

contends that when Holdfast designed the packaging for its UltraBonder adhesive it copied Henkel's SuperAttak packaging. The packaging in both cases comprises a multicoloured card on which the bottle of adhesive is contained in a clear plastic blister pack. The High Court upheld Henkel's claim but Holdfast's appeal to the Court of Appeal succeeded and the declaration and injunction made in Henkel's favour in the High Court were set aside. Henkel appeals to this Court seeking to restore the orders made by the High Court.

[2] Henkel is based in Germany. Holdfast is a New Zealand company. Henkel supplies its products to different parts of the world under different brand names. In August 2001 Mr Henderson, the managing director of Holdfast, attended a trade fair in Chicago and there saw Henkel's SuperAttak adhesive in its particular packaging. He brought a sample of that packaging back to New Zealand and proceeded, on his own admission, to copy the SuperAttak packaging for an adhesive which Holdfast produced and called SuperBonder.

[3] When Henkel issued proceedings for infringement of copyright, Holdfast agreed to cease using the copied packaging. It had new packaging designed and renamed its adhesive UltraBonder. Holdfast did not dispute that its SuperBonder packaging infringed Henkel's copyright in the drawing which underlay the latter's SuperAttak packaging. Holdfast had indirectly copied that drawing as a result of copying the SuperAttak packaging. Henkel now maintains, in these further proceedings, that Holdfast's new UltraBonder packaging still infringes its copyright in the drawing which underlay its SuperAttak packaging. It asserts that Holdfast's UltraBonder packaging is still an indirect copy of that drawing.

The pleading issue

[4] Before it can have the substance of that contention examined, Henkel has to overcome an argument by Holdfast that Henkel's claim for indirect copying of the SuperAttak drawing is not open to it because of the way Henkel's case was pleaded and advanced in evidence and submissions in the High Court. Holdfast claims that, despite its admission of having previously copied SuperAttak, Henkel never relied

on SuperAttak in its pleadings and that, as a result, Henkel is not entitled to advance an argument based on the SuperAttak drawing.

[5] The Court of Appeal, by a majority, held that Henkel's claim, although it failed in substance, was open to it on its pleadings. Holdfast challenges that conclusion as a matter preliminary to its support of the Court of Appeal's conclusion on the infringement issue.

[6] We have come to the conclusion that Holdfast's stance on this aspect of the case is sound and that Henkel's appeal should therefore fail on the basis that the case which it is seeking to advance is not open to it. That conclusion is based on a combination of the pleadings, the opening and closing addresses of counsel for Henkel in the High Court, an aspect of the evidence, and an indication given by counsel for Henkel in the course of Holdfast's cross-examination of Henkel's expert witness. We will deal first with the pleadings.

The pleadings

[7] The case went to trial on Henkel's second amended statement of claim. Aspects of this document responded to a request which had been made by Holdfast for particulars of the copyright work or works upon which Henkel was relying. Henkel's pleading commenced by stating that it manufactured and sold in several countries a range of adhesives which included products known as SuperBonder and Loctite. Henkel then stated that it sold its adhesives, including SuperBonder and Loctite, in packaging consisting of a card and a blister pack incorporating what it called the "Blue Image Design".

[8] Henkel's first cause of action was based on infringement of copyright in literary works. This claim failed in the High Court and has not been pursued on appeal. The works concerned, whatever they precisely were, were understandably found by the High Court Judge not to be literary works.

[9] Henkel's second cause of action was based on the proposition that Holdfast had infringed Henkel's copyright in artistic works. It was this claim that succeeded

in the High Court. The pleading in support of the proposition that there had been an infringement of Henkel's copyright in artistic works was framed in the following way:

14. THE Plaintiff is the owner of the copyright in the following original artistic works as defined in section 2 of the Copyright Act 1994, ("the artistic works") produced for the manufacture of the Blue Image Design:

- a) consisting of
 - i) selection and layout
 - ii) colours
 - iii) instructionsof the product known as "SuperBonder".
- b) consisting of:
 - i) selection and layout
 - ii) colours
 - iii) instructionsof the product known as "QuickTite".

[10] This paragraph was followed by averments that the artistic works were made in Italy and/or Germany by employees of Henkel or by third parties commissioned by Henkel.

