IN THE SUPREME COURT OF NEW ZEALAND SC 43/2006

BETWEEN **HENKEL KGAA**

Appellant

AND **HOLDFAST NZ LIMITED**

Respondent

Hearing 7 November 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel JO Upton QC and Miss KG Duckworth for Appellant
I Finch and DL Marriott for Respondent

CIVIL APPEAL

10.02am

Upton If Your Honours please, counsel's name is Upton and I appear with my learned friend Miss Kate Duckworth for the appellant

Elias CJ Thank you Mr Upton, Miss Duckworth.

Finch May it please the Court, counsel's name is Finch and I'm here with Mr Marriott for the respondent Holdfast NZ Limited.

Elias CJ Thank you Mr Finch and Mr Marriott. Yes Mr Upton.

Upton Yes if the Court pleases this is a case about indirect copying by Holdfast of Henkel's copyright in what's called the Blue Image Design which was expressed in original Cipidue design drawings. And the situation as you will have noted was that initially Holdfast had copied Henkel SuperBonder which was the end product of the original Cipidue drawings. Those proceedings were settled, and then there was a

substitute product put on the market which Henkel continued to offend and the High Court proceedings followed

Tipping J When you say Holdfast had copied SuperBonder, is there some reference in the papers to them having copied SuperAttak?

Upton Yes that's the, SuperAttak is the original manifestation of the idea in the Cipidue drawing Your Honour but the evidence was that Mr Henderson actually brought back with him from overseas a particular wrapper, a particular packaging from a Trade Fair in Chicago and I think that was SuperBonder. I need to just double-check that but

Tipping J Well I had an impression it was SuperAttak but I may be wrong.

Upton Yes, yes I can check that Your Honour. In fact Your Honour I think Your Honour is correct, it was SuperAttak, thank you. And well from that he then produced his SuperBonder.

Tipping J So we've changed to what you first said, to Holdfast copied SuperAttak?

Upton Yes and called it SuperBonder, which happened to be the name of another Henkel product. So that was just the first opening point I wanted to make. The second opening point I wanted to make was that Henkel has always maintained that its copyright in the Blue Image Design was expressed in its original Cipidue drawing. In other words the Cipidue drawings were the underlying copyright work and I have to say that Henkel has had a total consistency in that and has never deviated or changed from that position since the proceedings were originally issued.

Blanchard J But you're not focusing on just one of those drawings?

Upton I am Your Honour. I have to say that initially the case was run on the basis of the collection of drawings but it was seen as appropriate to do that on the basis of what's sometimes known as the *Popeye* case, but having reconsidered the situation I've now nailed my colours to a drawing which you'll find in the bundle from memory at page 458, and I'll come back to that later on.

Blanchard J It's attached to your submission isn't it?

Upton Yes, yes it is.

McGrath J No. 1.

Tipping J Well the drawing is not attached, it's the one underlying SuperAttak is it that you're focusing on?

Upton Yes.

Tipping J But that's not attached is it, it's SuperAttak

Upton	No, no, no, it's SuperAttak, if I just go to it
Tipping J	You've got attached to your submissions a document headed Henkel's Copyright Work Cipidue Drawing and then you've got a representation of the SuperAttak packaging.
Upton	You'll see the drawing that we rely on at page 458.
Blanchard J	That is the drawing isn't it?
Upton	Yes, that is the Cipidue
Blanchard J	As one can see by looking at it, it's not the SuperAttak product?
Upton	No, it's the underlying drawing.
McGrath J	Well the letters really indicate that don't they?
Blanchard J	Yes.
Upton	Yes, and it forms one of a series of Cipidue drawings which you can see starting at page 455 and if you run through, I'll come back to them obviously later on, but if you run through you'll see the series finishes at page 464. But I just wanted to make a comment about this pleading issue because the position as I submit is that Henkel has never deviated on this stance and it's contrary to the view that His Honour Justice Chambers took in the Court of Appeal, and I have to say with respect that I take strong objection to what he said at para.95 in the Court of Appeal judgment, and I just want to draw Your Honours' attention to that please, it's at page 38 in volume 1. Perhaps if we step back to para.92 where my learned friend Mr Finch is recorded as saying that Henkel has never pleaded that the work in respect of his copyright was breached was the Cipidue drawings and then we run through that and he talks about moving the goal posts and then para.93 accurately records what I said which is that the pleadings were wide enough to cover the Cipidue drawings and Justice Chambers said at 94 that he thought Mr Finch's submissions were sound and then at para. 95 Justice Chambers said I'm left with the clear view that Henkel's case has been bedevilled by confused thought and talks there about fudging of the case, and amendment to the pleadings may be required etc, and then he ends by saying 'considerable strength in Mr Finch's submission that Henkel's case throughout has been a movable feast. And all I want to say on that at this stage Your Honours is that I'll be submitting to the Court that the pleadings were wide enough to cover the Cipidue drawings, as indeed Justice Baragwanath and Justice Young specifically acknowledged. Is the relevant pleading Mr Upton to be found on page 96 of the first volume at para.14?
Upton	Correct, yes what happened Your Honours was that we started out pleading literary work and then there was a request for further particulars

	and as a result we ended up with alternatives, literary work and artistic work, so Your Honour is absolutely correct. It's para.14.
Tipping J	Yes, that's where it is and the crucial words it seemed to me were 'original artistic work produced for the manufacture of the Blue Image Design, i.e., a document prior to the manifestation of the design in 3-dimensional form'. That's the key isn't it?
Upton	That is the key and I accept that looking back on it there is some ambiguity but I'm saying that based on the way the case was run and the evidence of the submissions that there's absolutely no question of difficulty with this. Your Honour actually had this issue in *Bonz and Cooke* and what I'm saying is that this case is the reverse of *Bonz and Cooke,* but I'll come back to that in a minute if I may. I just wanted to finish these brief opening remarks by making my third point, which is that in the final analysis the key issue in this case is infringement as His Honour Justice Baragwanath acknowledged at para.40 of his decision. My submission is that Henkel has established copyright in the Cipidue drawings, it has established originality and its established ownership and also that it has established copying indirectly by Holdfast of its SuperBonder via the Henkel SuperAttak, so the issue this morning is whether the Holdfast new product called UltraBonder also infringes the Henkel copyright.
Tipping J	And that depends very much on the design path of UltraBonder?
Upton	Absolutely, absolutely.
Tipping J	And all this business about collocation and so-on is although a necessary ingredient
Upton	It's part of it but not all of it.
Tipping J	It's something of a distraction at this stage I would have thought.
Upton	It is, and so I'm going to be talking about *Bleiman* and I'm going to be talking about *Elanco* and *Design Path*, that's where I'm coming from but at the end of the day the key issue today I suggest is infringement or no. Now what I'd like to do, or what I propose to do now Your Honours is hand up a little potted summary of where I'm coming from so that you can see
McGrath J	Mr Upton when you say it's infringement can you go further and say that that comes down to a question of whether there was copying and as to whether what was copied was a substantial part of the original? Is that
Upton	Yes, yes.
McGrath J	Are those the two sub-issues of infringement?

Upton Yes, yes and of course there are issues of principles involved in looking at the way the Court of Appeal handled it. How many copies would you like? Six, I think I've got six here, thank you. And what I'd like to do Your Honours is talk to my summary. I want to talk about the pleadings, this pleading issue. I then want to talk about the design path under which UltraBonder was created and I want to look at the evidence of Henderson and Towes on that. I then want to look at what I call the misdirections by His Honour Justice Baragwanath who wrote the lead judgment in the Court of Appeal and then I want to come back and close off by dealing with the Holdfast submissions. Just a housekeeping matter, I understand that some of the samples are with the Court. I don't want you to be distracted but I'm told that if you want them I'm told that we found them and they're now with the Court. They were in Auckland in the High Court; they came down here to the Court of Appeal; they went back to Auckland and now they're back here. So there are some original samples if you want them.

McGrath J Original samples of what?

Upton Of the packaging that we're talking about of the UltraBonder

McGrath J Yes.

Upton And the offending SuperBonder and some of the Henkel products as well.

McGrath J And the Henkel products, why are the Henkel products relevant, because we're looking really at the Cipidue drawing aren't we?

Upton That's right, yes we are, but they're simply a later manifestation of the original expression which I say was contained in the Cipidue drawings. They're simply there for completeness Your Honour, but the argument of course is whether the design path from Cipidue SuperAttak through the offending SuperBonder and the UltraBonder is present. Now I have to make a confession. It's always good to make confessions up front but in the High Court His Honour Justice Harrison found copyright existed in some of the Henkel packaging and he talked about QuickTite and if I just go to his decision. If we go to page 73 in the casebook His Honour Justice Harrison found that Henkel SuperBonder and QuickTite also had copy

Tipping J What paragraph is this. I'm working off a different copy. If you could just identify the paragraph that would be helpful to me Mr Upton.

Upton Oh yes, it's paras. 25, and 26.

Tipping J Thank you.

Upton There's a distraction here. I just want to clear it away right at the outset. At para.26, or if we start at para.25, 'While I did not hear direct evidence on the point, I have no difficulty in inferring that both SuperBonder and

QuickTite are modifications of Cipidue's work. I do not require a witness to inform me that SuperBonder or QuickTite packaging differs in certain respects from Cipidue's drawing for SuperAttak, etc, which I've already found to be original'. Then he talks about differences and then he says 'the packaging is itself original' and then he says referring to *Wham-O*, 'SuperBonder and QuickTite cards are, like SuperAttak, produced from the same foundation, namely the Blue Image Design. They are simply an extension. I cannot see any reason why copyright should not exist in them on that basis, especially when they do not infringe Henkel's existing copyright in the original Blue Image Design'. So what he's clearly saying is that there is copyright in this packaging over and above the copyright in the original drawings. Now we didn't argue that in the High Court, we argued Blue Image Design Cipidue drawings. He's come out with a finding which with the benefit of hindsight was seductive but I should not have been attracted to it because we adopted it in the Court of Appeal.

Tipping J Did you really, because it's not a copyright work is it?

Upton Well that's the way, well obviously it wasn't our primary plank in the Court of Appeal but we should not have gone there.

Tipping J Maybe that helped to confuse.

Upton Absolutely Your Honour, that's where I think something went wrong.

Anderson J But this is your dilemma isn't it, if you acknowledge that then you can't shoot it back to the Cipidue drawings?

Upton I'm sorry, the

Anderson J SuperAttak is itself a copyright at work

Upton Yes.

Anderson J Then it hasn't really been derived from the drawings.

Upton No the SuperBonder and QuickTite arguably not derived.

Anderson J You have to for one or the other.

Upton That's right so I rely

Anderson J And you prefer to go with the drawings?

Upton I go with the drawings, and we've always gone with the drawings

Tipping J There's a very good reason for that, because the physical manifestation of the drawing of this kind is not a copyright work.

Upton	Absolutely, absolutely.
McGrath J	Mr Upton can I just to help follow your argument, I take it that when we talk about the SuperBonder card here, we're talking about your client's SuperBonder, not your opponents SuperBonder?
Upton	Correct, yes that's in para.26, we're talking about Henkel SuperBonder.
McGrath J	Yes, thank you.
Upton	Yes so that's why I'm saying at this stage that that I think is where something, where a confusion or potential for confusion arose in the Court of Appeal and looking back on it, it would have obviously been much better had we simply stuck with our knitting and stayed with the Cipidue drawing as the manifestation of the idea.
Tipping J	Well it was only the drawing that was a graphic work.
Upton	That's right, that was the artistic work. And you will see that I discussed that in my submissions at paras.4.10 and 4.12. I just want to touch on those for a moment, and in my submissions I don't propose to read these three paragraphs but I do just note para.4.11 in particular. 'It was not necessary for Justice Harrison to make the findings but Henkel accepted them for the purpose of the hearing in the Court of Appeal and with the benefit of hindsight I say that was unwise because it caused much distraction in that Court and deflected attention from the primary issue, infringement of BID drawings, Cipidue drawings.
Tipping J	But wasn't the point made to the Court of Appeal Mr Upton by somebody that it just couldn't be the packaging. It just didn't qualify for a copyright work. One would have thought that the respondent might have ventured such an observation.
Upton	Yes, quite, quite. I mean my attitude in the Court of Appeal was well we've got a bonus in the High Court and we'll keep that bonus thank you but let's just focus on the primary issue and if you look at the judgments, His Honour Justice Baragwanath correctly identifies where I was coming from but then we still are bedevilled by this distracting issue.
Elias CJ	So Justice Chambers was right that there was conceptual confusion but it was in the Court of Appeal argument rather than in the pleadings in the case presented in the High Court?
Upton	With respect, no Your Honour. With respect I would say that the way I put it is that I also argued that the issue was copyright in the drawings and that's how I tried to run my case, but I then had this side issue. It wasn't so much a confusion, I'd say it was a distraction. I think that's a better work for it. Now with those opening remarks I just want to come back to my summary and I just want to read that because that captures my stance on the pleadings. The pleadings have defined the copyright works issues

sufficiently, that is that the Blue Image Design is expressed in the Cipidue drawings, particularly when coupled with Henkel's High Court submissions, both opening and closing and the evidence presented at the stage of the interim injunction, the summary judgment application, and the substantive trial, with the situation being very much the reverse of the Bonds pleading issue and in addition to that there was an acknowledgement in the Court of Appeal that Holdfast was not misled by the pleadings and that acknowledgement was not addressed by the Court. Now if can then take you please to para.4.1 of my submissions where I go into this in more detail, and I've set out the chronology and Justice Chambers I've said noted that I concentrated on the Cipidue drawings but found that Henkel didn't plead infringement of the Cipidue drawings whereas Justice Baragwanath was prepared to assume that the pleading embraced the Cipidue drawings and could be amended to do so and His Honour Justice Young, the President of the Court, found that Henkel did plead them.

Tipping J	Well you clearly pleaded an artistic work produced for the manufacturer of. Now that is clearly not the packaging. It must be something anterior to the packaging which could only be a drawing.

Upton	Yes, that's right and I accept entirely what Your Honour is saying, and then you come to

Tipping J	Where do they say now that they've been disadvantaged Mr Upton? What is it that they're saying that is unfair of difficult about this?

Upton	I can't say Your Honour, I just don't know.

Blanchard J	You say here in your note that there was an acknowledgement in the Court of Appeal that Holdfast wasn't misled by the pleadings.

Upton	That's right.

Blanchard J	So that's an acknowledgement by Holdfast counsel?

Upton	Yes Sir, yes Sir, that's according to my junior's note taken at the time and that point was specifically put in my submissions to this Court. It was specifically put in the submissions to this Court and has not been challenged by my learned friend in submission in response.

Tipping J	Well that's why I was wondering wherein the trouble is now said to lie where is it didn't lie anywhere in the Court of Appeal.

Blanchard J	Do we have a transcript of the opening and closing that you refer to in the third line of your note.

Upton	Yes I can give you those now but it's a question of overload and whether it would assist and whether it would assist. I'm very happy, I've got them here and I can give them to you and what I'd like to

Blanchard J Well it may be important because I can't see that the pleading point gets anywhere if the case was in fact opened or perhaps more importantly closed on the Cipidue drawings.

Upton Yes, could you give six copies please. Yes, and I'd like to actually take Your Honour through it and demonstrate precisely how the case was presented because it concerns me that we have a Court of Appeal decision, and I accept some of the responsibility obviously because of taking advantage of this bonus point from Justice Harrison, but it concerns me that we end up with what I submit is an unsatisfactory, and I'll put it at that level, an unsatisfactory judgment.

Tipping J How precise was the reliance on the Cipidue drawings in the High Court? Was it a specific reliance on the drawing underlying SuperAttak as it is now?

Upton No, no.

Tipping J That may be

Upton It wasn't.

Tipping J There was some room perhaps to trying to be balanced about this for some uncertainty but it was incorporated within and it's now just sharpened.

Upton That's right, absolutely, yes.

Tipping J Is that a fair summation?

Upton Yes, yes Sir, and as I say it had been run on a collective basis based on a reading of what I call the *Popeye* case, and just so Your Honours know

Tipping J *Popeye*, not ***Popup.***

Upton I'm sorry *Popeye,* that was as I moved away from the microphone, but it was based on my reading of a case called *King Feature Syndicate and Kleeman* which is a 1941 appeal case at 417. If we could just wait a moment while we get the

Blanchard J This doesn't start very promisingly because it begins with a statement that the plaintiff alleges it owns the copyright in the packaging and it calls this packaging the Blue Image Design.

Upton And I take Your Honour to para.19

Tipping J Moving along.

Upton Yes we'll just move along please but if we look at para.19, and this explains how the concept was developed and we look at para.19, we look at para.21, we look at para.

Tipping J The only criticism one could have of 19 is that you own the copyright not in the design but in the drawings.

Upton Yes, it's in the drawings.

Tipping J Yes, but that seems to have distracted Justice Chambers but I doubt that it would have distracted me.

Upton Yes, yes. Well if we go to 29, we'll go to 31, defendant offered to follow the undertaking; no admission of liability; undertook to immediately cease use of packing which incorporates the BID. We go to 37; the new packaging infringed plaintiff's copyright in the Blue Image Design; packaging still too close. We go to 41, I'm sorry to 44 and then I've just picked up a pleading, and then we go to 45 and we go to 46 and we go to 52 G and H which talks about the creation and ownership of the design and that's there referring to the Cipidue drawings. So that's the opening and then the closing submissions in the High Court, could I take the Court please to 2.6 we refer to the pleadings; 2.35

McGrath J Don't go too fast please Mr Upton.

Upton Thank you.

McGrath J 2.6

Upton 2.6 in the closing, then we go to 2.35, 2.36 and 2.37 and that's talking about the development and creation of the Cipidue drawings.

Tipping J Well that was clear evidence of originality wasn't it and it's hard to get behind that?

Upton Yes, yes, that's right. And then we go to 2.56, we have the Blue Image Design being used with different trademarks but there's nothing significant about that. The different trademarks include SuperAttak, SuperBonder, QuickTite and Loctite at different locations around the world. Para.2.57, and then from 2.57 we go to 2.59, and of course you have to also keep in mind, I don't think you've got it, but you also need to keep in mind that there was the evidence at the time of the interim injunction application which had included in it the Cipidue drawings and coupled with that as I've said you've got the evidence of Messrs Martinez and Vandepaepeliere as to what was being done. I'd like to also just give you a taste of what was said in the Court of Appeal because I'm just reading now from my submissions to the Court of Appeal. Has the Court got that submission in its bundle that's just been handed up?

Elias CJ The one that we just got. Mr Upton I'm sorry I'm a little confused, were the underlying drawings not produced to the Court?

Blanchard Yes they were.

Elias CJ They were.

Upton They were, what we call the Cipidue drawings were produced.

Elias CJ Yes, they were produced.

Upton Yes, they were produced, and the evidence was that they were developed by Messrs Martinez and Vandepaepeliere.

Elias CJ Yes.

Tipping J We're not really, although there is some attack on originality come back in there hasn't there?

Upton It's come in the side door Your Honour.

Tipping J Yes, come in the side door.

Upton But my argument is that we we're really beyond that.

Tipping J Yes.

