

IN THE PATENTS COUNTY COURT

Before :

RICHARD MEADE QC

Between :

Pro-Tec Covers Limited
- and -
(1) Specialised Covers Limited
(2) Specialised Car Covers Limited
(3) Omegacars Limited
(4) Mr Douglas Long
(5) Mr Elliot Long

Claimant
Defendants

Douglas Campbell (instructed by **Lupton Fawcett LLP**) for the Claimant
Piers Acland QC and Chris Hall (instructed by **Squire, Sanders & Dempsey (UK) LLP**) for
the Defendants

Hearing dates: 6-8 September 2011

JUDGMENT

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Richard Meade QC:

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Introduction

1. This is an action for unregistered design right infringement. The Claimant alleges that the Defendants infringed its design rights relating to a number of designs of caravan towing covers. The Defendants deny copying, and the parties have both treated that as the primary issue at trial, but as a second line of defence the Defendants also allege that the designs relied on are excluded from protection by one or both of the “method or principle of construction” and “must fit” provisions of the Copyright, Designs and Patents Act 1988 (“CDPA”).
2. The trial of this action was listed for three days, longer than the two days maximum now aimed for by the Patents County Court, because of the complex facts. It was possible to conclude the hearing in that time, almost all of it being taken up by oral evidence. There was time for a very short oral opening by the Claimant, and very brief oral closing submissions by each side. Each side then filed quite extensive written closing submissions.
3. This timetable has meant that on some subsidiary issues the argument has been rather limited. This is not a criticism of the parties or their advisers: they have focused their time and resources on the main issues.
4. When caravans are stored for the winter their owners often protect them with a full cover which covers the whole caravan. During the spring and summer, when caravans are in use, some owners wish to protect the front face of the caravan when it is being towed, against dirt and debris from the road. For this purpose they use a towing cover which is essentially a sheet of robust fabric which covers the front face of the caravan, along with fastenings to attach it.
5. Most caravans have an awning rail on each side. An awning rail is a sort of profile which runs from the top of the caravan to the bottom, generally but not exactly parallel to the edge of the side face adjacent to the front.

6. For some years prior to the events to which this action relates front towing covers were available which consisted of a main sheet of fabric as I mentioned above and were attached to the caravan on each side in the following way. Down each side of the towing cover were a series of straps. To attach the towing cover the user would take each strap and attach it to the awning rail on the appropriate side by wrapping it around, then tightening.

7. This is somewhat difficult to describe and easier to understand from a picture, such as the following, which is a depiction of what was referred to in the evidence as the predecessor design:



8. There are only three companies in the UK of any significance in the market for caravan covers. They are the Claimant, the Defendants, and a third company called Cover Systems. Prior to the events to which this action relates only the Claimant and Cover Systems provided front towing covers for caravans. The Defendants did not have a front towing product.

9. In 2009 Mr Proctor of the Claimant came up with an improvement to the existing design of front towing cover. The improvement was that rather than have multiple straps separately attaching to the awning rail, a long piece of piping could be inserted into the awning rail bearing a large piece of fabric which would then cooperate with the main part of the cover by means of straps: for each strap, one end would be attached to the fabric piece and one end to the main part of the cover. This arrangement was referred to as the strap strip in the action. The thinking behind the strap strip was that it would be easier to fit. The following is a picture of a strap strip type of cover mounted on a caravan:



10. The above account of the strap strip is something of a simplification because a single piece of fabric on a single piece of piping presents certain practical difficulties to which I will refer further below, and so developments of the strap strip idea used two pieces of fabric mounted on either one or two pieces of piping.

11. An individual strap strip looks something like this:



12. This strap strip is for the driver's side. The front of the caravan would be to the right of the picture. The grey strip on the left is the piping which would slide into the channel of the awning rail, and then each black strap extends towards the front

of the caravan, with one half of a plastic buckle visible on each. The main part of the front cover then bears the other half of each buckle, at the appropriate height. It can faintly be seen that there are two pieces of fabric in this strap strip: they meet level with the third strap from the bottom. This strap strip has a single piece of piping.

13. I will have to return below to the question of whether the strap strip was an improvement over the predecessor design, and if so to what extent. But it is worth noting that the predecessor design had been sold successfully for some years before the strap strip came along. This suggests that the problem that the strap strip was intended to address was not too severe.
14. In addition, it should be noted that the predecessor design worked perfectly adequately for its main function of protecting the front face of the caravan during towing.