[11] Henkel pleaded next that Holdfast had infringed the copyright which it owned in the artistic works. Particulars of the artistic works in respect of which the plaintiff claimed copyright were introduced by the words "The Blue Image Design comprises: ...". Those words were then followed by 20 separately identified features of the so-called Blue Image Design. It is unnecessary to set them out in full but by way of example the first particular of what the Blue Image Design comprised reads "red and blue card with blister pack". The seventh reads "two photographs vertically positioned on the left side of the card", and the eighth reads "the words non clog cap or thin nozzle or non drip formula in yellow writing and a yellow arrow to the right of the cap of the product". The key point is that the separately identified features are common to Henkel's packaging generally, and do not point clearly to

SuperAttak as opposed to SuperBonder and QuickTite.¹ Nor were the particulars descriptive of the Cipidue drawing identified by Mr Upton QC in this Court as the drawing which was copied.

[12] The first ingredient in the way Henkel pleaded its case was that the artistic works upon which it was relying were works “produced for the manufacture” of the Blue Image Design. The idea of an artistic work being produced for manufacturing purposes suggests an underlying drawing from which the ultimate manufactured product was to be made. The drawings which, as a group, underlay Henkel’s so-called Blue Image Design were drawings made by an Italian company called Cipidue. They came to be known for the purposes of the case as the Cipidue drawings but nowhere in the relevant part of the statement of claim, or indeed in the statement of claim as a whole, was there any reference to drawings in these terms. It might perhaps have been inferred that, by its implicit reference to underlying, albeit unidentified, drawings, paragraph 14 was referring to the Cipidue drawings. Subject to what follows, Henkel may have been entitled to assert it was claiming copyright in all or any of the Cipidue drawings.

[13] But paragraph 14 must be read as a whole and, when that is done and the paragraph is read in the light of the particulars which were given, it is clear that the implicit reference to drawings was limited to such drawings as could be said to underlie the packaging for Henkel’s SuperBonder and QuickTite products. At best, from Henkel’s point of view, it is those drawings, and only those drawings, which come within the concept of the artistic works as set out in paragraph 14. There was absolutely no suggestion that Henkel was relying on the copyright it claimed in a drawing or drawings (Cipidue or otherwise) which underlay the packaging for its product known as SuperAttak.

The submissions and evidence at trial

[14] This Court was supplied with copies of the written submissions made by senior counsel for Henkel when he opened and closed its case in the High Court. It

¹ The drawings underlying the latter products were not even in evidence.

is appropriate to consider whether they can reasonably be regarded as expanding the averments in the second amended statement of claim so as to include a claim by Henkel that its copyright in the drawing or drawings underlying its SuperAttak packaging had been infringed by Holdfast. In the result nothing to that effect can be found in either Henkel's opening submissions or its closing submissions.

[15] The second paragraph of Henkel's opening stated:

The plaintiff [Henkel] alleges it owns the copyright in the packaging of a glue product. At its most basic level the packaging consists of a card and a blister pack. It calls this packaging the "Blue Image Design".

[16] This statement got the plaintiff's case off to an unfortunate start by claiming copyright in the packaging rather than in the artistic work underlying the packaging. As will become apparent for later purposes, this failure to distinguish the commercial product from the artistic work underlying it seems to have caused quite unnecessary difficulty and complexity particularly in the High Court, but also to some extent in the Court of Appeal. Counsel for Henkel appears ultimately to have accepted in the Court of Appeal that his client's claim to ownership of the copyright in an artistic work had to focus on the underlying drawing rather than on the commercial product manufactured from that drawing. This is of course entirely correct. The reason is that the packaging is no more than a lawful copy of the original graphic work. As a copy it has no such originality as would justify its being regarded in itself as an independent copyright work.²

[17] When introducing the subject of the Blue Image Design in its opening submissions, Henkel indicated that in 1999 it had decided to re-package its adhesives. One of its strategic business units, which was a Milanese company, commissioned an Italian design company, Cipidue Srl, to design the new packaging. Cipidue did so and produced a new design which it called the Blue Image Design. Counsel for Henkel then advanced the proposition that Henkel owned the copyright "in the Blue Image Design". This was an even more difficult proposition than the proposition that Henkel owned the copyright in the Blue Image packaging. At least the packaging was a physical object. The design, as a design, had no physical

² See s 14(2)(a) of the Copyright Act 1994.

manifestation.³ Copyright does not protect ideas as such, only the physical expression of those ideas.⁴ The relevant point for present purposes is that counsel's reference to Cipidue's role cannot possibly be regarded as in any way expanding the particularised pleading, the effect of which was that the implied reference to drawings went no further than drawings associated with Henkel's SuperBonder and QuickTite products. Their packaging was materially different from that which Henkel employed for its SuperAttak product.