Upton We're really beyond that. The issue here is infringement or no. We've established copyright originality

Tipping J Well there's a finding of fact, concurrent findings of fact out there that these were original pieces of work.

Upton Yes, yes, and then as Justice Baragwanath said at para.40 it's an infringement issue. Can I just ask you to look at my submissions to the Court of Appeal at para.2.3? Following the respondent's format the Italian company produced a series of drawings of the new packaging

Blanchard J Sorry, what paragraph?

Upton This is 2.3 in my submissions on behalf of the respondent.

Blanchard J Oh right.

Upton In the Court of Appeal. The Italian company produced a series of drawings of the new packaging. The respondent, that's us, that's Henkel, called this the Blue Image Design - the drawings are where copyright resides. And then I went a step too far over the page but note the next point with respect, I come back a little bit when I say Henkel primarily relies on copyright in the drawings of the Blue Image Design and then

2.4, 2.5 and then at 4.8, and I'm reading 4.8 'the respondent submits that Justice Harrison was correct to find the Blue Image Design drawings constitute a graphic work. In short the drawings which the Italian design company prepared are graphic works and therefore artistic works in which copyright resides. The evidence supports this', and then I run through the evidence in my submissions and I get to para.4,17, 'the appellant seems to argue the respondent has only claimed copyright in the finished packaging – rather than also the Cipidue drawings'. 4.18, 'this misconceives the respondent's case in *Wham-O*. The respondent claimed copyright in the original Cipidue drawings of the Blue Image Design and packaging incorporating the Blue Image Design. It has reproduced and circulated those drawings in the packing of various products using the Blue Image Design'. And then at 5.10 I read that 'here the Cipidue drawings are an expression of an idea and in relation to the blue image design packaging the respondent does not claim copyright in glue packaging per se'. And with respect Your Honour Justice Tipping I think was making that point earlier.

Tipping J What are you reading from now?

Upton I'm reading from 5.10.

Tipping J Oh 5.10 sorry.

Upton Yes, of my submissions on behalf of respondent in the Court of Appeal. 'Rather it claims copyright in the form of its glue packaging or in its expression

Tipping J Well that's not quite right, you're still a wee bit off the target there Mr Upton.

Upton Yes, but the first sentence with respect is correct Your Honour.

Tipping J It is. If you'd stopped there you would have been alright.

Upton Yes, we'll put a little question mark over that second one, but certainly the first part I submit is quite clear. Then I go through and if we perhaps go to 7.34, if we go to 7.34, because this really captures what we're talking about. 'The respondent's case is that the appellant, Holdfast, by copying the Loctite SuperAttack packaging incorporating the Blue Image Design has directly copied that packaging and therefore indirectly copied the underlying original drawings, the Cipidue drawings, in which the copyright resides'.

Tipping J Yes well that's absolutely right.

Upton And that's it.

Tipping J And the reference to s.29(2) is out. But isn't this case, moving aside subtle issues that the present respondent might wish to introduce, isn't the

present case simply whether you had designed sufficiently away from, sorry, whether the other side had designed sufficiently away from the infringing SuperBond?

Upton Absolutely.

Tipping J That's all there is in it.

Upton That's right, absolutely. I agree totally and whether the Court of Appeal has correctly applied the principles that are involved and that's it. Now that then takes me to my next point in my little summary. Point 2, Justice Baragwanath acknowledged Henkel's copyright in the Cipidue drawings and he did that at para.28 of his decision.

McGrath J Sorry what are you referring to now, what document?

Upton I'm looking at my little summary, my little potted summary Your Honour and I'm now at para.2 in that. And I'm simply noting that he acknowledged Henkel's copyright in the drawings underlying the Blue Image Design. He specifically says "Henkel has copyright in the Cipidue drawings underlying its Blue Image Design' and I ask the Court to also note his comments at para.35 of his judgment on originality. He says 'the evidence of Cipidue's Art Director, Mr Martinez as to originality was not challenged'. Excuse me I'll just get a glass of water, and from there Holdfast actually admitted the copying of the Henkel SuperAttak and I just want to refer you please to the evidence on that and I'm asking the Court to look at volume 2 which deals with the evidence

Tipping J What you've put in your summary, I'm sorry to be pedantic Mr Upton, but this case has proved treacherous in the past for it's copying of the Henkel SuperAttak/SuperBonder is slightly misleading isn't it?

Upton Yes.

Tipping J Wouldn't it be better just to call it SuperAttak?

Upton No let's just say SuperAttak Your Honour, I agree totally, thank you. I'm now going to Mr Henderson's evidence and that's in the green folder at page 213 and what happens the evidence is that in this industry people go to Trade Fairs regularly and Mr Henderson says at page 213, para.11 'by early 2001 he was aware that the Holdfast livery was beginning to look outdated, and then he talks about going to a Trade Fair in Cologne and he goes to a Trade Fair in Chicago and he goes on to say that he was feeling frustrated about his packaging dilemmas and he says at para.18 'as I've already explained I wanted to combine the release of the Easy Brush product with a new packaging design but hadn't finalised what form it would take'. And then he talks about time pressure and frustration and he said it led him to make the unfortunate decision to copy the Loctite packaging which was a later manifestation of the Cipidue drawing.

Tipping J — It's a reference back effectively isn't it to para.16 where he took a sample of the SuperAttak product?

Upton — Yes, yes, that's right.

Tipping J — It's the same thing.

Upton — Yes, it's the same thing. So he brings that back to New Zealand and says I took a sample of it home with me to New Zealand. And then at para.21 he says in the second sentence in para.21 on page 215 'although the essential design had been copied from Locktite SuperAttak packaging it still did retain several key features'. Putting it bluntly what he's trying to do is to have a bet each way but he then goes on in para.22 to say 'although I concede I had copied the Locktite SuperAttak packing, the majority of the features of the packaging was still simply a continuation of what we had already been using for many years. Now

Tipping J — Well that's a contradiction in terms isn't it, he mean you can't have it both ways.

Upton — That's exactly what I'm saying. He's having a bet each way and the Judge in the High Court simply didn't accept that. Now I just want to now take you please to the judgment of Justice Baragwanath, having just touched on Mr Henderson's evidence, but I'm going to come back to it. I then just want to take you to Justice Baragwanath at para.73 and he's dealing here with the evidence we've just been looking at, and at para.73 of his judgment, Justice Baragwanath 'Holdfast originally did intentionally, intentionally doesn't matter, but that's what he says, intentionally appropriate both Henkel's SuperAttak collocation and the name SuperBonder to save time and effort and it was to be used in a similar fashion to Henkels'. And then this is the point 'such conduct clearly infringed Henkel's copyright in the collocation'. And then he describes it in the next sentence as pirating

Tipping J — Well then he slips into Henkel's SuperBonder collocation which is inaccurate. He really means Henkel's SuperAttak

Upton — SuperAttak, yes.

Tipping J — This is where this is quite difficult to follow.

Upton — Yes, yes.

Tipping J — But he must be meaning SuperAttak mustn't he?

Upton — Yes, yes.

Tipping J — He can't be meaning Henkel's SuperBonder.

Upton — No it's the SuperAttak.

Tipping J But there is a SuperBonder card of Henkel.

Upton There is a SuperBonder card of Henkel, that's right.

Tipping J Might he not be referring to that?

Upton No, he says the copyright in the SuperBonder, it's got to be the copyright in the SuperAttak Your Honour.

Tipping J The trouble is he's used the name, he's brought the name in as if it were a passing off action.

Upton And it's not a passing off.

Tipping J And he should have referred to it as the SuperAttak collocation. It's got nothing to do with the name per se.

Upton This is not a passing off case. If it was we wouldn't be here today.

Tipping J But I reckon he's meaning the SuperAttak collocation.

Upton Yes, because the copyrights in SuperAttak.

Tipping J Do we know what's the sample that was given to the designer brought back from Chicago. Do we know what the label on that was, what the name of that product was?

Upton I can probably help you with that.

Tipping J Was it SuperBonder?

Upton We know that the designer has a Henkel SuperBonder

Tipping J It's para.16 of Henderson, 214 I think. He says 'I took a sample of the SuperAttak product and packaging home with me to New Zealand'.

Upton Yes.

McGrath J You've just said there's some evidences to the name of the packaging that was used, I don't think that that may not be quite precise enough to identify later.

Upton Could Your Honour please look at page 249. Does Your Honour have 249?

McGrath J Yes, yes.

Upton Yes, at line 17. 'I already had the Holdfast SuperBonder and I had had the Henkel packaging. 'What was the Henkel packaging that you had? I

couldn't be sure which card'? 'It was when we produced the SuperBonder packaging but I believe it was the Henkel equivalent of the SuperBonder product'. Now we know that he's got SuperAttak but she's saying here that she thinks or believes that she has Henkel SuperBonder as well. I don't see

McGrath J I'm just really wanting to resolve something that maybe confusing on my part, but I've always understood SuperAttak to be the name on the Cipidue drawings, I hadn't necessarily understood it was the marketed product, a sample of which was brought back to New Zealand.

Upton Yes it was Your Honour.

McGrath J Okay.

Upton The evidence undoubtedly seen is that the Cipidue drawing was then expressed in various products, which were given various brands or trade names around the world, and one of the trade names or brands that was used around the world was SuperAttak.

McGrath J Right.

Upton And there's absolutely no doubt about that.

Tipping J That was the name in North America.

Upton Yes.

Tipping J Hence it being

Upton That's why it's in Chicago.

McGrath J Yes, but as to the evidence that Justice Tipping's referred to, the evidence you've referred to, is that as far as we get as to exactly what was on the packaging that was given to the designer that led to the Holdfast SuperBonder packaging?

Upton Yes, I just need to go slowly. My case is that Holdfast have packaging Henkel SuperAttak that they bring back from North America.

McGrath J Yes.

Upton There is also evidence that Mrs Towes believed she had Henkel SuperBonder as well.

McGrath J Right.

Upton And the inference is that Henderson uses the SuperAttak packaging and takes the SuperBonder name, that's where he gets SuperBonder from.

McGrath J	I don't want to take it any further, it was really going back to whether Baragwanath J had made a mistake in para.73, so you can perhaps go back to that. I think I've taken that as far as I can.
Upton	Yes if we go back to that I think the reality is that he should have said SuperAttak because that's where the copyright, that's the drawing in which the copyright rests.
McGrath J	Right thank you.
Upton	And so what I'm saying is that Holdfast directly copies Henkel's SuperAttak packaging and thereby indirectly attacks or appropriates the original expression found in the Cipidue drawing. Now I'd like to now take the Court to the evidence dealing with the way in which UltraBonder was created because this is important for my *Bleiman / Elanco* argument. Can I take you please to Mr Henderson at page 211, his statement, and we've looked at that, and I want to pick up his statement at the bottom of page 216 in the case on appeal, para.27. 'There's been a comprise reached with Henkel over the use of Blue Image Design and SuperBonder and he says at para.
Tipping J	That compromise involved also an undertaking to destroy didn't it?
Upton	It did.
Tipping J	So how did SuperAttak get to the designer?
Upton	Precisely. They didn't destroy every item that they had, that's the point.
Tipping J	This is an unquestionable inference isn't it that they can't fulfil their destruction undertaking?
Upton	That's right, absolutely.
McGrath J	Well it's a question of when SuperAttak go to the designer isn't it?
Tipping J	Well yes that is certainly, but I don't think SuperAttak got to the designer for the purposes of redesign until after the compromise but I could stand to be corrected on that.
Upton	Well
Tipping J	I mean it's not likely that it got before the compromise because
Upton	No, no, I think it may have.
Tipping J	It may have, oh.
Upton	Yes I think it may have Your Honour.

Tipping J	But surely
Upton	But then they give the undertaking
Tipping J	And then they give the undertaking and it's not destroyed.
Upton	It's still not destroyed.
Tipping J	I don't think it matters much.
Upton	No I don't think it does but
Blanchard J	Well it may be that they didn't have to destroy it because SuperAttak wasn't a Holdfast product and it wasn't Holdfast packaging.
Upton	No but they undertook Your Honour to not use the Blue Image Design and to cease
Tipping J	Well maybe I'm a
Upton	And to cease
Blanchard J	Well that's a different matter.
Upton	Yes of course.
Tipping J	And I may be misleading myself Mr Upton and my brother may be right.
Upton	So I come back to His Honour Justice Blanchard. There are three dimensions to it, one is not to use the BID, the second is not to use SuperBonder as a name and the third is that they will destroy the offending product.
Blanchard J	Their own infringing packaging.
Upton	Yes, their own infringing packaging, absolutely.
Tipping J	Yes so I was a bit peremptory when I suggested they should have destroyed the SuperAttak, but it's hardly in accordance with the spirit of the undertaking to send the work off to your designer.
Upton	That's right, I agree. I have to say, and you can see this for yourself, reading between the lines that Justice Harrison was not at all impressed with Mr Henderson. Now of course we're dealing with objective issues here very much but the Judge quite clearly was not impressed with Mr Henderson. Can I pick up Mr Henderson's at page 216 in the bundle, in the case on appeal, at para.27? He says 'in the latter agreement we ceased using and destroyed all the remaining SuperBonder packaging and promotional material in early August compliance with 2002'. Para.28 'at the same time as I agreed to stop using SuperBonder I immediately

approached Goldfields to produce a new packaging design for our cyanoacrylate adhesives. I decided to change the name SuperBonder to UltraBonder. I instructed Goldfields to produce a new UltraBonder packaging that was quite different from what Henkel called its Blue Image Design, yet which retain the key features of the Holdfast livery, using SuperBonder packaging as a start point'. Then he says over a period of about two weeks they produced various drafts and he says at para.30 the packaging was finalised in mid-August.

Blanchard J Now how could they have been using the SuperBonder packaging as a starting point if they were supposed to have destroyed SuperBonder packaging?

Upton I agree.

Tipping J I think I jumped like the Judge from one to the other.

Upton Yes Your Honour I agree but that's what they do Your Honour and he actually says they do it, and it's obvious that they do it because his design witness, Mr Towes, she says the same thing.

Blanchard J I wonder how they got away with not being caught by breach of their undertaking.

Upton Well we did sue for breach of undertaking but that really

Tipping J What they've done is they've used the infringing work as the start-point for the new work.

Upton That's right, this is *Elanco*, it's *Bleiman*.

Tipping J Well somebody calls it somewhere I think a clean slate. If you're caught in that situation the only safe course is to go back to a clean slate.

Upton That's right. Well I say a clean piece of paper.

Tipping J Well okay.

Upton And yes I've actually said in my little note that they should have started from scratch with a clean piece of paper.

Tipping J Well it's not absolutely fatal is it, but it's jolly dangerous?

Upton That's right and that's the risk that they ran and to be perfectly fair to Justice Baragwanath, he recognised it as a risk.

Tipping J Yes he did.

Upton He specifically said it was a risk, but I love using Latin. They needed a tabula rasa a clean slate.

Elias CJ Well you're back to the slate, yes.

Blanchard J Instead all they got was tabula in naufragio.

Tipping J Oh dear.

Upton Yes, yes, thank you Your Honour.

Tipping J Very well done.

Upton So the UltraBonder he says was finalised in August though subsequently invoiced and then at para.31 he says this 'the result is that UltraBonder packaging is now strikingly different to SuperBonder packaging that Henkel complained about. Instead it represents an updated version of the Fix-It Superglue packaging. The UltraBonder packaging is also markedly different to Henkel's Blue Image Design' and I have to interpolate here that Justice Harrison simply did not accept that. And he then goes through the rest of his evidence and then we get to cross-examination and I asked him about why he copied the original Henkel SuperAttak and we ran through that. He didn't have any legal advice on that. He ran through 223, 224, 225. I just want to pause at 226. Excuse me I'll just check the reference here. At 226 I'm actually putting to him a shop display and you'll see the photograph I'm referring to is in the bundle at page 490. This is Mr Henderson saying that his product, UltraBonder

Tipping J 400 and?

Upton It's 490 Your Honour.

Tipping J 490. What volume is it in?

Upton It's in the yellow volume 4 and I put it to him, I put this photograph to him at page 226 of Your Honours case on appeal and this actually includes a series of UltraBonder, so it's a Holdfast stand and in the middle of the Holdfast stand you can see UltraBonder, and UltraBonder the point I ask you to note is that UltraBonder is the only product that has blue at the top. Everyone else has red at the top and blue at the bottom and I'll come back to that later on but at page 226 of the case on appeal at line 19 I said 'if we look at the photograph more clearly the only item on display by Holdfast that have blue at the top as opposed to red at the top are the UltraBonder adhesives' and then he hesitated and I put the question again and I said 'the only items in the display that have blue colouring at the top of the card are UltraBonder products'? Yes. And of course Henkel always has blue at the top, so we go through some more of his evidence and we then get to the switch from SuperBonder to UltraBonder and if we look at page 228 at line 19, he's been talking about Henkel's claims as speculative and I put it to him that they weren't speculative at all because we know you admitted copying and he said 'Sir, I didn't admit copying, I had advice from James and Wells and I was

asked to, that I would be, I don't know the words to use, but it should die'. 'I'm sorry you have admitted now that you copied, you simply cannot say your claims are speculative can you'? 'I've made an honest statement saying I've made a mistake and I've pulled out of it. It cost me 20 grand'. 'What Mr Upton is saying is this, you've admitted that you copied Henkel's work'. 'Yes'. As a result of that he's saying it's incorrect to assert Henkel's claim was of a speculative nature'. 'If you put it those words you are right Sir'. Then I said 'move to 29 in your brief. Isn't the situation that you'd already decided to switch to UltraBonder before you resolved mater relating to SuperBonder' and this comes to this question of timing that we were looking at a few minutes ago. 'I had thought about it very very deeply and I said to myself I need another option should something go wrong so I thought about UltraBonder, yes, that's my job, I'm paid to think', and the whole process of switching from SuperBonder to UltraBonder was dealt with in a matter of a few days at the end of July. He'd actually said it took some weeks and I put it to him that it was dealt with in a matter of a few days at the end of July and first or second of August wasn't it. 'Sir my, I have, my heart says I really want to do it better. I made a mistake so rather than have any grief with SuperBonder and I could see it was going to be grief I simply decided to change tack and go back and it better than they'd ever done. That was instructions to Goldfields. That's what drives me'. 'What I'm suggesting is the whole changeover took place very quickly over a matter of a few days, correct'? 'Nah, not necessarily, it took about two to three weeks I think it was. I honestly can't remember the time'. 'But you've said it took placed over a period of about two weeks and it was finalised in mid August'. 'Yes'. 'In fact it took place over a period of a few days and was finalised by 2 August wasn't it'? Now I just want to explain why I'm asking these questions. My submission to you is going to be that this was a rushed job, he was under pressure and he didn't get the job done properly and he didn't move far enough away from the original offending product and that's why the

Blanchard J It's only the last of those points that matters. Did he move far enough away?

Upton That's right.

Blanchard J The fact that it might or might not have been rushed or leisurely is beside the point.

Upton Absolutely, but this explains why he hadn't moved far enough away, that was all. And then he said I can't remember the specific time and then I took him to various documents and sketches which actually had dates on them and I'm not going to go through and read all of this in detail but if you go through the documents in question – it may help if I give you the casebook numbers.