The parties

The Claimant

15. The Claimant company is a relatively small business. Among other things it sells both full caravan covers and towing covers. Mr Proctor is its moving spirit along with his wife. He also designs its products.
16. Although relatively small, the Claimant conducts its business in a fairly professional and well-organised way. For example it maintains a formal ISO manual and has in place a system for controlling and maintaining the documentation of its business.

The Defendants

17. There are three corporate Defendants in this action. Unfortunately, they have had a number of rather similar trading and corporate names which have changed over time. One reason for this, is that some rebranding was undertaken when Mr

Douglas Long (I explain his role further below) handed over control of everyday matters to his children.

18. The similarity and multiplicity of names has led to some confusion during these proceedings about which company is which, and which of them carried out the allegedly infringing acts. In the end it was not necessary to spend any appreciable time on the issue at trial and in the light of my conclusion that there is no infringement anyway, it does not matter which corporate Defendant is which. I will say in passing, however, that I think the Defendants could have been a good deal more constructive in addressing the confusion which arose.
19. Where convenient, I will use the expression “Specialised” to refer to the business of the corporate Defendants, without implying anything about which of them did what. I will also refer to “the Defendants” to mean all of them, again without intending to distinguish.
20. The fourth Defendant, Mr Douglas Long, started Specialised. He remains chairman and a senior employee but he no longer controls the day-to-day activities of the business. He was, however, closely involved in the activities alleged to infringe, especially the design known as the A2.
21. The fifth Defendant, Mr Elliot Long, is the son of Mr Douglas Long and the managing director of Specialised. Recently, day-to-day control has been moved from Mr Douglas Long to him (and his sister Mrs Katie Fishwick). Again, he was very closely involved in the activities alleged to infringe, even more so than Mr Douglas Long.
22. Mr Douglas Long and Mr Elliot Long are both alleged to be jointly liable with the corporate Defendants on the basis of their having been the controlling minds or having authorised or directed the infringing acts. There was a bare denial of this in

the Defence but the Defendants made nothing of it at trial, and rightly so in my view: it was clear from the evidence, outlined below, that the Claimant was correct on this point and the Fourth and Fifth Defendants specifically and closely directed the acts complained of. Had there been an infringement, they would have been liable.

Previous relationship between the parties

23. From 1996 to 1997 a predecessor company to the Claimant (also controlled by Mr Proctor) and the Defendants had a commercial relationship whereby the Claimant's predecessor manufactured covers for the Defendants to buy, based on dimensions and drawings supplied by the Defendant. This relationship ended badly in late 1997 and the Defendants brought proceedings against the Claimant's predecessor, Mr Proctor and his wife for copyright and database right infringement, and breach of confidence. Those proceedings were compromised by a consent order of Master Bragge of 25 February 1999 by which certain undertakings were given.

24. I do not think that those proceedings have any direct relevance to this action, but they do go some way to explain the parties' attitudes to one another. I am not in a position to decide who was right or wrong in the previous proceedings; it is possible that the Claimant's predecessor infringed the Defendants' rights and equally it is possible that the Claimant is correct in its position that its predecessor gave undertakings based on a practical decision that the dispute was not worth the candle.

The design process for caravan covers

25. It is important to appreciate that caravan covers (whether full covers or towing covers) are not complicated products, although the design requires skill, and do not involve lengthy or sophisticated design procedures.

26. For custom full covers, for example, the design process is rather like that involved in a tailor making a suit. Measurements of the caravan's key dimensions are taken, and a template is made which is then improved and perfected by fitting it onto the caravan along with pinning and cutting. The evidence was that this is a process

which can be done fairly quickly. It was also clear to me that it could be done with no or very little drawing. As it happens, the Claimant does maintain some design drawings although they are rather general in nature and I include some later on in this judgment. The Defendant does not maintain design drawings although it does of course need and keep templates from which its cutters work when they make production covers.