[18] Nothing else appears in Henkel's opening submissions that might justify the conclusion that Henkel was seeking to go outside the confines of its pleading. Indeed the specific reference to the launch of its adhesives in New Zealand under the name QuickTite serves, if anything, to reinforce the pleading that it was the drawings underlying the packaging for this product which were the primary focus of Henkel's case.

[19] Before examining Henkel's closing submissions, it is appropriate to make brief reference to an aspect of the evidence. Henkel's expert witness at trial was a Mr Roband. In cross-examination he confirmed that he had been asked to compare Holdfast's SuperBonder and UltraBonder packaging with Henkel's QuickTite packaging. He had not been asked to compare the Holdfast packaging with Henkel's SuperAttak packaging. Furthermore, Mr Roband indicated that he had not seen the Cipidue drawings prior to his attention being called to them in the course of his giving evidence. Again, therefore, it seems clear that up to this point Henkel had been concentrating on the ultimate packaging rather than the underlying drawings. So far as the packaging was concerned, the concentration had been on QuickTite and certainly not on SuperAttak.

[20] All this is made plain beyond any doubt by the fact that during the course of Mr Roband's cross-examination by counsel for Holdfast, counsel for Henkel is

³ See *Copinger and Skone James on Copyright* (15th ed, 2005) Vol I, para [3-105], discussing what is technically known as the requirement of fixation. We will refer to this work hereafter simply as *Copinger*.

⁴ See *Copinger*, paras [3-18], [3-53] and [3-127]; *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551 at p 567; *Martin v Polyplas Manufacturers Ltd* [1969] NZLR 1046 at pp 1049–1050 (SC) and *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 at p 219 (HC).

recorded in the High Court transcript as having made an objection in the following terms:

OBJECTION BY MR UPTON – The issue is whether UltraBonder is a copy of the plaintiff's products SuperBonder and QuickTite. It's not whether it's a copy of 25,000 other possible items and it's important we go back to the issue.

[21] The Judge ruled that the line of cross-examination then being pursued could continue but clearly enough counsel for Holdfast was entitled to proceed on the basis that the issue in the case was as stated by senior counsel for Henkel.

[22] There is only one passage in counsel's closing address for Henkel which might reasonably be thought to bear on the present issue. In the course of his written submissions in closing, counsel advised the Court that Henkel relied, in support of its submission that a substantial part of its copyright work had been copied by Holdfast, on various key features. These were no more than a selection of the particulars given in the second amended statement of claim. There was no suggestion that Henkel was seeking to go outside the confines of its pleading.

The first instance judgment

[23] It is clear that Harrison J considered Henkel's claim was confined to Henkel's SuperBonder and QuickTite packaging or the drawings behind that packaging. That is why he did not compare Holdfast's UltraBonder packaging with Henkel's SuperAttak packaging or the drawings that lay behind it. The trial Judge's approach can be seen from his narration⁵ of Henkel's pleading which referred expressly to SuperBonder and QuickTite. The Judge said⁶ that he was satisfied that the Blue Image Design, incorporating the SuperBonder and QuickTite packaging, was a new graphic work. There are substantive difficulties in that proposition but, for present purposes, it is sufficient to note that the focus was clearly still on Henkel's SuperBonder and QuickTite packaging. SuperAttak was mentioned only in

⁵ At para [8].

⁶ At para [13].

passing and not on the basis that it was associated with any copyright work in issue in the proceedings.

[24] In the next paragraph the Judge made a pointed reference to SuperBonder and QuickTite in his finding that Cipidue had not produced any drawing specifically relating to either of those products. The Judge made one further reference⁷ to SuperAttak but in a context which was clearly intended to distinguish it from SuperBonder and QuickTite. In short, the first instance judgment was clearly built around the proposition that Henkel was claiming copyright in works relating to SuperBonder and QuickTite and in nothing else. The point is reinforced by the Judge's statement,⁸ when he was discussing ownership, that he was satisfied Henkel either created "these works, that is the SuperBonder and QuickTite packaging" by its development or modification of Cipidue's drawings or that it was the first owner thereof by virtue of having commissioned the Cipidue drawings.