Tipping J Mr Upton I have to confess like my Brother Blanchard I think far more important is this prevarication over the source of the material which was supplied to the designer

Upton Designer, yes

Tipping J And which comes up on the next page. He seems to be very anxious to distance himself, or attempt to do so, from the materials. At one stage he was even querying wasn't he whether the designer got them from his own company? So frankly I think it's that sort of evidence if anything is of significance beyond just the question of what precisely was the design path, it's that.

Upton Well yes, and that's dramatically highlighted Your Honour. I agree with Your Honour but it's dramatically highlighted if you go to page 234. Well if we start at the bottom of 233, line 34 'You've said in your evidence that they were to use SuperBonder packaging as the starting point haven't you'? 'I've said clearly that my instructions were to forget SuperBonder and start again', which is simply wrong.

Tipping J Well it's that sort of connotation I was referring to Mr Upton which doesn't make his providence if you like hugely powerful.

Upton No quite, and that's what I'm saying that Justice Harrison clearly was not impressed with him and I won't put it any higher than that. Then I said 'well if that's the case why didn't you say in your evidence at para.28 they were to use SuperBonder, why did you say they were to use SuperBonder as a starting point'? 'Because the principles were there, in other words red, yellow and blue'. 'But they didn't need to use SuperBonder as a starting point at all did they'? 'No they didn't'. 'And the reason why you told them to use SuperBonder as the starting point was to provide a platform on which they could build. It's obvious'. 'It is obvious but I can't comment because I don't know enough about it'. But it gets better, it gets better or worse, depending on how you look at it. 'But you accept the answer is obvious don't you'? 'I accept yeah'. 'When the final products or specifications were produced you personally approved them didn't you'? 'No'. 'You must have been involved in the redesign process'? 'Yes'. 'Because it was a matter of real importance for your company wasn't it'? 'Yes'. 'Because you were at risk at the time of being sued'? 'Yes'. 'And you wanted to make sure the new packaging was distinctive'? 'Yes' 'And not based on SuperBonder packaging'? 'Correct'. 'And so you were closely involved I suggest step by step'? 'No'. And then His Honour Justice Harrison said at line 26 'I have difficulty following your evidence that you instructed Goldfields to produce a new UltraBonder packaging using SuperBonder as a starting point if you wanted to get away from the infringing product. Can you help me on that point?' Answer: 'I have difficulties with it myself'.

Tipping J Well the Judge didn't think it was a case for an apology. I think he thought it was a case for an explanation.

Upton — That's right, absolutely, and then I took the witness to an invoice which had been produced in which it said, well I'll take you to the invoice which is at tab, which is at page 508. If I take you to that you can see what the questioning was about. That's an invoice from Goldfields.

Elias CJ — Sorry, what page is it?

Upton — 508 Your Honour. You'll see exactly the same invoice elsewhere in the bundle. It's at 479 for example but I'm looking at 508. And the point, and I put this invoice to Mr Henderson because the narrative in the invoice says 'description of charges – alter SuperBonder, it says alter SuperBonder, it doesn't say start with a clean piece of paper, it says alter SuperBonder and then if you run your eye down the lines it goes various new styles to vary from LocTite. So I then asked the witness about that at pages 235, and I asked him about that wording at page 235 of Your Honours' casebook, line 20 and following and he said he had no idea why they used that wording on the invoice. So that was Mr Henderson and then can I just complete this

McGrath J — Mr Upton the reference is to send to Asia. Is that to produce the design?

Upton — Yes the printing apparently, it's in the evidence somewhere, but the references of the actual printing was done in Taiwan.

McGrath J — Yes, thank you.

Upton — And I can find the passage if you want it.

McGrath J — No, that's fine.

Upton — But there's no doubt that the packaging was produced in Taiwan.

Tipping J — Mr Upton I think in fairness, and we should put this on the table so the other side knows what's in play so to speak, but the top of page 235 I thought was quite significant. When you suggested to him that the instructions were to use SuperBonder as a starting point and to alter it and vary it and then he says 'no Sir, they were not' and that's where the invoice really bites.

Upton — Yes, well I started him off and he gave me the answer I wanted and then I said now look at the invoice.

Tipping J — Well he gave you an answer which was forensically useful.

Upton — Yes, so I ask him that question, I get that answer and then I say now look at the invoice.

Tipping J — I just didn't want it. This cross-examination I think has to be read as a whole. It then becomes fairly plain what's going on.

Upton And then, could I just ask Your Honours please to keep in mind that he said he was not involved step by step. He denied being involved step by step and that was at 234. Now I want you, I ask please the Court to look at Mrs Towes' evidence and we're at page 238. At page 238 we have her written brief of evidence. At para.3 she says my instructions were that the new packaging which was to be branded UltraBonder was to incorporate more of the traditional Holdfast elements as exemplified in Fix-It Super Glue. And she says she was also instructed that the end result needed to be distinctive, this is the end of para.3

Tipping J Well she also says here 'he explained specifically what he required changing'.

Upton I'm deliberately not reading everything Your Honour

Tipping J No, no I know but I mean

Upton There are some very significant points in this evidence and she ends up by saying 'in particular needed to be quite different to LocTite'. And then she says 'over the next three weeks or so Goldfields prepared various drafts of artwork and presented them to Brett Henderson. On receipt of each draft Brett would normally telephone me and discuss the various features and where appropriate decide on amendments'.

Tipping J Does this evidence really do anymore Mr Upton than show that the best from your client's point of view that they were trying to steer very close to the wind? I mean ultimately where does it all take you other than to invite the conclusion, and the ultimate issue is surely whether they got too close to the wind.

Upton Yes, whether they succeeded. No I agree Your Honour.

Tipping J I mean there's plenty of colour here but I'm just wondering exactly where you're ultimately willing to ask us to take it.

Upton Well it's simply background and I'm going to be saying obviously that the objective similarity still remains. That they haven't moved far enough away.

Elias CJ Well is it very necessary to give us quite as much colour Mr Upton?

Upton This is the only part Your Honour where I'm going into the evidence in detail that was all.

Tipping J I can understand why but I just want to know where you say in copyright law this bites.

Upton Yes, well we come back to objective issues. So if I just go through

Tipping J Might it not be relevant to the amount of skill and labour that was put in and the degree of originality that was applied to the so-called non-infringing work?

Upton Yes, that's right, and the respondents will inevitably say to Your Honours that there was a large amount of time and skill which went in to doing this over a period of some weeks and it cost a significant amount of money, and the point I'm making in my case of course is that in fact it was a rushed job, it didn't take very long at all and they didn't apply much skill to the job either. So if I just take you to 246 which is cross-examination of Mrs Towes. It's a bit hard to read some of it because it's had a highlighter through but at line 20 'What you're obviously doing is re-arranging, changing, adapting the existing layout'? 'Yes' she says, 'upon instructions from Brett on the telephone. Brett doesn't document anything. I act as interpreter, translator between him and the computer operator and this would have been a result of a telephone call from Brett'. 'Was he in close contact with you over this redesign we're talking about'? 'Yes'. 'Did he know in general terms what he wanted?' 'He knew what he wanted. He knew he had to change SuperBonder and incorporate elements of his more traditional packaging and as I understand each time a proof was produced he was checking with his legal advisors as to whether the change was satisfactory. He told me he had to withdraw SuperBonder and he had to change the card'. And then I took her to when the final product was completed and she acknowledged at line 22 the final product was somewhere around 1 August. She said yes it looks to be the case and then I put the bill to her with the narrative at line 31 and at line 35 she acknowledged that accurately recorded what she was doing at the time. And then over on 248 I asked her about livery that has blue at the top, as opposed to having red at the top, that's at line 15 and she said it's certainly not the norm and at 249, top of the page, she acknowledged the ultimate combination of colours rested with Mr Henderson. It was his judgement as to what was acceptable and then the Judge asked her some questions about what she actually had in front of her when she was doing the redesign job. So that gives you the creativity path in the change from SuperBonder to UltraBonder. What I'd like to do now Your Honours is move to a totally different topic and I'm now looking at what I respectfully submit are the misdirections by Mr Justice Baragwanath, and that's in my little potted summary. I just want to go through those because my submission is that these misdirections colour his thinking and his outcome. The first of what I submit to be a misdirection is at para.52 of his judgment and that's at page 26 in the casebook. He says at para.52 dealing with objective similarity, 'this is a purely objective question for the Court which views essentially the same issue as (i) from another angle'. And my submission is that that can only be the case if every feature of the copyright work is taken which is not the case here in relation to Holdfast UltraBonder. In relation to Holdfast UltraBonder Henkel says not the whole but a substantial part of its Blue Image Design was taken, but the situation is a little more serious than that because having wrongly held in my respectful submission that objective similarity and substantial part are essentially the same but from different

angles, the Judge then wrongly deals with them together rather than separately, and you can see that at para.66 of his decision where he says it's convenient to consider them together. My basic submission is that it's important not confuse or merge the two steps. You're actually looking at slightly different issues. Then we get to my second which was the Judge's para.68 and that's at page 30 in the casebook. He said that Henkel's case may be put at its highest by assuming a presumed drawing from which derived the design on its SuperAttak. In my respectful that's wrong. It's the Cipidue drawings with which the UltraBonder product is to be compared as indeed the Judge had earlier acknowledged at the paragraph references I've given you.

Tipping J	Why did the Judge here, by presumed drawing he's presumably, forgive me, referring to some intermediate drawing. I can't quite understand how any issue of intermediate drawings arises.

Upton	No, it doesn't come up, no, I don't know Your Honour, I just don't know. As I say I tried to, obviously unsuccessfully, but I tried to make it plain that it was the Cipidue drawings that we were relying on and indeed he'd got that correct at his para.61, if you'd just have a quick look at 61. At para.61 Justice Baragwanath said 'proof of infringement must be established by comparison of the allegedly infringing copy and the original source, the Cipidue drawings'. At paragraph he said and I have to be fair and read the whole paragraph. 'In this case because the Judge did not take each of the Cipidue drawings, consider what of them had been taken by the Holdfast packaging and consider whether what has been taken constitutes all or a substantial part of copyright work, this Court must undertake that task'. Now the important piece for present purposes. 'The issue is whether Holdfast took a substantial part of Henkel's Cipidue drawings. And I say absolutely correct. Then his next paragraph which is 67 he says 'It is the Cipidue drawings and not the later expression which which the Holdfast products are to be compared' and I respectfully endorse that, but it's in that framework that I don't understand why he then has to say Henkel's case may be put at its highest by assuming a presumed drawing, because that intermediate step in my submission is simply not required.

Tipping J	Well he himself I see here uses the expression 'intermediate drawing' in the previous paragraph.

Upton	Yes.

Tipping J	But what was he looking for? Something between Cipidue SuperAttak and SuperAttak.

Elias CJ	Is it this issue causation that features in the judgments?

Upton	No this is not a causation. We're not talking about causation here, we're talking about taking a substantial part.

Elias CJ No I'm just trying to understand why it's been thought necessary to do this.

Upton Yes we'll get to causation, he does get to causation but not at this stage. At this stage he's merged together two issues. One is substantial part and the other is objective similarity and he's dealing with them both together and in the middle of it we have this discussion about a presumed drawing.

Tipping J You've got to identify the substantial part before you can decide whether there's objective similarity between the infringing work and a substantial part of the copyright work. It's not a fusion is it?

Upton No, I respectfully adopt precisely what Your Honour is saying and that's why I'm criticising in my first point about his merger of the two steps.

Anderson J There may well have been an intermediate drawing but it doesn't mean to say that it's anything other than an expression of the Cipidue drawings.

Upton That's right it's just another expression.

Anderson J If it was an original work well you'd be saying that was breached.

Upton Yes, right. So we've got this merger of two distinct steps in the process, we've got this reference to a presumed drawing which in my submission simply was not the way I argued the case and it just distracts attention. Then we get to my third point which takes us to His Honour's para.69 and 70 and in those two paragraphs I submit there's a triple misdirection and if I just read through them and then we'll look at the paragraphs. I submit firstly he's adopted a disectionist approach which is not permitted when you're looking at an infringement; secondly the correct comparator is the Cipidue drawings and not the Henkel SuperBonder card as indeed he'd already acknowledged at those paragraph references and contrary to what the learned Judge says, there can be no issue as to originality or whether copyright arises because those have already been dealt with earlier. Now if I then please go to para.69, which is quite a long paragraph, but the key features are that he's talking about individual elements. He talks about common form elements, I'm not reading every line, I'm just highlighting points. He talks about common form elements. He says none of them is original and he goes through various features and at page 31 in the bundle about line 6 he refers to unoriginality, he then talks about the word 'Bonder' as a relatively new noun and says that Henkel did not suggest it's use was original and then in para. 70 he says by themselves the features of blue and red colouring on white background and yellow arrows are unoriginal. So in my submission what he's doing is dissecting and looking at the individual pieces which we shouldn't be doing.

Tipping J Well he's also using it with respect it seems the word 'original' in the sense of novel.

Upton That's right.

Tipping J Which is a really fundamental difficulty if it be correct.

Upton It doesn't need to be novel, not in this area.

Tipping J No.

Upton What he should be doing with respect is asking himself whether there's been copying of a substantial part.

Tipping J Well he's got to identify the essence of the copyright work.

Upton Yes.

Tipping J The essence of the copyright work and then ask himself whether that essence has been copied.

Upton That's right, as a totality

Tipping J By means of first of all the objective similarity test and/or any other evidence that might be relevant on the question of copy.

Upton Yes.

McGrath J Mr Upton in para.70 you stopped short of the last sentence. You've got to address that don't you?

Upton Yes Sir I hadn't got to that and I'm going to do that right now. He then says the remaining question is whether taken together they and the other features of Henkel's SuperBonder card constitute a distinct pattern of such originality as to give rise to a copyright. Now my complaint about that sentence is that we're not looking at originality, we're looking at whether there has been the copying of a substantial part, and

Tipping J By SuperBonder card he's presumably meaning SuperAttak.

Upton Yes, and that's why I'm saying the correct comparator is not the SuperBonder card, it's the Cipidue drawings and he'd already acknowledged that if I could take the Court back please to para.61, oh 65 and 67 which we looked at a few moments ago, and the question if I could come to His Honour Justice McGrath, the question is not whether those features constitute a pattern of such originality, that's not the question. The question is whether it signals the taking of a substantial part.

McGrath J And your criticism of a dissectionist approach though is that no somewhat alleviated by the observation that he then moves to the remaining question to whether taking it together.

Upton	Taking together. I agree that that may cure the issue. I'm not conceding it does but it may point towards a cure. The way he says you've got to look at them collectively and I accept that but
McGrath J	Well it's only the remaining question for him that postulates what point he's reached with dissectionist approach earlier.
Upton	Yes, but then he says the remaining question is whether they constitute a pattern of originality, and that is simply not the question at this stage of the process.
Tipping J	But there's a further difficulty in that. In my view, subject to correction, the idea of degrees of originality implied by the word such
Upton	It doesn't come into it.
Tipping J	Is a very novel development in this area of the law even if he were legitimately dealing with originality.
Upton	Yes, I agree, so with respect that is a difficult part of the judgment.
Tipping J	Well he seems to be saying doesn't he, at least in one point, that if the individual components are not in themselves original, the collocation cannot be original because they must all fall away and you end up with a blank sheet of paper.
Upton	That's right and we're going to see that after the morning break, where he says that you put to one side items that are not original, he actually says that, and I'll just check to make sure, yes we'll see that after the break where he says you have to remove items that are not original but with the time at 11.30am
Tipping J	But original in the sense of novel I understand, or there is difficulty, but anyway I won't further fire the debate Mr Upton.
Upton	No I think what he's talking about is matters which are common, common place.
Tipping J	I can draw a cat which is a very common place object but my drawing is probably going to be very original.
Anderson J	Unless it's Schrodingers cat
Tipping J	Unless it's Schrodingers.
Elias CJ	Alright we'll take the morning adjournment, thank you.
Upton	Thank you Your Honour.

11.30am	Court adjourned
11.47am	Court resumed

Elias CJ	Thank you.
Upton	Your Honours I'm now at point 4 of the points that I say are misdirections by Justice Baragwanath and that's dealing with para.71 of his judgment and that's at page 31 of the casebook. At para.71 he says Harrison Justice erred in failing to identify and apply the principle that there must be certainty in the subject matter of a monopoly. Now this comment was in the context of his discussion relating to substantiality and similarity and while there's no doubt that certainty in subject matter may be relevant when you're looking at expression of ideas, and I refer there to the Broadcasting Corporation case, *Green and Broadcasting Corporation*, it's irrelevant I submit at the stage when you're looking at substantial taking or objective similarity. And you also collectively need to look at paras.70, 71 and 72 because 70, 71 and 72 he's really talking about whether there's a copyright. In para.70 he says whether there's distinctive pattern sufficient to give rise to a copyright and then he talks about certainty in subjectment of monopoly, and that can only be relevant at the stage when you're looking at expression of ideas and copyright and then para.72, he says each of the elements is part of the common things of life and therefore requires relatively distinctive treatment for the collocation to give rise to copyright. And my basic point here of course is that we're actually beyond that stage. We're not looking at whether there's a copyright, we're looking at whether there's been a breach of that copyright.
Anderson J	Rather odd isn't in 73 talking about copyright in a collocation? It's the collocation that may make a work original.
Upton	Yes.
Anderson J	But you don't have copyright in a collocation, you have copyright in work.
Upton	Yes, the copyright is in the expression of the idea, that's where the copyright, if it's at rest anywhere, that's where it sits. So paras.70, 71 and 72 in my submission are difficult and he has misdirected himself. Then I get to para.73 and this is my fifth point. The Judge has already acknowledged that Henkel, and I'm just reading from my potted summary has copyright in the Cipidue drawings. He's already acknowledged there's a clear infringement of Henkel copyright. It should be in the Holdfast SuperBonder. There's a typing error there, it should be Holdfast.
Blanchard J	Or a speaking error.
Upton	Sorry Your Honour?

Blanchard J A speaking error rather than a typing error. I don't think you can blame the typist.

Upton Oh I'd much rather blame the typist Your Honour if I could but knowing my typist I shouldn't. And the third point is that His Honour actually notes *Elanco* in para.73 and by inference *Bleiman*. He then fails to undertake the correct analysis. Instead of looking at the overall context, including the admitted piracy, and have due regard to what's gone before, he simply compares the UltraBonder with the Cipidue drawings when he should also have looked at the admittedly offending Holdfast SuperBonder to see the extent of any changes which had been made. In other words to see whether there was only tinkering and whether Holdfast has moved sufficiently far away. Then I move to para.74 where His Honour says that he has analysed both Henkel's pleaded claim and not only the Cipidue drawings which are in law the true comparators but he's also analysed the SuperAttak, SuperBonder and QuickTite and then he says this has been necessary in order to make a series of what are in truth jury judgments required by the Judge's failure to remove from the collocation matters of no originality. And I say no more about it than that. Then at para.75 he says that the features in the Holdfast design which were previously used by Holdfast or are common place. I'm sorry I've misread it. He says the features in the Holdfast design were previously used by Holdfast or are common place and therefore does not, that's his words, does not warrant copyright protection, and again with respect I submit that is not the issue when addressing substantial taking or objective similarity. And it's paras.74 and 75 which really represent the ratio of his decision. Just standing back and looking at the overall, this overall part of the judgment, His Honour I have to say seems to be preoccupied with whether or not there is a copyright, not whether there is substantial taking or objective similarity, so he discusses at para.70 about giving rise to a copyright; 71 is clearly explicable only on the basis of whether it's a copyright; 72 he says give rise to a copyright and then he goes through his discussion and he then at 75 says that having done the exercise that what we're talking about does not warrant copyright protection. And then he goes on in 75 to talk about *Designers Guild*, and having talked about that case he says in that case there was an essential unity of concept pirated by the defendant from the plaintiff. 'I am satisfied that there is no such unity of theme that could justify categorising Holdfast's selection of common form elements as pirating Henkel's design'. Now I'm not sure what he's actually saying there but you have to read it in the context of what's already been said in that paragraph about no copyright protection.