27. For similar reasons, it is possible and indeed easy for a design of caravan cover to be modified slightly for a specific order. For example, I heard evidence, which I accept, that when the Defendants received orders for covers for caravans slightly wider than usual, the cutters were given ad hoc instructions to change the pattern.
28. This means that both parties had a large number of designs which fell into families; within each family there were a number of minor variants. Neither side's pleadings or evidence covered every such variant, and it would not have been practical for them to do so.

The witnesses

29. I will comment on each witness in turn. Because of the complexity of the factual issues and the numerous attacks on the witnesses' veracity, credibility and recollection it is impractical to comment on them without touching on a number of the specific factual issues in the case. I will then return to those issues when I deal with the facts, below.

Mr Proctor

30. Mr Proctor, whom I have already mentioned above, was the Claimant's main witness. His evidence concerned the design process for the Claimant's products, the documentation supporting it and the chronology of the various designs. He also covered the previous dealings between the parties, the various ways in which the

Claimant said that the Defendants had had access to the Claimant's designs and other similar matters. In particular he gave evidence about sale of the Claimant's products, various caravan shows it had attended, its advertising and marketing materials, and its employment and subsequent dismissal of Mr John Lord.

31. I found Mr Proctor to be a very fair and honest witness. He generally answered the question very directly, he was only very occasionally argumentative and his evidence was only slightly coloured, in my view, by the previous animosity between the parties.
32. However, his evidence has to be qualified considerably because he accepted in cross-examination that his memory is very poor. He said this was a result of a head trauma some time ago, and I accept that explanation, although it would have been better if he had mentioned it in his witness statement. His wife verified that his memory was very bad.
33. As a result, I think I must be very careful about accepting his evidence in relation to matters of detail where there is no documentary support. However, on those matters where he clearly does have a recollection I accept that he was doing his best to give an accurate account.
34. The Defendants criticised Mr Proctor for saying in his witness statement that the A1 design was shown in various promotional materials when in fact it was not (it was the predecessor design). It emerged in cross-examination that Mr Proctor had noticed some time ago that those materials did not show the A1 design, but he did not correct his witness statement when he confirmed it on oath. It was not altogether clear to me that Mr Proctor had appreciated that his witness statement itself contained a specific error but in any case this appeared to be an isolated incident and I do not think in itself it casts doubt on the general value of his written or oral evidence or suggests that Mr Proctor attached insufficient importance to being as truthful and accurate as possible.

35. The Defendants also criticised Mr Proctor for having retained some documents from the previous proceedings despite the consent Order of Master Bragge requiring their return. Mr Proctor was hazy about what had happened and thought that it was most probable that the documents in question had been in his solicitors' files since the end of the previous proceedings. This seemed very plausible to me. In any event, the Defendants came nowhere close to showing that Mr Proctor or the Claimant had deliberately disobeyed Master Bragge's Order, and I would also say that springing the issue on Mr Proctor in the witness box was not at all an ideal way of going about matters because it meant that there had been no opportunity to investigate.

Mrs Anne Proctor

36. Mrs Proctor did not provide a written witness statement. She was called to give oral evidence when the Defendants' Counsel alleged during the cross-examination of Mr Proctor that a particular document had been deliberately falsified. When Mr Proctor said that his wife had provided the document the Defendants' Counsel put to him that in that case she was the one who had falsified it.
37. Mrs Proctor was then called to deal with that specific issue and she said that in fact the document had been prepared by the Claimant's ex-employee Mr Read. The Defendants' Counsel rightly then accepted that Mrs Proctor had not falsified the document. But he maintained that it was false and that Mr Read was the culprit. He did not allege that Mr or Mrs Proctor knew of the falsification.
38. I find that Mrs Proctor was entirely honest.
39. I do not think it matters to the outcome of the case whether the document in question was falsified or not, but since there remains an allegation that a document said at one stage to support the Claimant's case was deliberately falsified, even if the Proctors did not know about it, I think I should deal with it briefly, and it is convenient to do so at this stage.