The pleading point in the Court of Appeal

[25] Holdfast took the pleading point in the Court of Appeal. Baragwanath J, who delivered the leading judgment in that Court, stated⁹ that Henkel had not pleaded that Holdfast had breached the copyright in the SuperAttak packaging which Holdfast had originally copied, or any drawing immediately underlying it. In reference to the Cipidue drawings as a group the Judge noted¹⁰ that they had been relied on by Henkel in evidence and in argument in the High Court and he was therefore prepared to assume that the pleading "embraces them or may be amended to do so". We have of course already made the point that while these drawings may have been relied on in general terms by Henkel in evidence and in argument, there was no claim for copyright in the drawings as such and the particulars of the claim confined it to such drawings (Cipidue or otherwise) as may have underlain Henkel's SuperBonder and QuickTite packaging. Baragwanath J's reasoning did not address that aspect.

⁷ At para [25].

⁸ At para [32].

⁹ At para [18].

¹⁰ At para [22].

[26] Baragwanath J¹¹ noted that the trial Judge had made a close comparison between Holdfast's UltraBonder and Henkel's QuickTite packaging. The context of this observation was Baragwanath J's rejection of Henkel's claim to ownership of the copyright in underlying QuickTite drawings. He then went on to say that the true comparison had to be with the Cipidue drawings and since the Judge had not made that comparison the Court of Appeal was obliged to do so. But that does not go far enough. The true comparison was not, on the way Henkel's case was presented, with the Cipidue drawings as a group but, at best, from Henkel's point of view, with such of the Cipidue drawings as could be said to underlie the SuperBonder and QuickTite packaging. Baragwanath J's conclusion that Henkel was entitled, as a matter of pleading and presentation, to rely on any drawings referable to the SuperAttak packaging was not supported by any reasoning specifically addressed to the kernel of Holdfast's objection to that course.

[27] Chambers J specifically and correctly directed himself¹² that it is of the essence of a claim for breach of copyright that the plaintiff identify the work which is said to have been wrongfully copied. He recorded that in the present case Henkel claimed that the relevant works were the packaging for its SuperBonder product and the packaging for its QuickTite product. The Judge later observed¹³ that the claim might implicitly be regarded as covering the drawings underlying those products. There was a substantial issue as to whether those drawings justified protection but the present point is that Chambers J correctly identified that the copyright works in issue were associated with SuperBonder and QuickTite and not with SuperAttak. Indeed, Chambers J recorded¹⁴ that, in the Court of Appeal, Henkel had largely jettisoned reliance on the QuickTite and SuperBonder packaging and had sought to develop an argument that Holdfast had breached its copyright by copying the SuperAttak packaging. When specifically addressing the pleading point, Chambers J accepted Holdfast's submission, saying¹⁵ "[t]he pleadings clearly were limited to the QuickTite packaging and the SuperBonder packaging, and perhaps by inference to

¹¹ At para [38].

¹² At para [87].

¹³ At para [94].

¹⁴ At para [90].

¹⁵ At para [94].

the drawings underlying them”. Chambers J held that the pleadings did not permit reliance on the SuperAttak packaging or any drawing underlying it.

[28] William Young P observed¹⁶ that, on the evidence as led and the exhibits as produced, the best argument available to Henkel at trial was that Holdfast’s UltraBonder packaging involved indirect copying (via the SuperAttak packaging) of the relevant underlying Cipidue drawing. The President considered that Henkel’s best case, as so identified, failed on the facts. His Honour observed¹⁷ that, in any event, Henkel’s best case was never pleaded. He pointed out that the pleadings had instead focused on the SuperBonder and QuickTite packaging and their underlying drawings. His Honour nevertheless observed that he considered the pleadings allowed the possibility of a claim based on the Cipidue drawings. He concluded that none of them was a direct precursor to the SuperBonder and QuickTite packaging. On the other hand, that packaging, in his Honour’s view, appeared to have been derived from them. The President concluded¹⁸ that, contrary to the view which Chambers J had expressed, Henkel’s pleading did encompass a claim that its copyright in the Cipidue drawings was breached. However, for the reasons the President gave, he was satisfied that such a claim also failed.

Discussion/conclusion on pleading point

[29] We consider, with respect, that the conclusion reached by Chambers J was the correct one. The pleadings and the course of evidence and submissions at trial did not permit reliance by Henkel on the SuperAttak packaging or any drawing (Cipidue or otherwise) which underlay that packaging. It is unnecessary to go beyond r 108 of the High Court Rules for the relevant principles which govern particularity of pleading. All statements of claim must not only show “the general nature of the plaintiff’s claim” but must also give “such particulars ... as may suffice to inform the Court and the party ... against whom relief is sought of the plaintiff’s cause of action”. A cause of action for breach of copyright necessarily involves

¹⁶ At para [125].