Tipping J I think he's really still back into mindset of the existence of copyrights.

Upton That's my point Your Honour that he's looking at copyright and he's looking at it at 70, 71, 72 and then the discussion and again at 75 when we have the ratio, and with respect I adopt Your Honour's comment and

so it's in that context that you have to read the last part of para.75. And then he then refers to an article which he's researched, a Canadian case

Tipping J Is your ultimate submission Mr Upton that in looking through these various paragraphs in the 70s the Judge has asked himself the wrong question?

Upton Yes, yes, and so he reaches the wrong conclusion, and if we then go from there to the judgments of Justice Chambers and the President of the Court, Justice Young, they agree with the lead judgment or leading judgment that Justice Baragwanath has written, so in my submission, and I'm now at the end of my summary on the first page of my point 5, that they in effect adopt his errors in the flawed conclusion. Now I then want to just go from Justice Baragwanath to Justice Chambers. I'm going to put to one side totally any question of the QuickTite packaging or the SuperBonder packaging because my case as I've said is based on the Cipidue drawings, so I'm putting that to one, I'm putting all the other issues to one side.

Elias CJ Mr Upton could you just, sorry, could you just indicate where you're going with your submissions. I would hope that you will be able to conclude by lunchtime to give the

Upton I'm intending to finish by lunchtime. I'll tell Your Honour where I'm aiming for. The major discussion has been in relation to Justice Baragwanath but I just want to touch lightly on Justice Chambers and Justice Young's decisions then I'm going to go through and finish off by going through the respondents' submissions and I'm intending to have that done by quarter to one.

Elias CJ Yes, yes thank you.

McGrath J Mr Upton will you be touching also on whether the copying was of a substantial part that qualitative element in what has been copied?

Upton Yes I had actually covered that in my written submissions

McGrath J Yes, you did, yes.

Upton And I was basically going to leave it at that but

McGrath J Well you certainly listed elements there and that may be the way you want to leave it.

Upton Well I'll come back and touch on it again after I've looked at the judgments of Justice Chambers and Justice Young.

McGrath J Thank you.

Upton	So I'm looking at Justice Chambers and I'm simply focusing on the Cipidue drawings and he deals with that at para.92 and following, and we've already looked at the pleading point and then having gone past the pleading point we get to para.98 in Justice Chambers' judgment where he says 'even if the Cipidue drawings or one or more of them had been pleaded and even if Henkel had been proved to own the copyright, I would not have found that Henkel had established infringement of copyright. He acknowledges that indirect copying will suffice and he quotes some authorities. He says that Justice Harrison never did the correct comparison because of course it had not been pleaded that Holdfast had breached Henkel's copyright in the Cipidue drawings themselves. Well I say he had. And then he says it's clear that Henkel could not have established that a substantial part had been copied. He said Holdfast packaging is not objectively similar to the original Cipidue drawings, substantially developed and altered by the time QuickTite and SuperBonder packaging was prepared. All I want to say about that Your Honours is that he does not discuss the *Bleiman* or *Elanco* issues
Tipping J	But isn't the more important point that he's not there focusing on the SuperAttack Cipidue drawing?
Upton	That's right
Tipping J	I mean whatever alterations there may or may not have been it was not your case.
Upton	That's right, he's looking at the collective, he's looking at the overall drawings. And then he says that the original drawings have been substantially developed and altered, but that's not the point.
Tipping J	Well that's right.
Upton	Yes, that's not the point, the point is to go back to the original drawing. So in my submission his reasoning is flawed, and then you go
Tipping J	And then he talks about inferred and presumed drawings and so on which is
Upton	Yes well we don't need to.
Tipping J	We don't need that.
Upton	No, and that's why I'm focusing very much on Cipidue and
Tipping J	Well that's really all isn't it and then he comes on to the undertaking? I'm not trying to push the accelerator Mr Upton but really
Upton	I don't want to go to the rest of it Your Honour
Tipping J	No.

Upton	I just want to go straight to Justice Young's decision now. Justice Young is at para.124 and he gives a two-page decision starting at page 46 in Your Honours' casebook and he says at para.125 the best argument available to Henkel at trial was that UltraBonder packaging involved indirect copying via SuperAttak packaging of the relevant underlying Cipidue drawing.
Tipping J	Well that's bang on isn't it?
Upton	That's right on the button. That's it. He understood what the issue was but then he says as a matter of fact the case fails, and he says, this at para.126, in his judgment Justice Baragwanath has addressed this and related issues. I agree with his conclusion. So he's in my submission picking up Justice Baragwanath's reasoning, and then he says accordingly it fails on the facts. And so I submit that inferentially for the same reasons as I criticise the thinking of, the reasoning of Justice Baragwanath, the reasoning of Justice Young is also open to criticism. And then he goes on to talk about inferred drawings and all the rest of it and then at para.128 he says that leaves the possibility of a claim based on the Cipidue drawing. He said Henkel's pleading does encompass a claim that Henkel's copyright in the Cipidue drawings was breached but he says this claim also fails. And then he's rolling into that reasoning the SuperBonder and QuickTite packaging.
Tipping J	Isn't it his 129(c) over the last page that's really his rejection of the case that you're now putting up and that which he had accurately identified?
Upton	That's right at 126, yes, that's right. And of course once again he does not, as the other Judges do not, he does not address the fact that you need to look at the offending product and see whether they've moved far enough away from there. So that's
Elias CJ	Are you going to address us on the test for designing away?
Upton	There is no sort of concrete tick the boxes, get the answer test, it must be a matter of analysis and impression. So one has to look at what has been done and see whether objectively it has moved sufficiently far away to say that it can't be regarded as infringing.
Tipping J	What would you say to the proposition that whereas for copying, objective similarity can lead to an inference of copying. If you're in a designing away situation you are looking as to how much objective dissimilarity there is so as to suggest an independent design path. Would you
Upton	Yes that's the issue
Tipping J	That's the issue

Upton In this case

Tipping J And insofar as questions of similarity

Upton It's not the issue; it's a question of dissimilarity.

Tipping J Dissimilarity

Upton Yes.

Tipping J It's moving away from an accepted copy.

Elias CJ But is that a matter of evidence? The conclusion must be similarity, dissimilarity simply being an indication of whether it's sufficiently

Tipping J I'm not posing it as an onus, I'm posing it as an evidential

Upton No it's a fact, it's a matter of fact.

Tipping J And evidential tool in the obverse way to objective similarity being an evidential tool towards proof of copying.

Upton So you look at the offending article and then you look at the Holdfast SuperBonder, which is the offending article, you then look at the Holdfast UltraBonder and you note, you note the differences and you then as I say you're really, it's difficult to define because it's impressionistic but you're looking very much I suggest at analysing and impression. And it's not a subjective issue it's an objective issue and you're not dissecting into individual parts

Tipping J But is it also helpful to enquire as to how much of the original, forgive the words, skill and labour went into the copyright work is manifested if you like in the copier way? That must be part of it Mr Upton because the essence of copyright is to protect the skill and labour.

Upton That's right and so you look to see if that's been taken.

Tipping J How much of it has been taken if you like, whether a substantial part of it has been taken.

Upton That's right.

Tipping J The word 'substantial' of course being one of the more difficult words in this field because it is very much a matter of impression rather than analysis.

Upton Yes Your Honour in *Bonz and Cooke* talked about analysis and impression but that was not in an *Elanco* situation, that was in the conventional, what I call a conventional case, but at the end of the day it's very much impression.

Tipping J Yes, yes. Well I think I think I chose that phrase because of the fact that in certain types of copyright cases it may be more analysis than impression and in certain others it may be more impression than analysis.

Upton Yes, yes, but you can actually go through this Your Honour and actually pick the features of the offending article and see whether those features appear in the UltraBonder, but at the end of the day you have to look at the overall impression.

Tipping J But you've got to be very careful haven't you that you don't slip into a passing-off mode. It's really a design mode not a passing-off, visual appearance being the ultimate determinant, mode?

Upton That's right, because you don't do a visual comparison I'd be submitting.

Tipping J Well you must have a visual comparison as an element in it. A blind man would be rather handicapped Mr Upton

Upton Yes of course Your Honour, but that's my point, you're not doing your passing-off comparison it's

Tipping J No, no, you're not doing a passing off comparison

Upton That's my point, now interestingly enough Justice Baragwanath in his decision actually starts referring to passing off concepts. I don't know if Your Honours noted that in Justice Baragwanath's decision but that's the very thing you mustn't do because this is not a passing-off case.

McGrath J I think he made it plain that he was just taking some language from passing-off cases appreciating that it wasn't directly relevant to apply the concept of passing off. This was on the question of whether it was commonplace I think.

Upton Yes I just need to double-check that Your Honour.

McGrath J I just wondered whether you were making a bit much of that passage.

Upton Yes, I'm not relying on it as part of my argument. I just note in passing that he did refer to passing-off concepts. I then just want to say a few words about the question of copying a substantial part and in my submission you look at the pirated items, the items that appear in the UltraBonder, you look at those on their own and consider whether they're a substantial part of the offending SuperBonder work and my submission is that you actually ignore the Chevron. There's a Chevron on the, I'll just show you the Chevron. If you have a look at page 542 in the bundle and in the bottom third of that picture there's what has been described as a Chevron or an inverted 'V' and my submission is that you ignore that. You look at the pirated items on their own and then ask whether they are a substantial part of Henkel's copyright work and

McGrath J	Can you just help me with what 542 is. I can see a Chevron their but is it more helpful in the drawings than the images you've attached to your submissions?
Upton	The reason I'm giving you that one Your Honour is because it's in colour.
Blanchard J	So are the ones attached to your submission.
Elias CJ	Where's the Chevron?
Upton	Your Honours' submissions have the exhibits in colour?
Blanchard J	Yes.
Upton	Well in that case that case that's fine.
Blanchard J	That's why I thought you'd attached it.
Upton	It's just that on my copy they're not in colour and I haven't
Blanchard J	The one that's missing from here is anything from Fix-It, because the case that you have to meet is that it's Fix-It that's the source of a lot of what appears in UltraBonder.
Upton	Yes but I start with a finding, yes I start with a finding in the judgment of Justice Harrison at paragraph, it's in the casebook at page 81. Here the Judge says Mr Henderson admitted that the Blue Image Design was the source from which Holdfast SuperBonder package was derived. Mr Henderson admitted that when instructing the printer to prepare a new package he directed it to use the SuperBonder packaging, that's the copied product as a starting point and then he says he agreed that the combined evidence of Henderson and Towes established the redesign was an alteration, so I've got that finding.
Tipping J	I'm sorry to keep coming back to the question of the test Mr Upton but I see this as lying very much at the heart of what this case is all about. *Copinger* says, and I'm referring to para.3.132 that you can gain some assistance when you're designing away from an existing work whether or not the new work has sufficient originality to justify it's being regarded as a copyright work in itself. Now although the point is not put quite as precisely, it seems to me that a concept of that kind could be of some use.
Upton	Yes, it's difficult
Tipping J	It is a difficult
Upton	I find it difficult quite frankly Your Honour to actually formulate precisely what the test is and that's why I come back to Her Honour the Learned Chief Justice that's impression and

Tipping J But it may be helpful to ask oneself would this UltraBonder drawing, the drawing underlying UltraBonder if you like, qualify as an original work as against what was known or what existed at the time

Upton Yes I agree with Your Honour and then I answer it by saying no.

Tipping J Well you would say no and Mr Finch will no doubt say yes, but isn't that getting, when one's looking at these issues conceptually, you're looking at whether enough independent skill and labour has gone into the competing version.

Upton That's right.

Tipping J And that's very similar to whether or not enough skill and labour has gone in to create an original work in the first place.

Upton The original, that's right, and I've analysed all of that in my written submissions but you also have to roll into that I suggest the fact that there is an infringing work which is given to the designer as a starting point and say

Tipping J Oh yes, of course.

Upton And say there's the starting point.

Tipping J I'm not talking about the facts of this case, I'm trying to conceptualise in my mind what might be helpful indicators if you like without anything ultimately driving the final conclusion. Yes I accept that as one of the ways in deciding whether or not there's originality.

Elias CJ But would that be limited to the differences, originality in the differences? Is that was the tests suggest it is?

Upton No.

Tipping J Well what *Copinger* says is in determining whether this is a work which makes some use of an existing work in determining whether the work is original and entitled to copyright, which if it were entitled to copyright it could hardly be regarded as a breach of a copy of an existing, the work must be looked at as a whole and if notwithstanding that the author has used existing subject matter, he has expended a degree of independent skill, labour and judgment, he will be entitled to copyright protection for his work as a whole. It is wrong to attempt to isolate parts which are not original and argue that the copyright subsists only in the remainder, well that's a different point.

Upton That's right, yes.

Tipping J	But it's that conceptual approach of equating it in a reverse sense with whether or not you had sufficient originality to be an independent copyright work.
Upton	Yes, yes Your Honour.
Tipping J	It's not precisely the point that *Copinger's* dealing with there but it seemed to me that there might be some parallel.
Upton	That's right, and then when you come to look at this case on the facts you then factor in as I said the earlier offending product and you also look at the evidence of *Roband* on similarities.
Tipping J	And you also bear in mind Lord Justice Goff's that if you start of with an infringing work and you don't go back to scratch, you're well on the back foot.
Upton	That's right, yes I agree, and Justice Baragwanath recognised that but he then didn't do the actual comparison, he didn't do the correct analysis.
Tipping J	Well I just wanted to put that forward to you Mr Upton because at the moment I find it reasonably persuasive.
Blanchrd J	Are we going to do the actual comparison?
McGrath J	I think Mr Upton was just about to do that because he'd got onto the Chevron and he was telling us not to pay any attention to the Chevron and I'd like to hear how in relation to that and other differences why he can justify for example why doesn't the Chevron element indicate a measure of independent skill and judgment in the UltraBonder design?
Upton	Well we're looking at the issue at the moment Your Honour of copying a substantial part?
McGrath J	Yes.
Upton	And when one looks at that issue the following features are significant.
McGrath J	Yes.
Upton	And there are five or six of them. If I give them to you that may help.
McGrath J	Is this in your written submissions?
Upton	No, no.
McGrath J	No, right oh, thank you.

Upton No, no, these are just some points I'm giving you which may help. The first thing is that you look at similarities rather than differences. The second point is that you look at quality not quantity.

Elias CJ What on earth does that, oh you're going to elaborate on this. I just grasped for what it means.

Upton Yes, well if I take Your Honour

Elias CJ Sorry I don't mean to interrupt you. Go through your list

Upton No, no, let me take the Mona Lisa as an example. The Mona Lisa is a painting, I'm trying to remember back now to the Louvre, but the Mona Lisa as a painting actually has more than just a head.

Elias CJ Yes.

Upton But if you copy the head that may be immediately seen as a copy because you're actually copying the key feature in the painting, so it's quality rather than quantity. You don't need to copy the whole painting to say that this is a copy of the Mona Lisa.

McGrath J So it's copying the striking feature as opposed to the common place feature, is that what you're saying?

Upton It's normally expressed as quality rather than quantity and I'll give you some case law on it. If you look at *Designer Guild* for example

McGrath J Yes.

Upton Can I give you the case references for the first point that you look at similarities rather than differences, you're focussing on what's been taken, I'll give you case law reference as we go on each point.

McGrath J Thank you.

Upton Looking at similarity rather than differences and you focus on what's been taken, that's *Bleiman*, I won't go to the cases, I'll just give you the references, that's *Bleiman* at page 679, Justice Gault.

Tipping J That's in a conventional case not in an admitted copying design away case.

Upton That's right and I want to come back to that when I've laid the foundation as it were. But that's *Bleiman* at 679 and *Designer Guild* at 116. The second point I said was it's quality rather than quantity and that's *Designer Guild* at 121 and 125.

Tipping J *Ladbroke*

Upton	And that's *Ladbroke* as well as *Designer Guild*. The third point is the importance to the copyright work is the key. Whether the part taken is substantial determined by quality rather than quantity it depends on its importance to the copy right work, it does not depend on its importance to the defendant's work. The next point is that you don't
McGrath J	And the authority for that?
Upton	Oh that's *Designer Guild* Your Honour.
McGrath J	At?
Upton	At 125. The next point is that you don't dissect what's been taken into its individual parts. I mean obviously you have to identify them but you don't then dissect them into individual parts and that's His Honour Justice Tipping's decision in *Bonz and Cooke*.
Tipping J	A very shaky authority Mr Upton.
Upton	A very useful decision Your Honour at pages 219 and 220 and I'm pleased to say Your Honour that the House of Lords is in step with Your Honour on this as well, and *Designer Guild* at page 119
Blanchard J	Unconscious plagiarism.
Tipping J	Sorry, that was page 119 was it?
Upton	119, *Designer Guild*, this is about not dissecting into individual parts, that's at para.19 on 119. You don't deal with a copied feature piecemeal, you consider the accumulative effect and the last point is that you do not do a visual comparison between the two works.
Elias CJ	What does that mean?
Tipping J	Yes it's a little blunt isn't it?
Upton	I'm reading from the House of Lords Your Honour
Tipping J	Which speech?
Upton	This is Lord Millett at page 125. He says at para.42, he says a visual comparison, he says the only issue is whether the features represented are a substantial part of the copyright work. A visual comparison of the two designs was not only unnecessary but likely to mislead.
Tipping J	I think Lord Scott has something to say which shall we say waters down Lord Millett's observation in that
Blanchard J	I frankly find that incomprehensible.

Elias CJ Well particularly if it's a matter of impression.

Anderson J If this is your personal impression, you don't compare.

Blanchard J I mean we're not going to look at any of these things but we're going to decide whether there's a breach of copyright, come on.

Upton Well those are the factors that I've identified from the case law Your Honour and whether or not you look at the competing works, whether you do the visual comparison, the other propositions are well established.

McGrath J This is solely on the question of substantial part of course isn't it?

Upton Yes, that's right.

Tipping J Is it not helpful to borrow some of the phraseology and I remember somebody saying, is it Justice Gault in *Bleiman,* that it must be the essence of the copyright work that has been taken.

Upton Yes that's right, that's right.

Tipping J That is no more precise but at least it gives some sort of flavour.