40. The document was a representation of a web posting in an online forum. The bulk of the posting was accepted to have been made by Mr Lord, but right at the end there was an additional line referring to the Claimant by name. It is clear, and now I think accepted by the Claimant, that that line was not written by Mr Lord and did not appear in the original posting.
41. That does not necessarily mean that the document was deliberately falsified. It could have been changed innocently by some computer error on the part of Mr Read. Mrs Proctor said that the document was originally prepared by Mr Read but then lay unread in a file until these proceedings were underway, by which time Mr Read had left the Claimant. I accept that, and it seems to me very unlikely that Mr Read would falsify such a document without the knowledge of Mr and Mrs Proctor and then make no use of it. I also think that if he had been prepared to falsify an incriminating document he would not have come up with something so feeble. Finally, I think it very unlikely that he would have falsified a document purporting to be a posting by Mr Lord or anyone else from the Defendants since the risk of it being identified as false would be obvious.
42. I therefore do not accept that the document was deliberately falsified.

Miss Christina Mageen

43. Miss Mageen is the Claimant's office manager. She was called to give evidence about events at Dickinson's Caravans on 17 June 2010. I should explain that Dickinson's Caravans is a caravan retailer close to the premises of both the Claimant and the Defendants where both of them were permitted to try out new products for size and fit.
44. During her cross-examination Miss Mageen was also asked about the Claimant's arrangements for filing and keeping documents such as design drawings.

45. Miss Mageen was clear and precise in her answers and I accept that she was giving honest evidence. It was not suggested otherwise.
46. The reason that those events at Dickinson's Caravans were raised in evidence is that in their pleadings the Defendants had alleged that Mr Paul Smith attended Dickinson's Caravans on that date. The Claimant wished to prove that he did not, not because it was of relevance itself but as an attack on his credibility and the credibility of the Defendants generally.
47. Miss Mageen, working from a picture of Mr Smith on the Defendants' website, said that she could confirm he was not at Dickinson's that day.
48. While I accept that that is Miss Mageen's genuine belief, I do not think that I can rely on her comparison of a website photo with what she remembers of the appearance of the people present that day to conclude that Mr Smith is untruthful when he says he was there. Identification of people by sight is notoriously difficult and Miss Mageen was working from a single photograph and her recollection of an event some time ago.

Mr Douglas Long

49. I have already mentioned Mr Douglas Long above.
50. He has many years' experience in making car and caravan covers, especially tailored covers. I find that as a result of that experience he has great abilities at designing those covers. This is relevant because the Defendants say, and I accept, that they had no need to copy the Claimant to come up with a workable towing cover design.
51. Mr Douglas Long, however, was not a good witness in other respects. He was combative and argumentative. He did not answer the question in many instances

and frequently made speeches or asked questions of the Claimant's Counsel, in order to make a point rather than seeking information or clarification. He was openly and extremely hostile to and contemptuous of the Claimant to a degree which I found unjustifiable, even given the parties' earlier disputes.

52. More importantly, Mr Douglas Long was inconsistent and unsatisfactory in his evidence about whether he and the Defendants kept an eye on the Claimant and its products in the market. He initially said that he had no interest at all in what the Claimant did, but it later turned out that he was specifically aware of the difficulties the Claimant had with the suckers for its products for Bailey caravans. He also accepted, eventually, a general interest in what the Claimant might be marketing.
53. This was a general problem with the Defendants' main witnesses; they consistently downplayed their interest in the Claimant's products. I touch on some specific instances further below. However, it is my conclusion that they did so out of defensiveness as a result of these proceedings being brought and not out of a desire to be untruthful about what they had done as a whole.
54. In the specific case of Mr Douglas Long, my clear impression was that although his evidence about keeping an eye on the Claimant was not satisfactory, and despite his inappropriate and unhelpful manner, he was telling the truth when he said that the Defendants did not copy the Claimant's designs or products.
55. Mr Douglas Long's evidence mainly concerned the design of the A2 product. He also spoke to the recruitment of Mr Lord and the Defendants' business and experience generally. It is worth mentioning that he had relatively little interest in the caravan side of the Defendants' business, being more engaged in high end custom car covers. He undertook the design of the A2 product because of his facility with bespoke covers, as it was to be a bespoke product for Bailey caravans, which I explain in more detail below.