¹⁷ At para [126].

¹⁸ At para [128].

clear and accurate identification of the copyright work in respect of which the defendant is said to have infringed.

[30] The early case of *Page v Wisden*¹⁹ exemplifies the principle. Malins VC said:²⁰

when an author files a bill to protect a work, being only entitled to copyright in a small part of such work, he is bound to tell the defendant what that part is ...

In that case, because the greater was deemed to include the lesser, the sanction for not giving the necessary particularity lay in costs. But the principle that accurate particulars are required in a copyright case is of general application.²¹

[31] In the present case Henkel's failure to plead the copyright work on which it is ultimately seeking to rely must result in its inability to rely on that work. Henkel's pleading fell well short of being sufficient to inform the Court and Holdfast that its cause of action relied on the graphic work underlying the SuperAttak packaging. The submissions and the course of evidence at trial did nothing to signal that Henkel was seeking to expand the scope of its pleading in such a major and material way. Indeed both features reinforced the pleading. In this Court Mr Upton expressly disavowed any question of amendment which would, in any event, almost certainly have been denied at this very late stage of the case. No request for amendment was made either in the High Court or in the Court of Appeal.

[32] Holdfast conducted its case in the High Court on the basis of Henkel's pleadings and the way it had presented its case and was entitled to do so. It would be quite unfair to Holdfast to allow Henkel to present a materially different case on appeal. Henkel's appeal to this Court must therefore be dismissed on the basis that its pleadings and the course of the trial in the High Court do not permit it now to rely on any copyright work associated with the SuperAttak packaging.

¹⁹ (1869) 17 WR 483.

²⁰ At p 484.

²¹ See Copinger, para [22-207].

[33] Although the appeal is determined by the conclusion we have reached on the pleading point, we propose to summarise the view we would have taken on the substantive issues raised by the appeal. It is in the interests of the parties to do so and there is some public interest in clarifying points which seem to have caused some difficulty.

The essence of a copyright claim

[34] To succeed in an action for breach of copyright the plaintiff has to establish two things: (1) that it is the owner of a copyright work; and (2) that the defendant has infringed the plaintiff's copyright in that work. These two headline questions can conveniently be broken down into a number of subsidiary issues. We will discuss them under the general headings of ownership and infringement.

Ownership of copyright

[35] The law of copyright in New Zealand is governed by the Copyright Act 1994 (the Act). It has close parallels with the relevant parts of the Copyright, Designs and Patents Act 1988 (UK). As is implicit in the earlier part of these reasons, the plaintiff must first clearly and accurately identify the copyright work or works in respect of which it is claiming infringement. The Act defines a copyright work as meaning a work of any of the descriptions found in s 14(1) in which copyright exists. Section 14(1) defines copyright as a property right that exists, in accordance with the Act, in original works of the descriptions set out. The first category is "literary, dramatic, musical or artistic works". In the present case we are concerned with the subcategory of artistic works. An artistic work:

- (a) Means—
 - (i) A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or
 - (ii) A work of architecture, being a building or a model for a building; or

- (iii) A work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii) of this definition; but
- (b) Does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994:

[36] The relevant category of artistic work in this case is a graphic work. A design drawing for packaging is capable of being an artistic work within the graphic work subcategory.²²

[37] Once the plaintiff has identified the work for which it is claiming copyright, it is next necessary for the plaintiff to establish that the work is an original work. The concept of originality is not defined in the Act and common law principles apply. The Act does, however, prescribe when a work is not original. That will be so if it is, or to the extent that it is, a copy or infringement of another work.²³ The Act thus gives some guide to the common law concept of originality which must be carefully distinguished from novelty. There need be nothing novel in a work to qualify it for copyright protection.²⁴ To be original for copyright purposes the work must originate from its author and must be the product of more than minimal skill and labour.²⁵

[38] The threshold for originality is a low one and it can be material for other purposes how original the work is; that is, how much skill and labour has gone into its creation. In general terms the greater the originality, the wider will be the scope

²² See Copinger, para [3-56] and the cases there cited under fn 67: *Charles Walker & Co Ltd v The British Pickers Co Ltd* [1961] RPC 57 (decoration on tins of sweets and fruit drops); *Taverner Rutledge Ltd v Specters Ltd* [1959] RPC 83 (labels for textile machinery); and *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* (1994) 29 IPR 465 (CA of South Africa) (artwork for audio cassette wrappers).