Upton Yes it did and in fact I used that phrase in front of Justice Harrison that it must be the essence of the work which is

Tipping J And you've got to try and identify the essence of the copyright work. What makes it the work it is if you like and then say whether that essence is reproduced in the infringing work.

Upton That's right.

Blanchard Is

Upton And then

Blanchard J Sorry,

Upton Sorry Your Honour, please.

Blanchard J Is what Lord Millett getting at in that rather cryptic phrase the idea that if you look at the end product of the alleged copying and do a visual comparison with what it came from, you may get distracted by the fact that there's a lot more in the finished product?

Upton Yes I think that's the issue because that takes me back to the first point Your Honour, that you're looking at similarities rather than differences, and if you

Blanchard J So you're looking to see whether a substantial amount's been extracted, well it may have been, and then put into a much larger

Upton Framework

Blanchard J Framework where it doesn't look like a substantial part, but it's not whether it's a substantial part of what it goes into, it's whether it's a substantial part of what it comes out of.

Upton That's right, yes I think that's what he's saying because we come back to similarities rather than dissimilarities in this particular exercise.

Tipping J Is it also helpful to remind oneself that the expression 'substantial part' has not been construed as the most part or the greater part.

Upton That's right.

Tipping J That's where question of quality as opposed to quantity comes in.

Elias CJ The essence notion.

Upton Yes it's the essence. I think the essence as a concept captures because it can be quality rather than quantity.

McGrath J Mr Upton I think you were referring on the question of quality to Lord Hoffmann's judgment at page 125. That was one of the authorities you gave and I wonder if you could just point out the precise passage in his judgment.

Upton No, it's Lord Hoffmann at page 121

McGrath J 121, sorry, that's what I meant, 121.

Upton It's 121 and it follows on. He refers to *Ladbroke* and then he says *Ladbroke* and of course I should interpolate here Your Honour that *Ladbroke* is one of the seminal cases in this area. He says '*Ladbroke* establishes that substantiality depends on quality rather than quantity'. There's just one line that he refers to.

McGrath J Okay, thank you. He doesn't go on to elaborate of what he says quality indicates? I mean you've mentioned essence very properly but

Upton That's right.

Blanchard J Isn't it summed up in the next point that it has to be something that was of importance to the copyright work?

Upton Yes and this Your Honour is found in the speech of Lord Millett. Could Your Honour Justice McGrath go to page 125?

McGrath J Yes.

Upton If you go to 125 you'll see what His Honour Justice Blanchard may be referring to about the eighth line down, or sixth line down. This is a matter of, the question is whether what has been taken constitutes all or a substantial part. This is a matter of impression, for whether the part taken is substantial must be determined by quality rather than quantity and that's what Lord Hoffmann would say. It depends on its importance to the copyright work.

McGrath J Thank you, both of those are helpful, but can I just come back to a question I put to you before. Is it an indication that the necessary quality is not there if in this case the arrangement were a common place sort of thing?

Upton No, no. What we've got here in this case are a collection of common place factors – colours

McGrath J Yes but it's the collection or the arrangements that the essence of the copyright isn't it?

Upton Yes it's the arrangement or as His Honour Justice Tipping said in *Bonz and Cooke* it's the collocation. It's the arrangement or the collocation. So you could have

McGrath J Yes but arrangement is the word I'm more familiar with. Does that mean anything different to collocation?

Upton No.

McGrath J Thank you.

Upton If you look up the word 'collocation' in the dictionary you will see it says amongst other things, it says 'arrangement', but

McGrath J So if the arrangement were commonplace would that be an indication that perhaps the necessary quality or substantiality wasn't there?

Upton I'm sorry, just repeat that?

McGrath J If the arrangement were on the facts you were to say well that's just a common ordering of various items in a particular drawing or artistic work or display or whatever, would that indicate that it didn't have the necessary quality?

Upton It could do, it could do. It essentially depends on the facts Your Honour in this area so I could make an arrangement which is not a breach of copyright. On the other hand perhaps rearranging them I could have an arrangement which is a breach of copyright so it basically depends on the particular case at the end of the day

Tipping J	It's more likely to bear on originality I would have though rather than on the qualitative element of a substantial part. In other words if it's just a commonplace arrangement of commonplace things then it may be vulnerable to lack of originality, but once it's passed that threshold then it's very unlikely to fall at the substantial copying point as a result of the commonality if you like of the various integers or the arrangement of them.

Upton	That's right because the originality has already been established. Now in this case, and I come back to a point Mr Justice McGrath that I made earlier, my argument is that originality is established.

McGrath J	Yes, I understand the point.

Upton	I've been talking so far about the situation where the Holdfast work copies the Henkel work. That's the classical copyright breach situation. Now I just want to talk about the variation on that which is what we actually have here where we have an admittedly offending work and then a substitute work – in this case it's UltraBonder – and whether the UltraBonder can be regarded as moving sufficiently far away to be categorised as an independent work because that at the end of the day is what we're looking at here.

Elias CJ	Just before you do, because I'm still thinking about the exchange earlier about differences, that does seem to be and I suppose the cases are not dealing with designing away, but it does seem to be inconsistent with the emphasis on the importance to the copyright work to look to differences in the pirated version.

Upton	The way in my submission you deal with this where you're looking at what I call a modified version, you still look at whether there's an objective similarity. You're still looking at whether there's an objective similarity between Holdfast and the Cipidue drawings but the significance in my submission of the, admittedly infringement work, is that it allows the inference to be drawn more easily that it was derived from that original Cipidue drawing. That's how I put it. And I'm taking that proposition from *Bleiman*.

Tipping J	That may be better.

Elias CJ	Yes I think that is better.

Blanchard J	Do you ask what new elements appear in the ultimate work here, UltraBonder, and then ask where they may have come from?

Upton	No, with respect I maintain you still look at what are the similarities between the UltraBonder and the Cipidue. You don't look at the differences or the new elements; you look at the similarities.

Elias CJ Yes.

Upton You always do that but because there's an offending work which is the starting point on the evidence that allows the inference to be drawn more easily.

Blanchard J Yes that's helpful.

Upton And Your Honour can I just give you the reference to that. That's *Bleiman* at page 678 and this is Court of Appeal and this is 678 at line 46 and it's quite a short sentence. I'll just read it. And this of course is an interlocutory case they're looking at, an inter-injunction case. 'We considerable it's arguable that even in the modified version of the game is published there is sufficient objective similarity to the appellant's works, and that's comparing UltraBonder with Cipidue and ample basis for the inference that it was derived from those works and that's where you fit in your offending Holdfast **SuperBonder.** It's difficult Your Honour to actually express it in words

Elias CJ No it's a matter of evidence, it's a matter of evidence really isn't it?

Upton Yes that's right.

Elias CJ And the emphasis on differences rather than similarities may be why in the Court of Appeal there was emphasis on originality, because once you're looking at the differences you're trying to establish whether they're appropriately the subject of copyright in themselves and that may be why the Courts, which you don't get to if you're emphasising similarity.

Upton Similarities, and that's where Justice Baragwanath spent much of his discussion was looking at whether there was originality sufficient to justify copyright protection which at that stage of the exercise it should not have been. He should have been looking at substantial

Elias CJ Well he was looking at the infringing work at that stage.

Tipping J I suppose this is fair comment because it is ultimately still a question of whether the work in suit is a breach or an infringement of the copyright work.

Upton That's why I say repeatedly Your Honour, you've got to go from UltraBonder and look at the relevant document

Tipping J And the fact that you've got an intermediate copy

Upton It makes it a lot easier for me.

Tipping J Is just as you say a good help along the way in an evidentiary sense as the Chief Justice has put it.

Upton	That's right and you roll into that, this is where I suggest you roll into the equation the circumstances in which the UltraBonder came to be designed. I think you roll that into the equation to allow you to
Tipping J	Well you know something of the design path that may be helpful on that ultimate derivation question. It's not similarity in the end, it's derivation.
Upton	Yes, it's the derivation. Your Honours I'm concerned about the time. Unless Your Honours have got some other questions specific to this point I'd like to move on and just cover the respondent's submissions and then I'm done.
Elias CJ	Are you making new points?
Upton	No I want to go through their submissions because I just want to comment on them, on what they've said in their submissions. I obviously don't have written submissions on this but I just want to go through them.
Elias CJ	Justice Tipping makes the point to me that would this not be better left for reply but it seems to me that in fact it may be helpful to the respondents to hear any comments if they are additional.
Upton	Yes that's what I was thinking was that if went through and gave them an opportunity then to respond otherwise they wouldn't have it.
Elias CJ	Yes thank you.
Tipping	Well yes if they are truly new points beyond your implicit in your main submissions.
Upton	Yes, yes. Could I ask the Court to look please at their para.5? They say Henkel now claims that its monopoly resides only the collocation of the individual features of its copyright works. With respect we've always claimed that. Para.7 they say on a visual comparison the 13 individual collocated features of the Holdfast packaging are not the same as those in the Cipidue drawings. My submission is that you don't break them down in that way. At paragraph 8 they say uncertainty of monopoly collocation as claimed is unoriginal. The answer to that is that Henkel's unchallenged evidence was the packaging was unique and it didn't copy it from anyone else. Paragraph 10, talking about causation. Well I've taken you through that in some detail about how the UltraBonder came to be designed and I've dealt with that. That's Henderson and Towse. Page 3 there's a long discussion there about the pleadings. We've covered that. They talk in para.15 about being permitted. Holdfast would be significantly disadvantaged if Henkel were permitted to amend its pleadings at this late juncture. Well I just want to assure my learned friends that I'm not seeking to do that. At para.15, they're talking, no that's causal connection, and we've discussed that. Para.16 they say Mr Henderson's evidence didn't change between the exchange of briefs and trial. Henkel's never said it did.

Elias CJ	Mr Upton this isn't new material, this is really the substance of what you've already put to us. There's no need to emphasise where you take issue with the respondents.
Upton	Let me just go through then and I'll just have a look. Yes just at page 12, no page 13, line 50, they say there may have been significant effort involved in preparation of the design brief/market research by Henkel but that doesn't form part of the proceedings. On the contrary I submit it does form part of the proceedings. It was in evidence. It's the combined effect of all that work of Henkel and their designers.
Tipping J	Well this is a tilt here of originality.
Upton	Yes, that's right. I'm just having a look to see if there is anything else. No I think that probably covers everything and I will obviously reserve my right of reply. May it please the Court.
Elias CJ	Yes thank you Mr Upton.
McGrath J	Mr Upton before you sit down, we've got your emphasis on the similarity of features between UltraBonder and the Cipidue drawings in para.2.12 of your submissions. Were you making anything in relation to Holdfast's earlier design, the Fix-It design? I mean that's if you like was their own non-infringing packaging.
Upton	Your Honours looking at 2.12 of my
McGrath J	Well 2.12 seems to me that consistent with the submissions to us which we should focus on similarities, you've highlighted the similarities between the Cipidue drawings and the UltraBonder packaging, but I'm wondering if you make anything in relation of the earlier work, the earlier packaging work that was Fix-It. Fix-It being the first holdfast glue packaging as I understand it that was before any trouble emerged between the two companies at all.
Upton	No the earlier Fix-It packaging Henkel did not object to.
McGrath J	Yes, and there's no need for us to go and look at that to see what similarities, doesn't it help Holdfast if they can say well look we had particular features in our packaging at that time and if though there might be similarities seen now with the Cipidue they were the result of our own unaided efforts.
Upton	Absolutely and I'm sure that's what they're going to say. There are going to say that UltraBonder on analysis derived from Fix-It, that's what they're going to say.
McGrath J	But you haven't talked about Fix-It at all and I wondered if you had any comment on that.

Upton	Oh I'm sorry, the short answer Your Honour is that UltraBonder on analysis derives its similarities from Cipidue drawings and not from Fix-It and I rely very much on the evidence of Mr Roband and the visual comparison of the similarities.
McGrath J	Right.
Upton	But I come back to the point that I made earlier Your Honour that I accept that it depends very much on the arrangement or particular collocation because we are dealing with, that has to be recognised, common place features.
McGrath J	And it's a totally different arrangement from Fix-It is your point is it? That's what you're saying, yes.
Upton	Yes, if I take
Tipping J	And the colours are different too.
Upton	I was just going to say Your Honour that the key feature of all of Henkel's packaging is dark blue at the top. Now the evidence is that blue is a strong colour for reasons I don't understand but it's a strong colour and the Henkel evidence is that they particularly went for dark blue and having dark blue at the top, Fix-It always had red at the top. It's an eye-catching feature I assume but it's just one example of what I'm talking about, the fact that Henkel has always been dark blue. It's just one example of what I'm talking about, the fact that Henkel has always been dark blue. Fix-It had always been read and then they see this product in Chicago and they come back and mirabile dictu they produce a product with blue at the top and that's just a simple illustration of one feature that was taken from the Henkel Cipidue drawings.
Blanchard J	You haven't deigned to get into a comparison of the kind that you've just been making in response to Justice McGrath. You say you rely on the evidence of Roband, are you going to give us some references to that evidence.
Upton	Yes Your Honour I'm very happy to do that. I should explain that Roband gave evidence and then interpolated a witness and then he came and finished his evidence but his evidence starts at page 159, and if we look at page 162 he says at para.9 'in my view there have only been incremental changes between Holdfast UltraBonder and Holdfast SuperBonder and thus between Holdfast UltraBonder and Henkel Blue Image Design. It would have been a very easy exercise to move well away from Henkel Blue Image Design or the Holdfast SuperBonder packaging when creating Holdfast UltraBonder. This could have been done by changing the lay-out and/or changing the colours or the position of the tubes, bottles and/or photographs or a combination of all or any of these changes yet Holdfast UltraBonder retains the same key features as

Holdfast SuperBonder packaging which in turn copies Henkel Blue Image Design' and then he goes, well there's para.13, he then goes through the comparison between UltraBonder and Blue Image Design

Tipping J	Isn't, and I don't want to distract you and I'm sure it will be helpful to have all of these, it's relativity short evidence anyway, but isn't the significant feature that the trial Judge substantially is not expressly by clear implication prefer the evidence of Roband to the other lady.

Upton	Yes, to Cosley,

Tipping J	To Cosley, and it was his assessment on a matter of fact ultimately that the Court of Appeal reversed.

Upton	Yes that's right and then you get into these issues about trial Judge and the advantage of the witness and what have you and that of course is an issue that concerned the House of Lords in the *Designers Guild* case with the Court of Appeal in that case overturning the trial Judge, and so if we substitute this Court for the House of Lords

Tipping J	I mean the trial Judge got it wrong in that he focused on the packaging as opposed to the underlying drawing but on this issue where the packaging is no more than a 3D representation of a 2D drawing, I wouldn't have thought his error of law was particularly material on this issue and I would have thought with respect that that probably one of the better points you can raise.

Upton	Yes that's right but Your Honour accepting everything Your Honour is saying, I just want to pick up one point with respect that he got it wrong when he compared the packaging, can I just ask you please and I

Tipping J	Well I didn't really want a hare running Mr Upton because if it's

Upton	Well this is just a small baby hare this one Your Honour. Can I just say to you that Justice Harrison did actually do the correct comparison but where he went wrong was that he compared the offending product with all the drawings rather than just one of them but he did make the comparison with Cipidue drawings.

Blanchard J	Well he was rather encouraged to do that.

Tipping J	Point taken.

Upton	Your Honour I accept that immediately, but he did make the comparison with the drawings.

Tipping J	Well I want to hear from this respondent what error of law the trial Judge made relevant to the weight normally given to a trial Judge's assessment on this point.

Upton	Well in my submission he obviously got it right.
Tipping J	Well that would be your submission.
Upton	Yes but I'm entitled to say it Sir because of the way he went about it as you can see from the evidence that was available to him.
Tipping J	Yes, alright, well we understand each other Mr Upton thank you.
Upton	Yes thank you and that completes my submissions. May it please the Court.
Elias CJ	Thank you. Mr Finch it's close to 1pm. I haven't spoken to my colleagues to find out whether they'd be prepared to sit at 2pm. Is that alright? It's probably best if you start at 2pm so well take the lunch adjournment now and start again at 2pm. Thank you.

12.55pm Court adjourned
2.05pm Court resumed

Elias CJ	Yes Mr Finch?
Finch	Thank you Ma'am. Now Holdfast has three responses in this appeal and I'll just run through them in summary and then I'll speak to them in a little more detail. They're also in terms of my synopsis of submissions the order that I deal with them here is very much in the order that they're dealt with in that written synopsis. Well the first is a pleading point and that is that the claim is now put on a basis that Holdfast breached copyright in the Cipidue drawing via SuperAttak and in my submission that's never been pleaded. The second whether it's appropriate for this Court to interfere with the findings of the Court of Appeal and in my submission because of the way in which the case was pleaded and argued Justice Harrison never carried out a comparison of the Cipidue drawings and the UltraBonder product and because he didn't do that as he was required to do by the authorities, the Court of Appeal had to put themselves in the position of the Court of first instance and carry out that comparison, in my submission this Court should only interfere of the findings of the Court of Appeal if it can be shown that the Court of Appeal erred on a point of principle and I say that there has been no error of principle or of the application of the relevant legal authorities and then the final point if you're not with me on the first two points I'd say that even if the Court of Appeal did err on a point of principle, if you go back to first principles and carry out the correct comparison, there's just insufficient objective similarity between UltraBonder and Cipidue to amount to a finding of infringement.
Elias CJ	Sorry, insufficient?

Finch Object similarity.

Elias CJ Yes.

Tipping J Not enough objective similarity to infer copy.

Finch To infer copy. Well infer is probably the wrong word Sir because that goes to whether there's a cause of connection and in this case there's an admitted copying of SuperAttak which became Holdfast SuperBonder and then was modified to UltraBonder so I don't think we're in the realm of inferring anything. As Your Honour pointed out the ultimate task is simply to take UltraBonder, compare it to the closest of the Cipidue drawings and see whether you think it's an infringement or not.

Tipping J Is this a submission, it's not a reproduction?

Finch It's not a copy.

Tipping J Not a copy, yes.

Finch And in my submission that is the heart of the case. If it's not a copy on an objective assessment, there can't be any finding of infringement notwithstanding that Holdfast started with an admitted copy. Now I'll turn to my first point which is in relation to the pleadings, and I say that Holdfast's case is that it copied SuperAttak to produce SuperBonder and then it reintroduced aspects of earlier packaging to produce UltraBonder so it went and modified that SuperBonder copy and notably one of the packages that went back to is Fix-It and I'll ask you just for present purposes to turn to Fix-It in the bundle, it's in the yellow and there are two pages I'd like to refer you to. The first is 488 and that's a photograph of one aspect or one variant of the Fix-It SuperGlue packaging and wave to remember that this is a collocation case. I'll take you through the aspects of the claim to collocation that the plaintiff Henkel's advance in comparison to Fix-It and we'll see in my submission I'll demonstrate that most of the collocation is present in Fix-It. The other

Tipping J Are we talking about the pleadings?

Finch Yes.

Tipping J Are you saying that the Cipidue via SuperAttak is not open on the pleadings, that the copyright work which they're now relying on was not pleaded?