Mr Elliot Long

56. As I have explained above, Mr Elliot Long is the son of Mr Douglas Long, and the managing director of Specialised.
57. Mr Elliot Long was not as hostile to the Claimant as his father, and he was significantly better as a witness because he made more effort to answer the question and was much less argumentative. I have to say that I found him somewhat flippant in his attitude, but not to an extent to undermine his credibility.
58. As with his father, Mr Elliot Long was excessively resistant to the idea that the Defendants would keep an eye on the Claimant's products in the marketplace. I found this unconvincing in general in such a niche market, and that impression was reinforced by a number of matters including, in particular, the fact that both Mr Elliot Long and Mr Paul Smith referred to the Claimant by name in their notes of the first meeting after Mr Lord joined the Defendants.
59. As with Mr Douglas Long, I did not form the impression that Mr Elliot Long being unhelpful on that point was a symptom of untruthfulness. It was just defensive and rather obstinate. I find that Mr Elliot Long was in general trying to be truthful, and was truthful.
60. Mr Elliot Long gave evidence on many of the topics relevant to these proceedings, indeed most of them, but what he said was particularly important on the topic of the design of the Defendants' first front towing cover, the A1. According to the Defendants' case, which I accept on this point, he was the person who thought of the strap strip feature during the Defendants' design work leading to the A1.

Mr Paul Smith

61. Mr Smith is the general manager of the Defendants and has worked for them for many years, starting as a cutter.

62. I found him a very clear and direct witness, without the drawbacks of Mr Elliot Long and Mr Douglas Long. He accepted in some instances that he did not recall precisely what happened (for example in relation to his notes of the first meeting after Mr Lord joined).
63. As with the other main witnesses for the Defendants, Mr Smith was somewhat weak on the issue of whether they had been interested in what the Claimant was doing. There was a particular incident after the Defendants learnt of the Claimant's Bailey product with suckers where Mr Lord said that Mr Smith asked him to contact the Claimant to find out how that product was attached to the caravan. This was not directly relevant to copying, since it is accepted that the incident took place after the Defendants had finalised the relevant iteration of its own design, but it does show a general interest by the Defendants in the Claimant's products. Also, Mr Lord was clear that Mr Smith asked him to find out how the Claimant's product attached, while Mr Smith equivocated and said that although that was possible, he thought he may only have asked Mr Lord to find out the Claimant's price.
64. Despite this, I have no hesitation in finding that Mr Smith was being entirely truthful about whether or not the Defendants copied the Claimant.
65. Mr Smith gave evidence on a number of matters and had a good general knowledge of the Defendants' business, as one would expect. He was particularly concerned with the design of the Bailey towing skirt, and assisted Mr Douglas Long in the design of the full height Bailey tailored cover.

Mr John Lord

66. Mr Lord was an important witness in a number of respects.
67. Mr Lord first worked for the Claimant from August to November 2009. He was dismissed on 23 November 2009. Thereafter, he applied for a job at the

Defendants. He attended an interview in mid-December 2009, was successful, and started work on 1 February 2010.

68. Mr Lord's duties at the Claimant were primarily in relation to sales. He was not a product designer and had no skills or experience in design. There was a rather arid dispute about whether he attended design meetings. It was arid because it is clear that he had at least a general knowledge of the Claimant's relevant products and because it seemed to turn on what one meant by a "design" meeting.
69. There was a dispute between Mr Proctor and Mr Lord as to Mr Lord's exposure to, and interest in, the Claimant's towing cover products. Mr Lord said that he was office-bound for the majority of his time with the Claimant, and that he only really went "on the road" to try to sell towing covers after a caravan exhibition at the NEC in October 2009. Even then, he said that his main focus was on selling what was called a caravan trolley and that he devoted, and was only expected to devote, a small amount of effort to the towing covers. He did accept, and it is common ground, that he had samples of the Claimant's A1 product in the company van when he went out selling. The position as to whether he had an A2 product in the company van was not absolutely clear, but Mr Proctor said in written evidence that he did. The Defendants' Counsel accepted in the course of his closing oral submissions (rightly, in my view) that he had not challenged Mr Proctor on the point with the result that he could not submit to the contrary. So in the circumstances I accept Mr Proctor's evidence on the point so far as it matters.
70. Mr Proctor's perspective was that Mr Lord was trying to sell the A1 and A2 towing covers throughout his time at the Claimant, and had a real and close interest in them.
71. There was also dispute between Mr Proctor and Mr Lord as to what products were sold by the Claimant and precisely when.