²³ Sections 14(2)(a) and (b). The dichotomy of copy and infringement recognises that a copy made by someone entitled to make the copy will not be an infringement but will also not be regarded as an original work.

²⁴ See Copinger, para [3-132]; *Bonz* at p 216.

²⁵ See Copinger, para [3-128]; *Ultra Marketing (UK) Ltd v Universal Components Ltd* [2004] EWHC 468 at para [51] (Ch); *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at p 287 (HL); and *Autospin (Oil Seals) v Beehive Spinning* [1995] RPC 683 at p 694 (drawings of oil seals).

of the protection which copyright affords and vice versa.²⁶ In this case Henkel needed to identify and prove that it had copyright in the graphic work from which it had derived the packaging said to have been copied by Holdfast. It had to prove that the graphic work was original in the sense explained, and that it owned the copyright in that work.

[39] Subject to the exceptions prescribed in s 21 of the Act, the author of a work is the first owner of any copyright in that work. Conventional exceptions relate to employers and those who commission the making of qualifying works. They are, generally speaking, the first owner of the copyright in the work. Had the point been open to it, Henkel would have been obliged to prove that the Cipidue or other drawing which underlay its SuperAttak packaging was an original graphic work and that it had ownership of the copyright in that work. If that were so, Henkel could copy the drawing for its packaging but no one else could copy the drawing, either directly or indirectly through the packaging.²⁷

[40] As this case involves copyright which derives from a collocation or arrangement of features which are not original in themselves, it is appropriate to refer to the decision of the High Court in *Bonz Group (Pty) Ltd v Cooke*²⁸ which discussed that topic. A graphic work may qualify for copyright protection because its originality lies in the way in which a number of features, which have no originality in themselves, have been arranged or co-located. The following passage from the judgment in *Bonz*²⁹ deals with that situation:

²⁶ See *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 at p 271 (CA) where McGechan J for the Court, after referring to a passage from the speech of Lord Reid in the *Ladbroke* case, said:

In this passage also is to be found the response to the argument that the reward of protection calls for a higher requirement of originality. Where the originality is low, it is to be expected that anything other than almost exact reproduction will not support an inference of copying amounting to infringement, whereas where there is a higher degree of originality in the work an inference of copying will more readily be drawn even where the degree of similarity is less. In this way the reward in the scope of protection will tend to be related to the degree of originality. Retaining a low threshold for protection therefore presents no real harm.

Copinger refers to this passage with apparent approval at para [3-124] in fn 62, and at para [7-59].

²⁷ Section 30.

²⁸ [1994] 3 NZLR 216.

²⁹ At pp 219–220.

As Lord Reid emphasised,³⁰ the correct approach is first to determine whether the plaintiff's work as a whole is original and protected by copyright. The second step is to see whether such part as may have been taken by the defendant is a substantial part of the plaintiff's work. It is not correct to subdivide the plaintiff's work into its component parts and ask whether copyright might attach to the individual parts. Copyright, if it exists at all, exists in relation to the work as a whole. For example, an author may have taken six different components for his work by copying from six different sources. The combination of the six components may nevertheless have sufficient originality to attract copyright in the whole.

Where, as in this case, the plaintiff relies for its copyright on a collection of individual features, none of which on their own would attract copyright, this has ramifications when it comes to infringement. To infringe in such circumstances the defendant must have used the same or a substantially similar arrangement or collocation of the individual features. If the defendant has copied the individual features but has made its own arrangement of them, this will not represent an infringement. That is because the plaintiff has no monopoly in the individual features as such but only in their arrangement or collocation. Because the plaintiffs' copyright resides in the arrangement or collocation the defendant, to infringe, must have copied the arrangement or collocation or a substantial part thereof.

[41] As we observed earlier, it may be relevant for infringement purposes to determine how much skill and labour went into the making of the copyright work. This point can have particular relevance in arrangement cases. The skill and labour which has given rise to the arrangement is what gives the work its originality and if that skill and labour is not great, another arrangement of the same unoriginal underlying features may not have to depart greatly from the copyright arrangement in order to avoid infringement. If the level of originality in the copyright arrangement is low, the amount of originality required to qualify another arrangement of the same elements as original, is also likely to be low.³¹ Substantial reproduction of those aspects of the work in which the originality lies must be shown to establish infringement. This is consistent with the purpose of the law of copyright which is to recognise and protect the skill and labour of the author of the copyright

³⁰ In the *Ladbroke* case at p 285.

