 

Mannequin – Front view

Arc



Iceman



Mavrick













Levi's 501



Levi's Twisted



Mannequin – Back view

<p>Arc</p> 	<p>Bowral</p> 	<p>Capel</p> 	<p>Carton</p> 	<p>Ibaraki</p> 
<p>Jurien</p> 	<p>Maleny</p> 	<p>Vale</p> 	<p>Vobar</p> 	<p>Winton</p> 

Mannequin – Back view

Arc



Iceman



Mavrick



Levi's 501



Levi's Twisted



Mannequin – Side view

<p>Arc</p> 	<p>Bowral</p> 	<p>Capel</p> 	<p>Carton</p> 	<p>Ibaraki</p> 
<p>Jurien</p> 	<p>Maleny</p> 	<p>Vale</p> 	<p>Vobar</p> 	<p>Winton</p> 

Mannequin – Side view

Arc



Iceman



Mavrick



Levi's 501



Levi's Twisted



Table-top – Front view

<p>Arc</p> 	<p>Bowral</p> 	<p>Capel</p> 	<p>Carton</p> 	<p>Ibaraki</p> 
<p>Jurien</p> 	<p>Maleny</p> 	<p>Vale</p> 	<p>Vobar</p> 	<p>Winton</p> 

Arc



Iceman



Mavrick



Levi's 501



Levi's Twisted



Table-top – Back view

Arc



Bowral



Capel



Carton



Ibaraki



Jurien



Maleny



Vale








Vobar



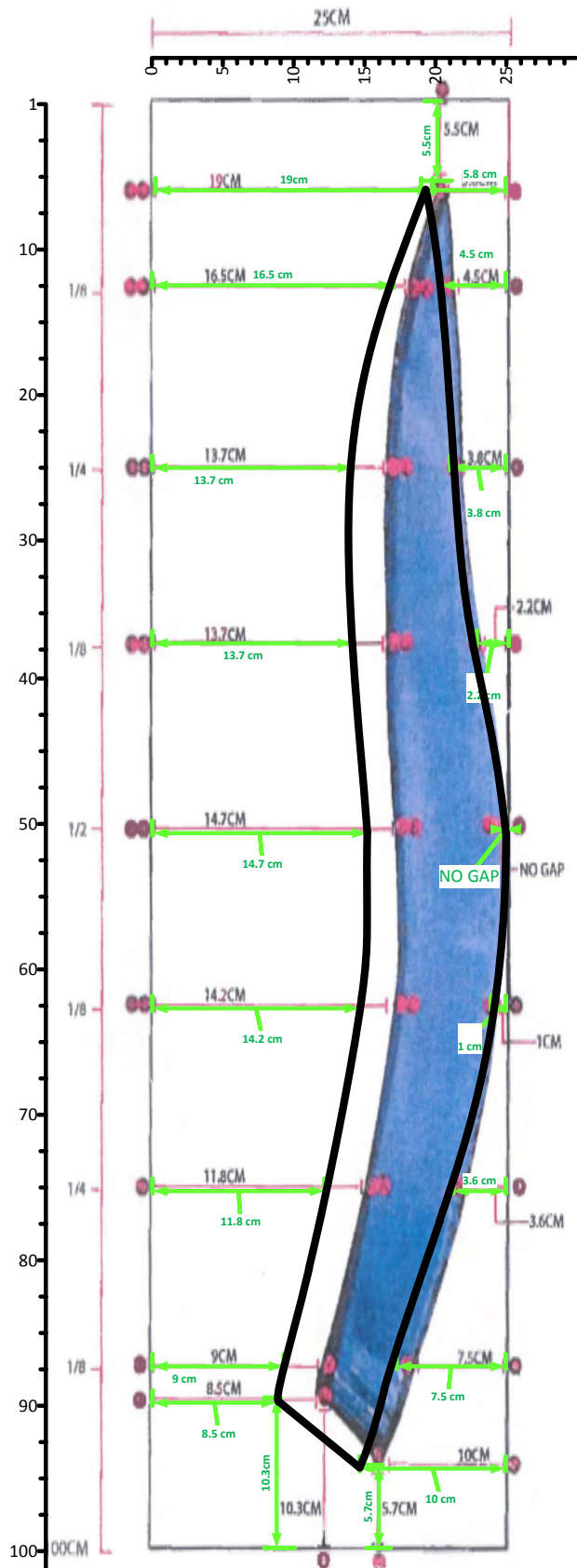
Winton



<p>Arc</p>		<p>Iceman</p>		<p>Mavrick</p>		<p>Levi's 501</p>		<p>Levi's Twisted</p>	
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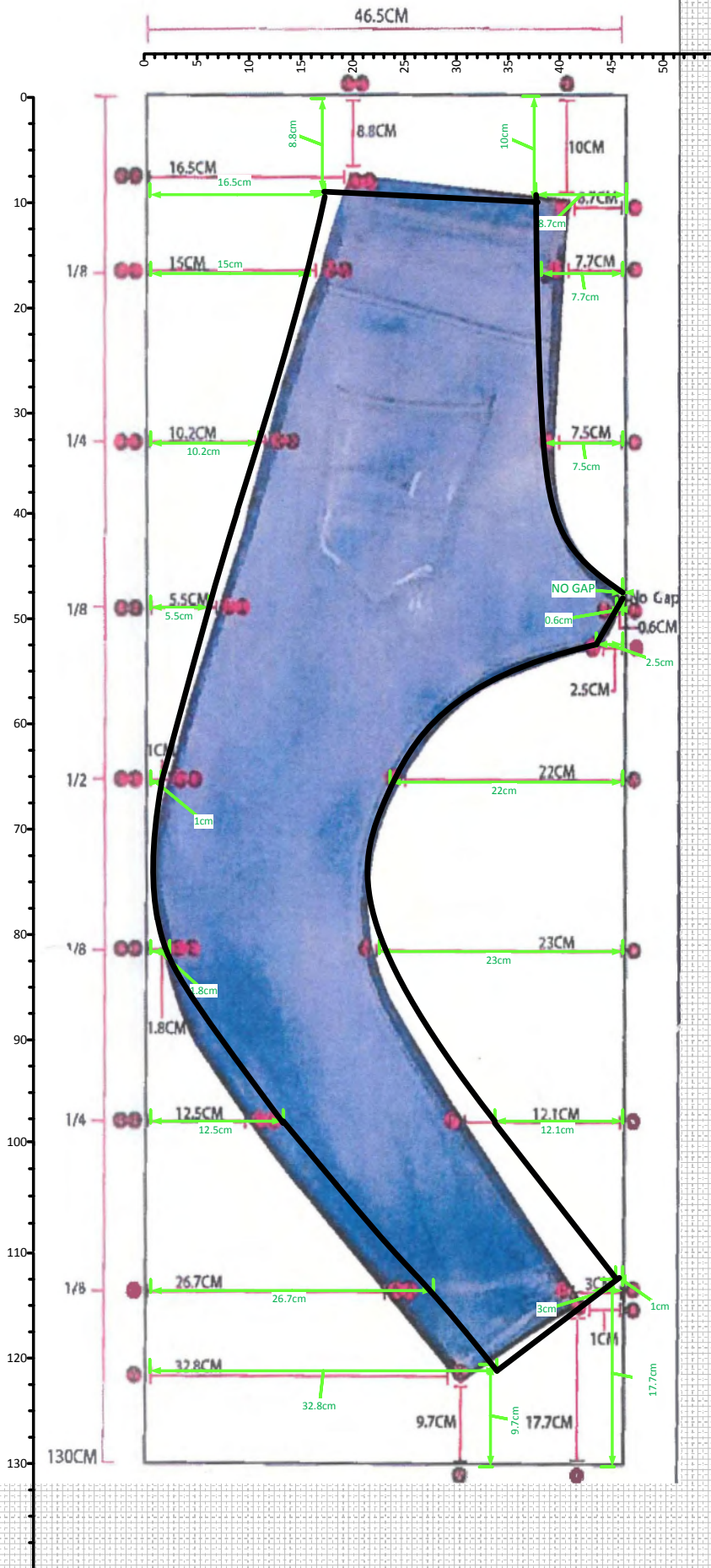
G-Star Arc Loose

Size: W 31" L32"



G-Star Arc Loose

Size: W 31" L 32"



G-Star Tapered Fit

Size: W 32" L30"