Finch That's correct Sir, yes. I'm just scene-setting in terms of familiarising you with Fix-It because I don't believe that Fix-It was attached to Mr Upton's submissions and I'm not sure whether you know what I'm going to be talking about when I talk about Fix-It later on.

Tipping J I find it slightly diverting. We're talking about pleadings

Finch Sorry Sir I'll move on and discuss the pleading point then. Just if I quickly can though, page 566 of the same bundle, that's a further variant of the Fix-It packaging and I'd just ask you to note the positioning of the product, because in the first one it's on the right-hand side of the card and in this one it's in the middle of the card, so there are some variants in terms of the way in which the information is set out.

Tipping J Yes, while you're on Fix-It can you tell us in a nutshell what relevance Fix-It has to this case?

Finch This Sir is a collocation case and if I understand Mr Upton correctly, earlier this morning he said that it's derivation which is important. It doesn't matter what it looks like. Now I take an issue with that, but if that is the test then Holdfast's uncontested evidence that it reverted to Fix-It when it modified SuperBonder breaks the causation or the chain of causation between those aspects which can be shown to be taken from Fix-It.

Tipping J Reversion to Fix-It breaks causal link.

Finch That's right. Holdfast can't be accused of taking from Henkel what it's already used in Fix-It and re-introduced into UltraBonder. It must be able to revert to its earlier packaging styles and designs.

Elias CJ You said that this was a pleading point. Are you going to take us to the pleadings?

Finch I will move on to the pleading point, sorry Ma'am. So advancing the pleading submission at least since the exchange of Mr Henderson's brief, Henkel's been aware of the admission of copying of SuperAttak and Henkel's case is now that Holdfast has breached copyright and Cipidue via its SuperAttak, and in my submission Henkels never pleaded copyright or copying of the SuperAttak packaging and I turn to the pleadings and they are at page 96 of volume 1, the relevant aspect of it. And I also say not only do these pleadings never mention SuperAttak, they don't mention Cipidue. The first paragraph is para.14. It says 'The Plaintiff is the owner of the copyright in the following original artistic works as defined in section 2 of the Act

McGrath J Sorry, what page of the bundle are you on?

Finch Sorry Sir, page 96.

McGrath J 96, thank you.

Finch Paragraph 14.

McGrath J Thank you.

Finch And then it talks about the selection and layout colours and instructions over the page of the

Tipping J Wait a minute, wait a minute, 'works in the plural produced for the manufacture of', that clearly denotes to my mind a drawing.

Finch Yes well I heard Your Honour's comment earlier today about that. Even if you're prepared to construe that pleading as broad enough to encompass the Cipidue drawings, my next point is that if you move on to

Tipping J Well are you arguing that it can't?

Finch Well I am by reference to the way the case was run and the way the remainder of the pleading reads, because on page 97, para.19(b) that is where the plaintiff sets out the particulars of the substantial part of the copyright work that it says has been reproduced and we can run through these because these are clearly not a description of the Cipidue drawings. Mr Upton's submission

Elias CJ So when you say this are you referring back to para.14?

Finch I'm saying this description Ma'am on page 98

Elias CJ Yes, 98

Finch Yes

Elias CJ Oh I see, yes, yes.

Finch Which is a description of the substantial part that's been said to have been reproduced in the Cipudue drawings, if that's what the earlier paragraph refers to, the majority of these factors can't be found in the Cipidue drawings and Mr Upton has made a submission this morning that the closest Cipidue drawings on page 458 of the bundle. Excuse me and I'd ask you to open the bundle to page 458 and keeping page 98 open, the first factor as part of these particulars is a red and blue card with a blister pack and there is no blister pack present in any of these drawings.

Tipping J Well the drawing that's on 458 are you saying hasn't got a representation of the plastic or celluloid or whatever it is cover for the tube of glue.

Finch That's correct Sir and that's what a blister pack means.

Tipping J Well

Elias CJ That's just an attachment.

Tipping J Alright, carry on.

Finch Well the next

McGrath J So the product's attached to it and the complaint is there's no pack around it?

Finch The point that I make and it should become clear as I go through, these particulars are a description of a product and they're not a description of a product that's depicted in the Cipidue drawings, they're a description of QuickTite, and my point is that it very specifically says a red and blue card with the blister pack. Later on it actually talks about the product so it's holding a blister pack out as being an important part of what they say has been pleaded. Roman numeral 2 to Roman numeral 5, they are present in the Cipidue drawing but then Roman number 6, a blister pack containing the product – again the blister pack isn't there. Roman numeral

Tipping J I wonder if we could simplify this. Are you saying that because of the reference in para.14 specifically to SuperBonder and QuickTite, the only underlying drawing that could be implicitly pleaded is the drawing underlying SuperBonder and QuickTite?

Finch That is part of my submission, yes Sir.

Tipping J Well that is the essence of it isn't it. You're trying to say and with what success remains to be seen, that in no way did this pleading signal the present reliance on the SuperAttak Cipidue drawing. It may signal the drawings as a group but when you particularise two products it doesn't signify the one that relates to SuperAttak.

Finch I'm saying that these particulars were put into the pleading on a specific request from the defendant that the plaintiff identified the substantial part of the copyright works that it alleged to have been infringed. These are a description of the QuickTite, they're not a description of any other product and they're certainly not a description of anything that appears in the Cipidue drawings because there are too many factors in here which aren't present in the Cipidue drawing.

Elias CJ Can you, I'm just wondering whether it would help me a little if you just reminded me, where's the QuickTite pack, where do I see that?

Tipping 353.

Elias CJ 353, thank you.

Finch And perhaps Ma'am if I can point out some of the more obvious ones. The Roman numeral 6, sorry 7, on page 98 says two photographs vertically positioned on the lefthand side of the card. If you look at page 458 there aren't photographs in that drawing, there are boxes but there's no indication in that drawing that there should be photographs in there. If you look at QuickTite there are photographs in the position that that particular says. If you move down to the next one, the words 'non clog

cap or thin nozzle or non drip formula' in the Cipidue drawings are gel control, actually it's lift and lock.

Elias CJ So that's why I'd quite like to see the QuickTite illustration. Do you have a page reference?

Finch There is no illustration of the QuickTite product and that's part of the defendant's case, or the respondent's case is that these underlying drawings of the product, if the claim is in relation to product as we say it is, have never been produced and so there's a gap between Cipidue and the end product.

Tipping J There's a gap between Cipidue and QuickTite and SuperBonder.

Finch That's correct and there's also Sir a gap between Cipidue and SuperAttak because the SuperAttak package has a number of changes to it which aren't present on page 458, so somewhere along the line someone's taken that 458 and made modifications to it, but we don't know what modifications they made, or we do, assuming that we can infer that the SuperAttak finished product came from 458, but we don't know who did them and we don't know whether it was Henkel, and if it wasn't Henkel, how Henkel came to own the fruits of their labour.

Tipping J Your point really boiled down is extremely simple. By pleading SuperBonder and QuickTite in response to particular request, they have not pleaded SuperAttak.

Finch No, that's correct Sir.

Tipping J Is that in its simplest manifestation? I mean I'm sure there are all sorts of subtleties around this but is that the essence of it?

Finch The essence is that they've never pleaded Cipidue and that's how they're running their case now.

Tipping J Oh I think they've pleaded Cipidue alright in 14. I think that's a very long shot to say they've never pleaded Cipidue but your point surely is, a better one is that when they've particularised they've not particularised SuperAttak.

Finch Well except Sir that the point of this paragraph is to tell Holdfast which parts of the copyright work are said to have been reproduced.

Tipping J That's exactly what I'm saying.

Finch But this isn't a description of the copyright work that they say is pleaded so you can't divorce those two things in my submission. You've got a pleading as to a work and then you've got a description of the parts of the work which are alleged to have been infringed and in my submission if

the parts are not the Cipidue drawings how can you say the pleading is to the Cipidue drawings.

Tipping J — I understand your point. You're saying that when you first start at 14 you'd think it could perhaps include Cipidue but when you read on to 19 etc you'd have to be certain that it doesn't.

Finch — We realise it can't because it's a description of QuickTite.

Tipping J — Yes, so they start with a possibility of Cipidue but the particulars exclude that possibility?

Finch — That's correct and as I'll try to expand, it's not just the particulars, it's the evidence that was led at trial and also the way in which Mr Upton argued the case at trial.

Tipping J — Well if this point's sound then nothing else matters.

Finch — I think the next points Sir reinforce the submission I'm making in relation to the pleadings themselves, so if I can move on to those next points, and this is a minor point but at para.15 of the pleadings the contention, and this is on page 97, the contention is made that 'the artistic works were made in Italy and/or the Federal Republic of Germany either by employees of the Plaintiff or by somebody who was commissioned by the Plaintiff'. Now if this was always a pleading to Cipidue, there's no need to have a bob-each-way because it's always been clear that the Cipidue drawings were created in Italy by Cipidue for Henkel on commission.

Elias CJ — So it's the reference to Germany you say is

Finch — German and/or Ma'am. Justice Chambers qualified this case as being a moving feast. These are examples of the lack of specificity if you will that the claim was advanced and argued. The next point is that the Cipidue drawings were never put to Henkel's own expert witness, Mr Roband, and I'll take you to, it's at volume 2, page 184, so that's green 184 and starting from line 2 'In the High Court the Cipidue drawings were set out at tab 35 of the common bundle. Mr Marriott is cross-examining Mr Roband and he says 'go and have a look at those drawings. You might want to flick through those, that's a set of drawings. Have you seen that set of drawings before'? And his answer is 'no'. So he's never been shown the Cipidue drawings when he provides his expert assessment as to whether UltraBonder is a breach of the thing which Henkel was claiming copyright in. And earlier on in that same cross-examination at page 178, line 11, Mr Roband clarifies what he was asked to do and he says 'I was asked if I could be specific, I was asked to compare the SuperBonder and UltraBonder packaging with the QuickTite packaging', and that's what he did.

Elias CJ — Sorry, where's that, what line?

Finch Page 178, line 11 through to 13 Ma'am.

Elias CJ Oh yes, thank you.

Tipping J Well that's odd.

Finch He was only ever shown QuickTite and asked to carry out a comparison in respect of that product.

Tipping J Are you saying that suggests that at stage that their focus was clearly not on SuperAttak?

Finch It wasn't on SuperAttak and it wasn't on Cipidue, it was on the end product, and that's what their case was Sir. Now the next point is that regardless of what Mr Upton might say now, because it suits Henkel to say it now in support of an appeal, it's pretty clear from the cross-examination, or at least an interjection in cross-examination that he himself considered examination of Mr Roband on the Cipidue drawings to be irrelevant, I ask you to turn to volume 2, page 185, well actually I won't read the entire passage but the passage of cross-examination of Mr Roband starts at page 184 and it's the question where he's being asked 'have you ever seen the Cipidue drawings before'. It continues down the page to the top of page 185 and then Mr Upton objects to the line of cross-examination over the Cipidue drawings and he says 'the issue is whether UltraBonder is a copy of the Plaintiff's products, SuperBonder or QuickTite. It's not whether it's a copy of 25,000 other possible items and it's important we come back to that issue'. Now in my submission that's

Tipping J It's so here is the heresy of the copyright seeing said to reside in the product?

Finch Yes Sir, because Henkel's own counsel objected to a line of cross-examination over the drawings which they're now saying form the basis for the claim. And if Mr Upton thought it was irrelevant then, it's no surprise that Justice Harrison didn't carry out that same comparison. There are two related points. My friends handed a copy of the submissions that were presented by both parties in the High Court and I won't take you to them but I would just like to make the point that on the strength of that interjection from Mr Upton, we didn't advance any submissions in respect of Cipidue at the High Court because we took that to be an admission that those drawings were irrelevant.

Tipping J Well he couldn't be relying on the product as a matter of law. You were being a bit foxy weren't you with all due respect?

Finch Well Sir you asked the question whether anyone had made submissions in respect of the inability to advance a claim on the basis of product and absolutely we advanced those submissions.

Tipping J You did?

Finch	Yes, because in our view Sir, and you'll agree I'm sure, that the product is a facsimile copy of something that came before and there's no copyright residing in that product. It must be in whatever underlies the product.
Tipping J	Of course.
Finch	And our point on that point is that it's not Cipidue because the product is different from Cipidue so there must be some intermediate drawing which Henkel didn't put into evidence and didn't lead any evidence as to ownership on it and that is why Sir there are a number of comments in the Court of Appeal's judgment about intermediate drawings because they're addressing that point.
Blanchard J	Did the Cipidue drawings came in in evidence in the High Court?
Finch	Yes they did.
Blanchard J	And what was said to be their relevance?
Finch	They were put in as examples of the line of work which presumably led to the products
Tipping J	I can understand the point you make because here they seem to be (a) disclaiming the Cipidue drawings and (b) confining the product to SuperBonder and QuickTite.
Finch	That's right, not SuperAttak.
Tipping J	Yes.
Finch	I'll just address Your Honour Justice Blanchard's comment. They were put in but they were never adequately explained as to what they were there for, so the causal link between Cipidue and the products which were being in our submission pleaded and argued was never made and that formed a plank of our defence in the High Court, it formed our defence in the Court of Appeal as well.
Blanchard J	So you effectively allowed them to come in without objection and just waited to see what if any use would be made of them?
Finch	Absolutely.
Blanchard J	And you're saying no use was made of them in the High Court?
Finch	Absolutely, and my friend said that I acknowledged in the Court of Appeal that we weren't misled by the way in which Henkel had pleaded and run its case, and he's absolutely right. We weren't misled but we were putting the plaintiff to the proof of the claim that it had advanced.

We deliberately chose not to lead evidence or not to cross-examine Mr Martinez because we knew that his evidence in respect of the development in originality was deficient, and then we relied on the lack of causal connection between Cipidue and the products which actually had been pleaded as a defence to the infringement action, and we were perfectly entitled to do that because it's the plaintiff's case to prove, not ours to disprove.

Tipping J — So is that a very good reason why, wrongly as it transpires, Justice Harrison simply focused on the product?

Finch — I think Justice Harrison

Tipping J — Because that's what the plaintiff was asking him to do.

Finch — Yes, and in my friend's closing submissions, he in support of, and I will take you to those, it's a matter of identifying where they are. These are the closing submission of the plaintiff in the High Court. Page 28, para.2.96 and then over on to page 29. This is the only aspect of the submission that deals with the evidence in relation to copying of a substantial part and objective similarity and it's quite telling that the, it's dealt with quite summarily by referring to the particulars in the statement of claim which we've already ascertained were particulars of a product and to the evidence of Mr Roband who had looked at QuickTite not at the Cipidue drawings.

Tipping J — So these are the particulars of QuickTite?

Finch — Yes. So in my submission given that context it's not surprising that Justice Harrison didn't carry out a comparison of Cipidue drawings. That wasn't the case as it was being run in the High Court.

Tipping J — Well there's two dimensions to that. There is (1) that it was a focus on a product not a drawing, and (2) it was inferentially a focus on a drawing. It was a different drawing from that upon which they now seek to rely.

Finch — That's correct. My simple point is that at the point in time when they received the evidence of Mr Henderson and he said that he copied SuperAttak, Henkel was well within its rights to apply to amend the pleadings and it should have done so, and it also should have made sure that the works that it was relying on could be linked to that SuperAttak product. Neither of those things occurred and that's why Holdfast carried on with its defence.

Tipping J — The implication being that if they'd amended your position might have been reassessed?

Finch — Almost inevitably our position would have been reassessed.

Elias CJ	What a very unattractive argument. I mean maybe totally right but very frank.
Finch	Yes.
Tipping	Well they're being extremely candid and their client was very candid I suppose one might say, sorry, yes your client was very candid but the inevitable didn't happen.
Finch	That's correct Sir and we say it can't happen now because things have moved on. The evidence was conducted and the arguments were led in such a way that we would now be severely prejudiced if an amendment to the pleadings were to be occasioned.
Blanchard J	Well Mr Upton has said they're not sought.
Tipping J	He doesn't second amendment in this Court, that much you're relieved of Mr Finch.
Finch	And in my submission Sir that means the claim fails.
Anderson J	Underlying your approach I suppose is the view that this is a commercial product and it will be supported or ditched depending on the commercial imperatives.
Finch	That's exactly correct Sir.
Anderson J	And in the area of intellectual property protection precision is important.
Finch	Yes.
Tipping J	This loose observation of Justice Baragwanath in his judgment about a need for clarity in the monopoly is perhaps a reflection of this point is it? It would with the greatest respect be a slightly more cogency if you like if it was related to this point rather than to a general observation during the course of a discussion on infringement.
Finch	I think Sir if you look at the Da Vinci code case, the certainty of monopoly argument comes out of the fact that the plaintiff wasn't able to define what the substantial part of the work is that it said was infringed and the comment was that if the plaintiff can't do it then how can anyone else. If the monopoly that you're trying to assert is incapable of definition by you and I can't even find it in the book that you're telling me because
Tipping J	They were perfectly capable of defining the monopoly by reference to SuperAttak in the underlying drawing. The simple fact is they did not put that in issue.
Finch	Yes.

Tipping J It's not really a conceptual point at all, it's a pleading point.

Finch Well it kind of is because the substantial part that they defined can't be identified in the works that they're relying on and that's very similar to the Da Vinci code where they said 'Holy blood, Holy Grail has these 15 factors which they tell the story, but when the Judge went to try and find them in the original work he couldn't find them so he said that leads to an uncertainty of monopoly. You're trying to advance something that you can't pin your own tail on, you can't tie down. Why should a defendant be required to meet that case?

Tipping J Well the irony is they could have tied it down but they didn't.

Finch That's correct.

Tipping J That's this case.

Finch That's correct, and now they're trying to do it because in my written submissions I've included a table which compares what's been pleaded as a substantial part versus what's now argued as a substantial part and there are some significant changes to the way that it's been argued before this Court as there were between the High Court and the Court of Appeal. Son unless Your Honours have any questions in relation to the pleading point I'll move on to the second point. It is related and that deals with the question of whether you should interfere with the Court of Appeal's judgment and in my submission, given the way that the case was pleaded and argued, Justice Harrison was never called upon to do a comparison between UltraBonder and the Cipidue drawings and accordingly the Court of Appeal had to do that, and when they did that they were acting as a Court of first instance in bringing their own judgment to bear on what's essentially a jury question, and the authorities make it clear that it's not appropriate for an appellate Court to interfere with that exercise unless there's been an error of principle, so the decision is wrong in fact or law and in my submission there is no such error. You only need to look at paras.74 and 75 of Justice Baragwanath's judgment. That's at page 32 of volume 1. Now I acknowledge that there is some unfortunate language in the lead-up to the ultimate analysis that His Honour carries out, but the last sentence, or the two sentences that my friend has taken you to half-way down para.74 His Honour talks about carrying out the comparison that he's been required to do and says that he had to do that because Justice Harrison failed to remove from the collocation matters of no originality. And then he goes on to say that

Tipping J But that's a classic error.

Finch Well Sir his next sentence makes it clear that the approach he took is the correct one regardless of what he said there, because he goes on to say that they include essentially all the factors which Henkel pleaded so that it is only their collocation, which Appendix 11 had infringed, that could

be said to be original. So he clearly recognises that he's got to look at the collocation as a whole, he's not to farm parts out when he's carrying out a comparison.