³¹ See Copinger, para [3-53], where it is said that in the case of simple artistic works the protection given by copyright is likely to be weak: see for example *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99 and the other cases cited in fn 31. In *Kenrick* the plaintiff had designed a card for use by illiterate voters. It showed a hand holding a pencil in the act of making a cross within a square. The defendants published similar cards with a hand holding a pencil in the same act of making a cross within a square. The defendants' hand was in a slightly different position. The Court held there was no infringement. There was no copyright in the idea. The defendants' work did not substantially reproduce the form of the claimant's work. The claimant was not entitled under the law of copyright to prevent anyone from producing such a simple design as a hand in a square in any form. If the context had been different a claim in passing off might have been possible.

work. This point is of significance in the present case. But, before addressing it further, we will make some general observations on the subject of infringement.

Infringement

[42] Infringement of copyright occurs when someone makes an unauthorised copy of the copyright work. Only the owner³² of the copyright may copy the work. The embargo against copying relates to the copyright work or any substantial part of it. Infringement occurs whether the copying be direct or indirect. In the present case making a copy of the packaging would amount to indirect copying of the graphic work on which the packaging was based. The subject of infringement can usefully be considered, at least for present purposes, under two sub-headings – proof of copying and substantial part.

Proof of copying

[43] The ultimate issue in a breach of copyright case concerns derivation not similarity,³³ albeit the degree of similarity between the copyright work and the allegedly infringing work has evidentiary significance. Proof of copying will seldom be direct; in most cases the court will rely on inference. The closer the similarity between the two works the stronger the inference is likely to be that the one was copied from the other. If the alleged infringer has had access to, and therefore an opportunity to copy, the copyright work, and the similarity between the works supports an inference of copying, it may well be appropriate for the court to conclude, on the balance of probabilities, that there was indeed copying. This of course is subject always to the evaluation of any evidence there may be that no copying actually took place.³⁴

³² Or someone acting with the owner's authority.

³³ See Copinger, para [7-57].

³⁴ See Copinger, para [7-17].

Substantial part

[44] It is not necessary for the plaintiff to show that the defendant copied the whole of the copyright work or that the copying was exact. It is enough if the plaintiff demonstrates that the defendant copied a substantial part of the copyright work.³⁵ This can sometimes be a difficult matter of evaluation and is usually the most difficult question which arises in copyright cases. What amounts to a substantial part in an artistic work case depends more on qualitative visual impression rather than on quantitative analysis.³⁶ As it has helpfully been put, what must have been copied is the essence of the copyright work.³⁷ This is a subject upon which, in borderline cases, minds can reasonably differ and it is appropriate for appellate courts to give to the trial judge's assessment the degree of latitude that conventionally applies to appellate review of a discretion.³⁸

This case

[45] We proceed as if Henkel had appropriately invoked the Cipidue drawing underlying its SuperAttak packaging as the copyright work on which it was relying. We would, on that premise, have had no difficulty in holding that Henkel owned the copyright in that work. It was made by a combination of its employees and Cipidue, on its commission. The work was clearly original to Henkel on that basis and sufficient skill and labour went into the arrangement of admittedly unoriginal features to qualify the work for copyright protection. The question becomes whether Holdfast indirectly copied Henkel's copyright work when it produced its UltraBonder packaging.

[46] At this point it is desirable to say something about the approach of the Court of Appeal in the judgment delivered by Baragwanath J, with whom the other members of the Court appeared to agree on the issue we are about to address. We

³⁵ Section 29(2)(a) of the Act and see Copinger, para [7-23] and following.

³⁶ Lord Reid in *Ladbroke* at p 279.

³⁷ *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 at p 678 (CA) per Gault J.

³⁸ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL). Provided always, of course, there has been no material misdirection in law.

consider the Judge inappropriately deconstructed the copyright work. He did not treat it as a whole. First, the Judge said.³⁹

The dominant components of that formulation by Henkel of its Blue Image design are the common form elements of a glue bottle affixed to a card of a dominant blue primary colour with pictures of two uses and a list of applications. None of these is original.