72. Mr Lord no longer works for the Defendants. The circumstances in which he left were only briefly touched on in evidence. The Defendants assert that because he has left he would have no interest in giving untruthful evidence to help the Defendants. I do not accept that reasoning; had he in fact been employed by the Defendants as part of a concerted campaign to copy the Claimant's products he might well now be willing to be untruthful about it. However, my impression was firmly that he was being truthful.
73. Some criticisms were made by the Claimant of what were said to be inconsistencies in his evidence in his written statements, of which there were two. I do not accept this. It is clear to me that he provided a first, outline witness statement and later a second which was much fuller.
74. It is also important, in my view, to bear in mind that not all Mr Lord's evidence was helpful to the Defendants. His disclosure that Mr Smith asked him to find out about the Claimant's product, which I have mentioned above, was a good example. Even though the incident was likely to be discovered by the Claimant (since it involved a call to Mr Read), Mr Lord's statement that Mr Smith asked him to find out how the product attached need not have been volunteered had Mr Lord been striving to help the Defendants at all costs.
75. Although Mr Lord was a bit combative at times, he was generally fair and willing to accept reasonable propositions put to him, and I found his account to be consistent and plausible.
76. In relation to the dispute between Mr Proctor and Mr Lord as to the latter's exposure to the products in issue, I prefer Mr Lord's account primarily because his recollection seemed clear, and this was the sort of detail, of specific dates, on which Mr Proctor's memory was not good.

77. I should mention that Mr Lord, who now has a new job, attended court as a result of a witness summons served by the Defendants. I was not told why that was necessary, although I was told that having been summonsed for the first day of the trial he voluntarily stayed on until called. I did not get the impression at all that he had been summonsed because of any hostility to the Defendants.
78. At the Claimant's request, the Defendants' main witnesses (Mr Elliot Long, Mr Douglas Long, Mr Smith and Mr Lord) did not listen to the evidence of one another prior to giving their own evidence, but waited outside court. This has some corroborating value because their evidence was, on the whole, very consistent save in relation to the issue of keeping an eye on the Claimant's products, to which I have referred several times above. However, it must be said that if the Claimant could make good its primary case that the Defendants' witnesses had all worked together to present an untruthful account then I expect they would have been willing to covertly discuss their oral evidence with each other.

Mr Michael Grindrod

79. Mr Grindrod is the husband of an employee of the Defendants. He and his wife are keen caravanners. He was called to give evidence about his use (with his wife) of one of the Defendants' early towing cover designs, during which the Grindrods noticed the "gap problem" to which I will refer below. The significance of this to the Defendants' case was that it provided, they said, independent verification of that problem having been observed in the course of their design process, so as to refute the Claimant's suggestion of blind copying. I accept that argument and it also seems to me to go a bit further than the narrow context of the gap problem. It shows in a general way which is verified by a plainly truthful witness that the Defendants were doing genuine, iterative design work with testing and feedback.
80. Mr Grindrod was an engaging, direct and helpful witness. Although his wife is an employee of the Defendants it was not put to him that his evidence was in any way shaded in the Defendants' favour and it clearly was not. No real criticism was

made of him by the Claimant and I accept his evidence as having been entirely truthful.

Mr Bob Swain

81. Mr Swain works for Bailey Caravans. Bailey Caravans is important to this case because two of the allegedly infringing products were tailored for specific Bailey caravans. Bailey provided input to the Claimant and to the Defendants about what was needed for its caravans.
82. Although called as a witness by the Defendants, Mr Swain was really in a neutral position. He had no reason consciously to favour one party over the other and it was not suggested that he had. However, it was obvious that his recollection of some of the events was not perfect and his witness statement was drafted by the Defendants' personnel. This is not objectionable in itself, but there was one specific event referred to in his witness statement (the sending of a quotation by Mr Lord) which did not in fact happen, according to Mr Swain. Mr Swain corrected this in his oral evidence in chief.
83. I have no doubt that Mr Swain was entirely honest in his evidence, but I must make allowance for his recollection and for the way in which his statement was prepared.
84. Mr Swain dealt in his evidence with his discussions with the parties and the Defendants in particular. There is one specific incident for which his evidence is important, namely what is called a grab handle feature of the towing skirt. The Claimant alleges that the Defendants learnt the Claimant's design approach via Mr Swain. I will deal with this in more detail below.