Tipping J Well I'm not sure about that. I'm not at all convinced that this next sentence cures the first sentence. He's basically saying you've got to take out factors of no originality and because they were all of no originality you end up with nothing.

Finch Well Sir in my submission he's harking back to a comment that was made in *Glogau* by Justice McGechan, and I'll take you to the authorities, which says that originality is relevant to the question of infringement.

Tipping J But how can you remove from a collocation matters of no originality because all copyright depends ultimately on matters of no originality. A novel is made up of the letters A to Z. It's that collocation that creates the originality; you can't remove the letters.

Finch Yes I understand that and I sympathise with the difficulty regarding the wording, but in my submission the methodology shows that he didn't do what it appears he's saying you should do.

Tipping J Well I don't think the next sentence cures it. If you can show that in substance that's not what he did.

Finch I can Sir at para.75. Perhaps if I can take you to the comment of Justice McGechan in *Glogau,* that's at tab 14 of the bundle

Blanchard J Now this is the replacement *Glogau*?

Finch That's correct Sir. I apologise, that was my fault. This was a case to do with Taxi log books of which the component parts weren't found to be particularly striking or original but the whole was still regarded as being original because it was the product of the author's time, labour, skill and judgement, and at page 270 there's an analysis of the oft-cited or quoted passage from *Ladbroke* which deals with the question of originality and I'll start it half-way down that passage at line 44. It's talking about the question of copying and it says 'if he does copy, the question whether he has copied a substantial part

Tipping J Sorry, what page are you on, I beg your pardon.

Finch Page 270 Sir.

Tipping J 270, line?

Finch Line 44.

Tipping J Thank you.

Finch The question of whether he's copied a substantial part depends much more on the quality than on the quantity of what he has taken and my friend made that submission to you this morning and I agree with that. One test may be whether the part which he has taken is novel or striking or is merely common place arrangement of ordinary words or well-known data so it may sometimes be a convenient shortcut to ask whether the part taken could by itself be the subject of copyright but in my view that's only a shortcut. The more correct approach is to first determine whether the plaintiff's work as a whole is original and protected by copyright and then to enquire whether the part taken by the defendant is substantial. So that's warning against a reductionist approach to originality. Justice McGechan carries on at line 11 and says in this passage also is to be found the response to the argument that the award of protection calls for a higher requirement of originality. Where the originality is low it's to be expected that anything other than almost exact reproduction will not support an inference of copying, amounting to infringement, whereas where there's a higher degree of originality in the work and 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, further there is to be kept in mind that independent work not derived from the copyright work no matter how close it might be because of incorporation of the unoriginal work will not infringe. And there's a similar sentiment that comes out of *Ladbroke* and that says that if the originality of your work arises because

Tipping J I find that last sentence really quite difficult - the further there is to be kept in mind sentence. Do you want to give any further assistance on it? Just at first reading Mr Finch, I'm not sure what the Judge is referring by incorporation of unoriginal work.

Finch I think he's talking about you have a low threshold of originality for something which has limited, sorry, a low threshold of protection for works which have limited originality and there's not

Tipping J Independent work doesn't infringe, fullstop.

Finch That's correct. That's right.

Tipping J There's no need to put this rather awkward gloss on it.

Anderson J Even if it replicates by chance.

Tipping J Even if it's a coincidental copy.

Finch That's right because the Act only prohibits against actual copying of the work.

Tipping J But anyway it's probably not central for this.

Finch Possibly not central to my point no Sir. The point is that under the Act the threshold for originality to prove subsistence of copyright is very low but this passage makes clear that when you come to infringement the originality is crucial because you only reap the fruit of your labour and so if all you've done is take a bunch of unoriginal items and put them together and possibly put them together in an unoriginal or commonplace way, your monopoly is extremely narrow. You can't then turn around and say well you've copied that and it doesn't need to be close, you've taken the essence of the work. The originality determines how much of a monopoly you're entitled to.

Tipping J Well the question of originality really marches with the question of substantial part doesn't it in that sense? In other words what is a substantial part made differ with the level of originality of the copyright work.

Finch Yes, well I would put it Sir that the breadth of monopoly, it's the other side of the coin, the breadth of monopoly that the Court will grant, how close it has to be, in linked to how original your work is.

Tipping J But these things are virtually never an exact copy. I mean if they are your onus is enormous, but I can understand the point that the question of the degree of originality marching with the concept of substantial power, is that essentially the point you're making?

Finch Yes, that is what I'm saying Sir, yes. And the difficulty that the Court faces in this case is that there's evidence of originality because Mr Martinez says I created this thing and I didn't copy from anyone else but there's no evidence as to how original the work is. And in light of this position that's being advocated in *Glogau*, in my submission what Justice Baragwanath is doing in the preceding paragraphs of his judgment, and those are the paragraphs that my friend took you to, he's trying to ascertain, he's not saying as my friend would have you believe or read this judgment, he's not saying these works aren't copyright works, he's saying I've accepted that they're original but how far should I take the extent of protection that Henkel's entitled to in this case? How original are these works? I've got no evidence from

Tipping J Are you able to point to any authority backing the crucial passage from Justice McGechan, that is from line 11 down to line 18? What does *Copinger* say about this sliding scale if you like between level originality and substantial part?

Finch Sir I'm not aware of any. The only other authority I could refer you to is *Ladbroke* which talks about if you're arguing about a collocation the substantial part can't be the unoriginal features

Tipping J Of course.

Finch Because that which is unoriginal apart from its

Tipping J It's a slightly different point.

Finch Yes.

Tipping J This sliding scale if you like is interesting.

Finch I'm not aware of any authority. I'll have my junior look for some Sir.

Tipping J Well you would have been aware of it by now I suspect Mr Finch if there was anything that was helpful.

Finch The policy behind that passage in my submission is correct though. The law will recognise virtually anything as being a copyright work provided you didn't copy it from someone else but how far you can take that in terms of enforcement will depend on how much effort you put into it. How original it is. You only get out what you put in. And I was making the point that Justice Baragwanath is trying to identify; he's not saying when he says does it constitute a distinctive pattern of such originality as to give rise to a copyright. He actually carries on, this is para.70, and says which Holdfast has infringed so he's not saying it's not original, an original work and I won't protect it, he's saying how far can I take that protection?

Tipping J Sorry I just want to keep up with you Mr Finch as I suspect this is quite important if we get to this point. You were referring to para.70.

Finch Paragraph 70 Sir, yes. Well perhaps if I can take you to the para.69 where His Honour says

Tipping J It's not so much such originality as to give rise to copyright is it, it's the level of originality being aligned with the degree of protection?

Finch Absolutely. How broad should Henkel's monopoly be in this case? And that's why the words which Holdfast has infringed are critical because that clearly shows that he's looking at it from an infringement perspective. Should I be granting Henkel a broad monopoly in these features, or this combination of features per se, or should I be looking for a relatively distinctive treatment of the thing that's said to be an infringement. And so in the earlier para.69 His Honour looks at the dominant components of the formulation by Henkel of it's Blue Image Design and he says that they're 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 and it goes on. The only evidence he's got at this stage of course about originality and packaging design is really the evidence that came from Holdfast of what they had done previously and so he looks to Holdfast to see, well can I see these features in the earlier packaging of Holdfast and he can find aspects of all of them which leads to the conclusion that it can't be the individual features, it must be the way in which they're combined and that's the way the case has been

run in this Court today, and not only that it has to be quite specific about the way in which they're combined because these are all the sorts of things that you would ordinarily expect to see in a package of this type, and that's why he's referring to the common things of life.

Tipping J So what you're submitting is a low-level of originality

Finch Yes.

Tipping J Has to be matched by a need for close copying if you like in order to gain protection.

Finch Yes and that's what Your Honour effectively said in the *Bonz* case, that where it's collocation of common integers then almost exact reproduction is going to be required before there's an infringement. And in my submission, para.75 of His Honour's judgment is a rounding off of all of the analysis that he's done before, so the first part of that paragraph looks at the features individually and says despite the original piracy and the supply of Henkel's work to Holdfast's designer, I've concluded that such features in the Holdfast design is similar to those in the Cipidue drawings and in Henkel's appendices 8 to 10 were either previously used by Holdfast or are among the common things of life and thus does not warrant protection. So he's talking about those things individually and then he goes on to do what they did in *Designers Guild*, what the House of Lords did in *Designers Guild*, and looked for some kind of unity of concept and my friend says that there's no unity of concept or unity of theme in the House of Lords judgment and *Designers Guild,* and in my submission there doesn't need to be. This is Justice Baragwanath summarising what he took out of the approach in that case. It's no different to saying you're looking for objective similarity or you're looking for a reproduction of a substantial part, or you're looking for reproduction of the essence of the work, or you're looking for some kind of evidence that the skill and labour and time and judgement of the copyright proprietor is present, or has been taken in the infringement. He says 'I'm looking for a common theme, I'm looking for unity of theme and I don't find it. In my view it's not a copy'.

Blanchard J Unity of theme's a rather inapt expression in relation to an arrangement or a collocation.

Finch Bearing in mind that this is an artistic work and so the collocation goes to form a particular artistic work. I made this point in my written submissions. You can't divorce the selection from the arrangement. You may decide to select a number of features and put them on a piece of paper but it's what you end up with, that's what's tested against the infringement so it's not just that you've got a brand name, it's what brand name you put on there, how big it is, what colours it's in, and these sorts of things.

Tipping J	I think there's a problem in that last sentence 'I am satisfied there is no such unity of theme' etc, where the Judge uses the word 'selection'. It should be arrangement shouldn't it? It's not the selection per se; it's the way the selected integers have been arranged.
Finch	Yes.
Tipping J	I mean I'm not saying that's going to bring you down Mr Finch but that just suggests to me that this is all rather slippery in this judgment.
Finch	Well I hadn't noticed that Sir but in my selection and arrangement take it much further than just selection and so His Honour's
Tipping J	It's the arrangement that's the key thing isn't it rather than the selection per se?
Finch	It's not the selection per se but again I've got to take it both ways, which is that the selection and arrangement form the copyright work. It's both of those things.
Tipping J	Yes, well you can't have an arrangement without a selection I suppose.
Finch	That's exactly right.
Tipping J	But it's the arrangement of the common integers that deserve the copyright.
Finch	That's right. So I've dealt with in my submission the correct way in which Justice Baragwanath approached that problem. He clearly recognised that he had to look at the collocation as a whole and his reference to unity of concept or unity of theme is really just saying does it look like a copy to me, knowing what I know about what's been done before in the field of packaging, and in particular what Holdfast has done before because they say that they went back to their earlier designs and I can see some of these aspects of selection and arrangement in their earlier designs. It's probably an appropriate point to turn to Fix-It. I'll ask you to turn to the copy at page 488 of the bundle and then if we go back to the pleadings
Tipping J	Which coloured bundle are we talking about? The green is it?
Finch	It's the yellow bundle Sir, page 488. If we go back to the pleading at page 98 of volume 1 and you run through a number of the things which the plaintiff claims, Henkel claims make up its collocation; a red and blue card with a blister pack we'll Fix-It as a red and blue card with a blister pack and that gets on to the certainty of monopoly again that the way the case has been run and pleaded Henkel hasn't tied itself down to the way that it's expressed these particular ideas, it wants to advance very broad claims to capture the Holdfast product and in so doing it captures the prior art with these commonplace elements in my submission. So the

next point, Roman numeral two, the card has a red horizontal stripe at the top with the balance of the card being in blue. Now within any limit on the dimensions of the red horizontal stripe, arguably Fix-It has a red horizontal stripe at the top and the balance of the card being blue. It's a lot wider than the stripe that Henkel put on its own design. Fix-It has the name of the manufacturer in white at the top lefthand corner within that red horizontal stripe; it has writing; it doesn't have the next point. It does have the name of the product in roughly the same position as is pleaded in Roman numeral five. I've said it's got a blister pack.

Blanchard J Now wait a minute, the name of the product being below the red horizontal stripe.

Finch Yes, well it's within the red horizontal stripe, but in terms of

Blanchrd J Well this is below.

Finch But it's in the same relative position as the brand name appears within the Cipidue drawings.

Anderson J Then one the context is red and the other context is blue.

Finch Well one's substantially red and the other one's substantially blue, yes but if you look at UltraBonder I would say that that's substantially red, or it's getting closer to 50-50, and there other aspects, two photographs vertically positioned on the lefthand side of the card and in Fix-It you've got two pictures. I'll just remind you that this product was designed and used by Holdfast since 1995, so it's four years before the Cipidue drawings came into existence. There are other products that embody very similar get-up. If you can turn to the back of the yellow bundle, page 590, you have a card which is roughly 50-50 red and blue; it's got the name of the manufacturer in the top lefthand corner; it's got two photographs of the use of the products; it's got a list of the applications of the product and these sorts of things and I won't take you to them all but if you leaf back through this volume there are numerous examples of promotional material or packaging used by Holdfast which employ those same colour schemes in that substantially similar layout and so that's where Justice Baragwanath was getting to when he said that it needs quite distinctive treatment of this collocation, or this arrangement to be found to be an infringement.

Tipping J Well perhaps more precisely the infringing collocation has to be close

Finch Very close.

Tipping J To the copyright work's collocation.

Finch Yes.

Tipping Yes.

Anderson J Looking at page 587, can we take it from the information above the card that this also was in existence before the Cipidue drawings?

Finch Yes that's correct. These are extracts from three folders of material that were supplied by Miss Towes and those are her internal records of the numbers of cards which were supplied to Holdfast on those days. I seem to recall their evidence was that they stopped keeping notes about two or three years before she gave her evidence so some of these have been discontinued, some of them had carried on.

Anderson J When you look at the name of the manufacturer in the top lefthand corner, basically blue background, photographs with applications on lefthand side

Finch Yes, all of the things that Henkel say make up their collocation. And there are a multitude of products with that same colour scheme. I'll just ask you to turn to, I think it's page 5, it's a display of Holdfast's product. Just bear with me while I find that.

Blanchard J 490?

Finch 490.

Blanchard J That's the one that we were referred to this morning.

Finch That may be it Sir. Yes, 490. Now my friend referred you to the UltraBonder product on the lefthand side of that display and he said that that's the only product that's got blue at the top. I guess technically that is correct, but there are other products in the righthand side that have a blue and red division where the blue is in an angle going up towards the top lefthand corner and further down there are products which have solely a blue label, but my point is that UltraBonder blends into this display because consistent with Mr Henderson and Miss Towse' evidence, when they redesigned it they harked back to original aspects of Holdfast packaging. It doesn't stand out it blends in and the main reason it blends in is the chevron device and the yellow band which my friend would have you disregard when you're carrying out your visual comparison as to whether it's an infringement or not. I just would like to address that point because one of the features of collocation is the substantially blue background colour. You can't say ignore the red chevron when you're saying that the background colour is part of your collocation. The background colour of UltraBonder includes all of the features that make up the background so it's not a substantially blue background anymore, it's a blue background with a large red device super-imposed over the top of it. And just while we're on the subject of Holdfast's earlier packing, the evidence of Miss Towse is that about four years, five years, before she gave her evidence in 1999 Holdfast changed its blue to Pantone 293 and that's the same Pantone colour that's set out in the Cipidue drawings, so unless there's a suggestion that Holdfast were privy to some information

about the Cipidue drawings before they were released yet further evidence that it's not just the selection of blue, it's the exact colour blue common to both Holdfast and to Cipidue. I'll find that reference for you.

Tipping J	Is there some sort of international register of colours so that you can say someone has got the same colour as someone in another country?

Finch	Yes Sir, it's called the Pantone system and the abbreviation is PMS, and if you turn to page 458, this is the closest Cipidue drawing, you can see a reference there to Pantone 293 for the blue colour, and the reference I was talking about in Miss Towse' evidence is at page 242 of the green volume starting from around line 32 where she's talking about the colours on the photocopies put before the Court not being accurate. She says that they're weaker in the original card

Tipping J	Sorry, I've lost you and I think this is quite important. What is the number in the green volume?

Finch	242 Sir.

Tipping J	242.

Finch	Perhaps if I start at line 30, 'Mr Marriott says if there are some differences between the copy and the original

Tipping J	Just pause please. You're really putting a great challenge on at least me to keep us with you.

Finch	I apologise.

Tipping J	And I want to follow this because I think it's important. Now 242, line?

Finch	Line 30 Sir.

Tipping J	Yes thank you.

Finch	Mr Marriott, 'If there are some differences between the copy and the original would you just describe for us those differences in whatever language you would normally use to describe that sort of thing'? This is talking about differences in the colour because the photocopy's never going to be as good. And she says 'the colours on the photocopy are weaker than in the original card that was printed. All the colours are much stronger on the card that's in the sample folder. The other difference I could check is the fact that that original card looks to be using the old Holdfast blue as these sample books haven't been kept up to date in the last few years. The Holdfast blue was changed to PMS293 approximately five years ago which is slightly lighter than that one here'.

Tipping J	So you say there's an independent original of this particular blue?

Finch	Yes, and that it was changed in 1999 to be Holdfast's standard blue colour. The same colour as was adopted by Henkel. Subsequently I should add.
Tipping J	Again independently so it seems?
Finch	Yes. Ms Towes' evidence was that the colour blue and yellow are commonly used in packaging because they're striking colours.
Anderson J	Yellow, blue and red are the primary colours.
Finch	Yes. Now I believe that I've dealt with Mr Upton's criticism of Justice Baragwanath's reductionist approach and in my submission he didn't take a reductionist approach to his assessment of infringement
Tipping J	He simply looked like he was doing so but he didn't.
Finch	Through a choice of poor language Sir, yes I think he did, but I don't believe that's what he did because the end result, the end analysis is correct. My friend also says that the Court failed to give sufficient weight to *Elanco and Bleiman*. I just make the point that these are both decisions in an interim injunction level and they don't talk in anything more than broad principles, the Courts are simply looking to establish whether there's an arguable case for infringement and both Courts quite clearly say that the ultimate issue of infringement is for the trial Judge, and that's based on an objective assessment of the alleged infringement versus the copyright work.
Tipping J	Are you saying on this question of the design part of the new work, the allegedly infringing work, that although you did have some Henkel in your background you came up with something that in objective terms should not be regarded as a copy.
Finch	Yes.
Tipping J	That's it in a nutshell?
Finch	Absolutely. I'm saying that you can't elevate *Elanco and Bleiman* to a proposition that if you start with a copy you will always end up with a copy, because the reality is that it's only going to be a copy if it looks like a copy and you've got that comment in *Designers Guild* that you can start with the original at your elbow and if you make enough changes to it, this is Lord Scott's judgment, if you make enough changes to it then that will be sufficient to avoid to infringement, and there's a continuum there. How far down that continuum you need to go depends on how original the work is to begin with and how strong or how broad the monopoly of the plaintiff is.
Tipping J	And how good your nerves are.