[47] We think the Judge was here suggesting that aspects of the design, strictly the drawing, were unoriginal. His method of expression in the context risks the appearance of confusing originality with novelty. Later the Judge correctly identified that the claimed originality lay in the arrangement of a number of unoriginal features. But the Judge then proceeded to say⁴⁰ that the trial Judge had failed “to remove from the collocation matters of no originality”. With respect, that is not the way to approach an arrangement case. If the Court were to do what Baragwanath J appears to have suggested, nothing would be left. An arrangement case is concerned with the author’s arrangement of features which in themselves have no originality. The originality lies in the arrangement. To remove from the arrangement matters of no originality would, in these circumstances, leave nothing to arrange; all that would be left would be a blank sheet of paper.

[48] This misdirection makes it necessary for this Court to examine the matter on the appropriate basis. The contrast is between Henkel’s SuperAttak drawing and Holdfast’s UltraBonder packaging. The inquiry also requires the Court to take into account earlier Holdfast packaging which it says, with some force, influenced its UltraBonder design. It is important to recall that Henkel has no monopoly in the individual features of its drawing. Its monopoly lies in the way those features have been arranged. A number of the features of Holdfast’s arrangement in its UltraBonder packaging bear as much resemblance to its own earlier packaging as they do to Henkel’s arrangement of the features of its SuperAttak packaging. Henkel is entitled to copyright protection on account of the skill and labour which combined to produce its arrangement. Therein lies the originality of its copyright work. The amount of skill and labour in effecting the arrangement was, in our judgment,

³⁹ At para [69].

⁴⁰ At para [74].

relatively low. The amount of skill and labour required on Holdfast's part to effect a non-infringing departure from Henkel's arrangement should also be relatively low.

[49] Has Holdfast created a non-infringing work on that basis? That is the essential issue. If Holdfast's work, that is the underlying drawing, which one can infer exists from the packaging itself, is of sufficient originality to amount to a copyright work, there will have been no infringement of Henkel's copyright.⁴¹ That is the practical effect of asking whether Holdfast copied a substantial part of Henkel's work. As the appeal has already been resolved on the pleading point, we do not propose to discuss the two works in the detail that might have been necessary had the infringement question been critical.

[50] The similarities of colour between the two works are themselves immaterial as there is no originality in the colours per se. The use of a red strip across the top of the UltraBonder card has a distinct similarity to the Henkel card, albeit the feature is not one of particular moment in itself. The positioning of the name of the product is similar on each card but no great originality is involved in that aspect of the arrangement. The SuperAttak red band, with the function of the product written on it in white letters, is represented on the UltraBonder card with a yellow band and red letters. The UltraBonder yellow band spans the whole width of the card whereas the SuperAttak band does not. UltraBonder has the words "super glue" in white letters within a red band above the bottle, whereas SuperAttak has no such feature. Similarly UltraBonder has a yellow arrow pointing to the top of the bottle on the right of the bottle with the words "easy control" under the arrow. SuperAttak has no similar feature. UltraBonder has a substantial red chevron at the bottom of the card covering approximately 25% of the whole surface area of the card. SuperAttak has no corresponding feature.

[51] Mr Upton invited us to ignore UltraBonder's red chevron. But that is to take the proposition that the Court concentrates on the similarities rather than the

⁴¹ See Copinger's discussion of the use of existing subject matter at para [3-132] and in particular the observation that in such a case it must be determined whether the author has expended sufficient independent skill and labour to justify copyright protection for the new work. For completeness we add that a lack of originality in the allegedly non-infringing work does not inevitably demonstrate infringement. The lack of originality may lie in the new work being a copy of another work, but not the plaintiff's work.

differences too far.⁴² The red chevron represents, pro tanto, a marked absence of similarity. The materials with which the adhesive is compatible are written in white letters within the red chevron on the UltraBonder card. In the SuperAttak drawing this feature is materially different, both as to arrangement, colour and lettering. Each card has, in approximately the same place, similar, but by no means identical, photographic representations of how the adhesive should be applied.

[52] As a matter of qualitative impression we do not consider Holdfast's UltraBonder packaging indirectly copies a substantial part of Henkel's SuperAttak drawing. Holdfast has not appropriated to itself a substantial part of the skill and labour which went into the authorship of Henkel's drawing. In a field where the level of originality is low on both sides, we consider Holdfast's work is sufficiently distinct that it cannot fairly be said to be a copy of a substantial part of Henkel's work. The level of similarity between these two works of low originality is such that, despite the opportunity to copy, we are not persuaded that there has actually been a copying by Holdfast of the essence of Henkel's copyright work. In short, we do not consider infringement has been established and we would have been of the view that Henkel's appeal should fail on that basis also.

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⁴² The rationale for this proposition is that originality added to piracy can be substantial piracy nonetheless.