Finch	Yes, well it is a risky decision to take, absolutely, but Justice Baragwanath acknowledged that. He clearly acknowledged that you may run the risk that the Court finds you didn't change it enough, but in his assessment we had. I just make the point at just finishing off with *Bleiman* the decision to grant the interim injunction turned on a finding that the essential features of the first game were still present in the second one and that's really just saying you haven't changed enough, or at an interim injunction level I don't think you've changed enough. It goes no further than that. And there's certainly no change to the burden of proof and no change to the test in my view and that's of objective similarity and reproduction of a substantial part.
Tipping J	Is the question of have you modified it enough to be looked at primarily, not exclusively, but primarily in relation to the independent design, labour and skill that's gone into it but with visual aspects there to assist that inquiry?
Finch	That's one way of looking at it because our copyright legislation rewards the effort of the copyright proprietor, or the person who designed the work, and Your Honour posited a test which was almost the opposite
Tipping J	No, forget that, it was a wayward thought I think Mr Finch. It seems to have lost traction fairly rapidly during the day.
Finch	I'm sad to hear that because I think you might have taken it from my written submissions.
Tipping J	Oh, well maybe we're not talking about the same thing.
Finch	Well it's at paras.83 and 84 of my written submissions and its really addressing this point that comes out of *Bleiman* which is that whether you traded on the effort of the copyright proprietor in carrying out your copying and in my submission if you can show that you expended as much time, labour, skill and judgement in producing what's said to be an infringement, then you can't be said to have traded on their effort, and the difficulty in this case is that I said earlier, there's no evidence from Cipidue as to what they did to bring their drawings into existence and as to how much work was required, so you don't have anything to benchmark the evidence of Miss Towse against, but she says that the redesign from SuperBonder to UltraBonder, and this is at volume 2, page 238, the reference is in my written submissions, she says it involved about 14 and a half hours work from her design team. She says that she spent another seven to eight hours herself and she says that that was a large amount of work for a job of this type, so that's the only evidence before the Court as to a saving of effort, and on that evidence there wasn't a saving, it took them more time to arrive at UltraBonder than you would expect them to.
Tipping J	I think this is a rather special case. I think they were designing away by degrees and therefore it's not really a truly comparative situation.

Blanchard J I'd be a bit suspicious about any tests that were relied upon hours of work in this way, because it's the quality of the work rather than its quantity that's important. Cipidue could hypothetically have done their work very very quickly but because they were very skilled they got a satisfactory result very quickly. The people in Hamilton on the other hand, hypothetically, might not have had those sort of skills and might have messed around for ages going up blind alleys and in the end come back fairly much towards the Cipidue production. We just don't know.

Finch No.

Tipping J It's a bit like a legal aid assessment.

Finch But I do agree with Your Honour, it's problematic without evidence from the plaintiff as to exactly what they did to bring their works into existence. You need some benchmark or some control to assess the evidence of Miss Towes' by.

Blanchard J Aren't you really reduced to looking at the finished products in each case?

Finch Yes.

Tipping J And my point is, I'm not sure that this turns solely on visual, I think it's visual as an aid to whether or not substantial part of the plaintiff's skill and effort has been poached.

Finch Yes, although it's very difficult to work out what the plaintiff's skill and effort was without evidence from the plaintiff to that effect. I'm sorry if I'm labouring the point but

Tipping J Well you don't need to call John Constable do you?

Finch No, but you do have to leave more evidence than simply 'we designed it and it wasn't copied from anyone else'. That doesn't tell the Court anything. All that tells the Court is that in terms of the threshold for granting copyright rights they've passed it but it's of absolutely no assistance in working out how broad the monopoly should be; what exactly it is that you're rewarding in this particular case. And there is a point that I make in my written submissions and that is that we don't know how much labour Cipidue, or how much creative effort they expended, because on the evidence of Mr Vandepaepeliere they were given an extremely well defined design brief and effectively acted as an amanuensis in putting that design brief down onto paper. And again that harks back to the extent of the monopoly that this Court is going to recognise.

McGrath J So we should be disregarding that evidence of surveys and other matters should we? I mean doesn't that come into the level of originality?

Finch Well there's a discussion Sir in *Ladbroke* about where you draw the line between preparatory work and the actual work in putting the product down on paper and my reading of it is that the preparatory work can be taken into account provided the end game or the end result when you started that work was the actual artwork or the copyright work that you end up with and in my submission there's a break there because you have Henkel doing market research and coming up with a design brief and if that had of been produced, that arguably could be a copyright work in its own right and then you have them giving that to a third party, to Cipidue, and saying take what we've done in here and turn that into a artistic work and I say that your inquiry starts at that point where they say 'take what we've done and draw us up some drawings of packaging', and if on the evidence of Mr Vandepaepeliere, what Henkel had done was the vast majority of the work in terms of choosing colours, choosing the packaging size, choosing the overall layout of the package, then Cipidue did very little, but the point is that the evidence of the design brief was put into Court, the design brief never was, and the evidence in relation from Mr Vandepaepeliere as to the design brief is quite scant as to what was actually done because he didn't prepare the brief.

Elias CJ Do you have to ignore the design brief **?** Can't it be a collaborative effort?

Finch Then Ma'am you get into all sorts of issues with is it a work of joint authorship, works of joint authorship you can't distinguish each author's contribution to the end product

Tipping J But if they're all working for Henkel either as employees or on commission, surely that problem doesn't arise.

Finch Possibly Sir, that could be one

Tipping J More than possibly, it doesn't arise.

Finch One way to approach it, yes, but in my submission it doesn't take you anywhere because if you don't have the design brief in evidence, you can't work out how detailed it is.

Elias CJ Well you're relying on it, you're saying well it's a very detailed design brief and therefore there isn't much originality in the design that was come up with.

Finch Yes I am relying on that evidence.

Tipping J But what if three employees all come up with different aspects, I mean with great respect I don't think this is one of your better points.

Finch Perhaps I'd better not advance it any further then Sir. Now the comparison in my view is to how you should approach the question of

infringement in the event that you're not with me on the second point that the Court of Appeal didn't err on a point of principle. Really to sum up my submission you've asked for some guidance as to the test that should be applied in this case and all I can really do, like Mr Upton I have some difficulty in positing an absolute test, but I can give you a test in this case. You're required to compare UltraBonder with Cipidue, assuming you get that far, and find that Cipidue has been pleaded, and the ultimate question you're asking is does one look like a copy of the other? Your answer may be no, but we can see some similarities between UltraBonder and Cipidue. I hope your answer will be no but it may be yes we can see some similarities and then you have to ask yourself the question of whether those similarities are something which Henkel's entitled to claim a monopoly in. And probably a good way of putting it is to ask it the other way around did Holdfast get these things from Henkel or did it have them in there because they're in its earlier packaging and that's what it reverted back to?

Tipping J What is the derivation of the similarities?

Finch Yes, are these things part of common packaging design like the Pantone 293 colour, like the brand name in the top lefthand corner and if the answer to that derivation question in my submission you are entitled to strike out things that you can't say came from Henkel and then ultimately what you've left with you have to ask whether that's a substantial part of Henkel's work.

McGrath J We have to bear in mind here though that we're focusing on an arrangement, don't we, we're not just focusing on the individual components which it's conceded I understand a common place anyway, so when we're looking at what was taken, whether Henkel had it originally, we have to look at how Henkel was using it originally.

Finch Yes that's correct, yes.

McGrath J Yes.

Finch It comes back to that point. It's not just the selection of these features, it's how they're actually arranged on the page.

McGrath J Yes.

Finch And in my submission what

McGrath J So what you'd say is that the photographs for a start you had old displays that had two photos in the exact place and so it's not really on to say that you were taking them from the empty square boxes at SuperAttak.

Finch That's right and if you look at where the photographs on UltraBonder are now, they're not in the same position as in the Cipidue drawings. Well in

fact there aren't photographs in the Cipidue drawings so that's a pleading issue for Henkel, so it's the relative positioning of these various things.

McGrath J Leaving that aside, you may want to come back to that, but just focusing, you actually did have photographs, two photographs historically in the position that you now say they're in the UltraBonder.

Finch Yes, that's right.

McGrath J That's your real point on the branch of the case you've just been arguing.

Finch We had photographs in a number of positions on a number of different products so that feature in itself and I know almost sounding like it's reductionist but viewed in the whole can you take that into account the fact that it's got photographs in the same position when other products had photographs, and Holdfast says we went back to those other products when we looked to redesign this product. It broke the causal link in my submission.

McGrath J Okay.

Finch Unless the Court has any further questions, those are my submissions. Thank you.

Elias CJ No thank you Mr Finch. Yes Mr Upton?

Upton I think I've got three points I just want to make Your Honours. The first deal with the pleadings and under that heading I just want to respectfully remind the Court that not only were the Cipidue drawings in the High Court from the outset, but also the reason that they were made it was made clear from the evidence of Martinez and Vandepaepeliere. Because the evidence made it plain that that's where Henkel said the expression of the Blue Image Design was to be found. There was absolutely no evidence of any other repository for that idea. And coupled with that my learned friend I think indicated that Justice Harrison focused on the product and not on the Cipidue drawings in his decision. My response is he did address the fact that Blue Image Design was to be found in the drawings and I just wanted to refer you please to some paragraphs and at para.8 of Justice Harrisons's decision I'm recorded correctly as confirming orally that the artistic work consisted of drawings. I don't recollect saying that they also included packaging, but I am recorded at page 68 as saying that I described them as drawings or diagrams of the packaging and then we go please to paragraphs 13, 14 and 15.

Blanchard J That supplementary opening address we don't have a record of.

Upton No, we have got it.

Blanchard J I'm just wondering whether it makes it clear which drawings were being referred to.

Upton	No I was talking about the collective
Blanchard J	I didn't say which drawing, which drawings, whether it is the Cipidue drawings.
Upton	Yes it was the Cipidue drawings. In that bundle that was handed up to you this morning Your Honour, there's a supplementary which is backed up 'Ownership submissions on behalf of plaintiff for the Judge'.
Blanchard J	Oh yes.
Upton	It's quite a short one. It's three or four pages, but if you just read through that and I'll take you to one or two key points but you'll see that I'm clearly referring there to the Cipidue drawings, and if we go to para.5, and this is in my opening, this is part of my opening, 'the plaintiff claims it is the owner of the artistic works either by authorship or by commissioning. It claims it made the works initially and then commissioned Cipidue to complete the process.
Tipping J	I have not too much difficulty with the fact that the Cipidue drawings are within the pleading, but the problem I think from my point of view you've got to fact is that your particulars are limited to those relevant to QuickTite and SuperBonder, and that I apprehended to be Mr Finch's essential complaint although he did take the prior point, but when I think that the graviman of it was the limitation through the particulars and your concession during the course of evidence, or your interjection during the course of evidence.
Upton	Yes it was my interruption Your Honour during the cross-examination.
Tipping J	Which you clearly focused it on SuperBonder and QuickTite as the pleadings did. That I think is the nub of the issue Mr Upton.
Upton	Yes but against that Sir you have to look at the overall evidence
Tipping J	Well never mind the overall evidence, I mean evidence has got to be there for the purpose of supporting a pleaded case.
Upton	Of course Your Honour but
Tipping J	It's not a sort of unrestrained roadmap.
Upton	No I agree with that but you look at the evidence and then you look also not only at my opening submissions but you also look at my closing submissions and I certainly didn't limit the point to the QuickTite and SuperBonder in the way that is suggested.
Tipping J	But did you expressly expand it?

Upton	No I was just running the case on a general basis in my opening and in my closing.
Blanchard J	What about Mr Roband who doesn't appear to have looked at the Cipidue drawings and yet was asked to express an expert view?
Upton	Yes, what he did Your Honour was look at the UltraBonder and line that up against the offending SuperBonder, that's what he did.
Tipping J	But that's just not consistent with the case you are now asserting.
Upton	Well with respect Sir it gets me part of the way there, because he can identify the similarity between the offending article and the later article.
Tipping J	But you now claim there's a breach in the drawing underlying SuperAttak?
Upton	Yes.
Tipping J	Why wasn't Mr Roband briefed to express an opinion on that issue?
Upton	Yes I agree Your Honour that that would have been the preferable way to do it but the reality was that the evidence was prepared in this way.
Tipping J	But when you talk about the evidence as a whole, surely this would be a very clear signal to the defendant that this was the way the plaintiff was putting his case, not that it was putting it's case on something that Mr Roband the expert for the plaintiff hadn't even addressed. I have real difficulty with this Mr Upton.
Upton	Well all I can do is take you back to the point that I made earlier Your Honour that I agree that he compared the two items and didn't go beyond that but we then as I've said repeatedly going back to the submissions
Tipping J	But if counsel tells us however morally, whatever moral view one might take about the stance, that they have formed their case and chosen what to lead and what not to lead in our view on the clear understanding that your case was focused as they've expressed. How can you get around that when it appears quite objectively legitimate for them to have done so in forensic terms?
Upton	Well I simply don't accept that Your Honour. It was properly arguable I would say that the Blue Image Design was found in the Cipidue drawings.
Tipping J	Yes I know it was found in the Cipidue drawings but you're now trying to underpin it with SuperAttak where at trial you were underpinning it with the drawings underlying SuperBonder and QuickTite.

Upton	Well I just need to go back to the submissions again but my recollection is that we didn't tie it back to the Super

Tipping J	Well your pleading did. The particulars as Mr Finch took us through carefully, the pleading could only be regarded as invoking artistic copyright in the drawings underlying SuperBonder and QuickTite.

Upton	Yes well I'm sorry Your Honour that's where we just have to disagree

Tipping J	Disagree

Upton	Yes that it was wide enough to cover the way that I'm putting it now and the way that I put it in the Court of Appeal and I thought it was made plain enough by the way that my opening submissions were put and the way that my closing submissions were put.

Tipping J	Well we'll have to look at those very carefully I daresay.

Upton	Yes of course. So if then come back to this point that I was just making about Justice Harrison not focusing on the products, that he did focus on the drawings, and I was just giving you the references to that and I'd mentioned para.8, 13, 14 and 15 and I just wanted to mention also 18, 19 and 26. Admittedly he's looking at the drawings collectively but he's still looking at the drawings as opposed to something else. The second issue I just wanted to touch on related to the analysis of Justice Baragwanath's decision and the proposition was that the extent of the enforcement available depends on how original the product is. As he put it you only get out what you put in but my answer to that is that this discussion of Justice Baragwanath's was inside the framework of looking at whether there was a substantial part which had been taken and I simply submit that he was looking at the wrong issue when he talks repeatedly from para.70 through to 75 about these integers or factors not warranting copyright protection.

Tipping J	You accept as a general proposition that the degree of originality will govern the extent of the copyright protection?

Upton	Absolutely, that's right, but it's not appropriate to talk in those terms when you're looking at the question of taking a substantial part, that's another issue, that's my point.

Tipping J	What constitutes a substantial part must surely be influenced to some extent by the degree of originality?

Upton	But with respect Sir you then get into a difficult question when you're dealing with these collocation cases which involve common place elements, because you then run the risk I submit of saying that protection is only available in the most limited of cases, that's the way I would answer that one. Accepting that there is a low standard for originality, it would be impossible to infringe on that basis except in the case of the

most slavish copying, and of course if it's correct it bites the other way. If the argument is correct that my learned friend is putting then in my submission it bites the other way because the drawings underlying his packaging suffers from the same criticism as well.

Tipping J — But what's that got to do with it.

Upton — Well I'm just saying, all I'm saying is that if the argument is correct it means that it's only in a very rare case that people involved in the collocation of common place things will be entitled to any protection at all that's all. I'm just illustrating the point.

Tipping J — Yes well that was rather what I was suggesting in *Bonz* wasn't it? I may be right, I may be wrong, but that was the flavour of *Bonz*, that if you've got a collocation of a number of common integers you've got to be very careful to confine the copyright protection to what is original, namely the precise method of collocation.

Upton — Yes, yes, to the precise arrangement.

Tipping J — And I think there is plenty of authority for that.

Upton — Pardon.

Tipping J — There is plenty of authority for that isn't there?

Upton — Yes and I accept that immediately Your Honour, but it just seems that if one applies what Justice Baragwanath is saying here that as I read what he's saying, he's saying that the Henkel work does not deserve copyright protection, well in fact that's what he says at para.75 and in my submission that's taking it too far. I think we have to come back to the point that Your Honour made in *Bonz*. And the last point I think it was, I'll just check. No there's just some other points I want to address in the context of my learned friend's discussion of Justice Baragwanath. It's the use by Justice Baragwanath of the word 'selection' in para.75. I respectfully suggest that that ties back when he says selection, that that ties back to his comment about removing matters of no originality. In the context of this particular area which is whether or not a substantial part has been taken, one looks at arrangement not at selection and for that reason I submit also that the

Tipping J — It can't be because he's referring to Holdfast's selection, not Henkel's selection.

Upton — He says justify categorising Holdfast's selections pirating Henkel's design, yes, but I submit there he's clearly looking at individual integers, that's how I read what that sentence is referring to and I was just going to respectfully remind the Court that we're not arguing that there is an exact copy here, what we are arguing is that Holdfast has pirated items from the Henkel product and it's a matter of degree and whether there is a close

similarity, but in this area we're certainly not saying that they took the whole of our client's product. Now the next point related to the design path and my learned friend said that his clients came up with something which is original. That's where I submit that Mr Roband's evidence is of some help because it makes it plain that in his view what was done was an incremental development rather than an original product that was produced, and on that topic I submit that the total of Henkel's time and effort

Tipping J What was he comparing it against?

Upton He was just comparing one with the other and simply saying that 'B' is very similar to 'A', that was what he was doing.

Tipping J But he wasn't comparing it with the work that you're now relying on.

Upton No but the question is whether the offending product was itself the basis for the new work or whether the new work contained sufficient originality and I'm simply saying that his evidence fits in at that level, and the only other point I wanted to make under that head was that the time, effort and cost or expense of Henkel in my submission can be combined with the work that was done by Cipidue. It's a collaborative effort and whether it's a joint production or not doesn't matter because one joint owner can sue. And that brings me to my final point. My learned friend put to you what the appropriate test would be and my submission is that I noted him he said you strike out what didn't come from Henkel and then see what's left and ask yourself whether that's a substantial part of the Henkel product and I agree with that but at the end of the day that means that you ignore the chevron that we talked about this morning and then compare the part that's taken, assuming you're satisfied

Tipping J Why do you ignore the chevron Mr Upton?

Upton I say because you put to one side what is not taken from Henkel and you then ask yourself is what's left a substantial part. It's either got to be a whole or the substantial part of the Henkel product.

Blanchard J So you say the chevron's the only new element?

Upton No I don't Your Honour. There are some fine details which change as well, but what I'm saying is that if you compare the two comparators that there is a taking of a substantial part.

Tipping J You mean even without the chevron?

Upton Yes you just put the chevron to one side

Tipping J There is still a taking of a substantial part?

Upton That's right.

Tipping J	So it's in that sense that you say you ignore the chevron?
Upton	Yes that's why you ignore the chevron and then you get into these issues about your looking at similarities
McGrath J	But is that part of your general argument that you're focusing on similarities not differences?
Upton	Yes, yes, that's right, and as I tried to explain this morning Your Honour, there's ample case law for that and that completes the submissions that I wanted to make in reply. May it please the Court.
Elias CJ	Thank you Mr Upton. Well we'll take time to consider our decision in the matter and thank you very much counsel for your helpful submissions.

3.50pm	Court adjourned