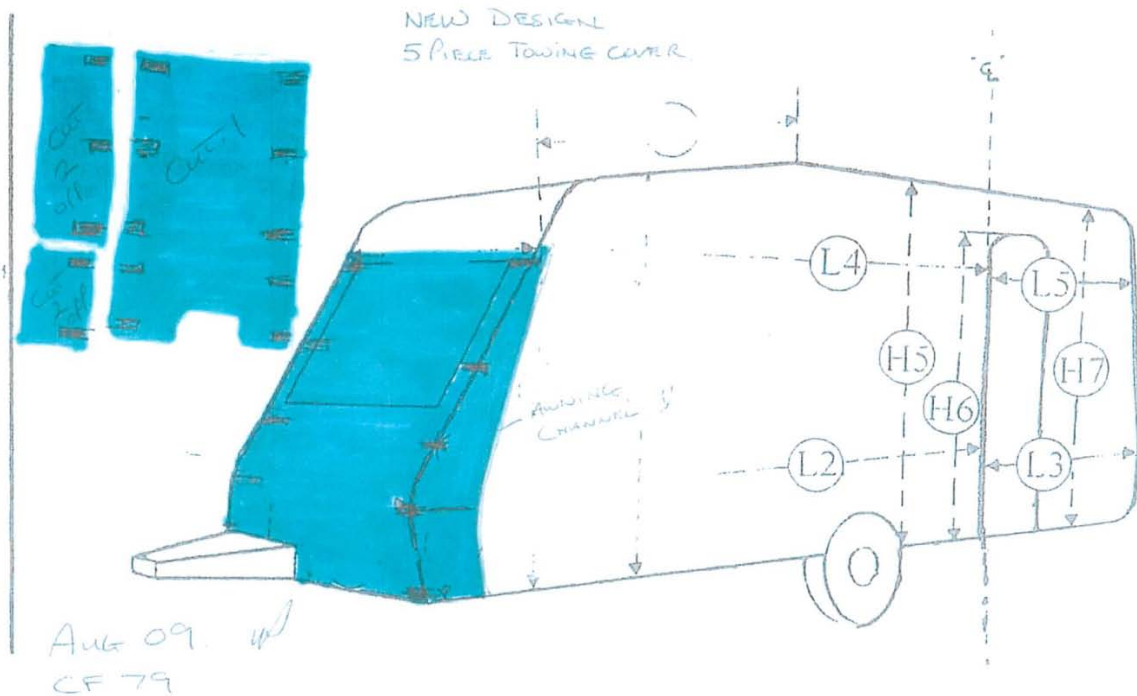
The products and designs in issue

85. I will now identify the products in issue, and the designs relied on by the Claimant. It is necessary to identify the parties' actual products in order to deal with factual

disputes. The Claimant's designs as pleaded are more generalised, as I will explain below.

Products in issue

86. There are essentially three product types in issue. For each of them, the Claimant and the Defendants respectively had multiple sub variants. Where necessary I will deal with the details of those below. For present purposes, I will identify the three products somewhat more generally. I intend mainly to refer to them by the designations A1, A2 and B2, which is how most of the argument proceeded. After my judgment was provided to the parties in draft, the Defendants suggested that I should refer to the Claimant's products as A1, A2 and B2 and the Defendants' products by more descriptive names including "UFTP", "the Bailey FTP", "the Later Version FTP", "the Bailey Front Towing Protector", "the Bailey Skirt", "the Finished Skirt" and "Skirt". The Claimant said that this was too complicated and unnecessary and I agree; it also does not marry up with how the matter was argued and so is confusing. I make it clear however that where I refer to A1, A2 or B2 that does not mean that I am unaware of there having been multiple sub variants.
87. First of all, there is what was referred to as the A1 design, also sometimes known as the universal front towing protector (UFTP).
88. This had roughly the following appearance, as designed by the Claimant:



89. The above drawing is one of the Claimant's design drawings. I emphasise that I include it at this stage in the judgment only to give a general idea of the product. There are numerous disputes about precisely what design the Claimant made at what stage, and what it sold when. The photograph at paragraph 9 above is also one of the Claimant's A1 products (and is subject to the same caveats, which apply to all of the depictions in this section of the judgment and which I will therefore not repeat any further).
90. The Defendants' A1 product looked generally as follows:



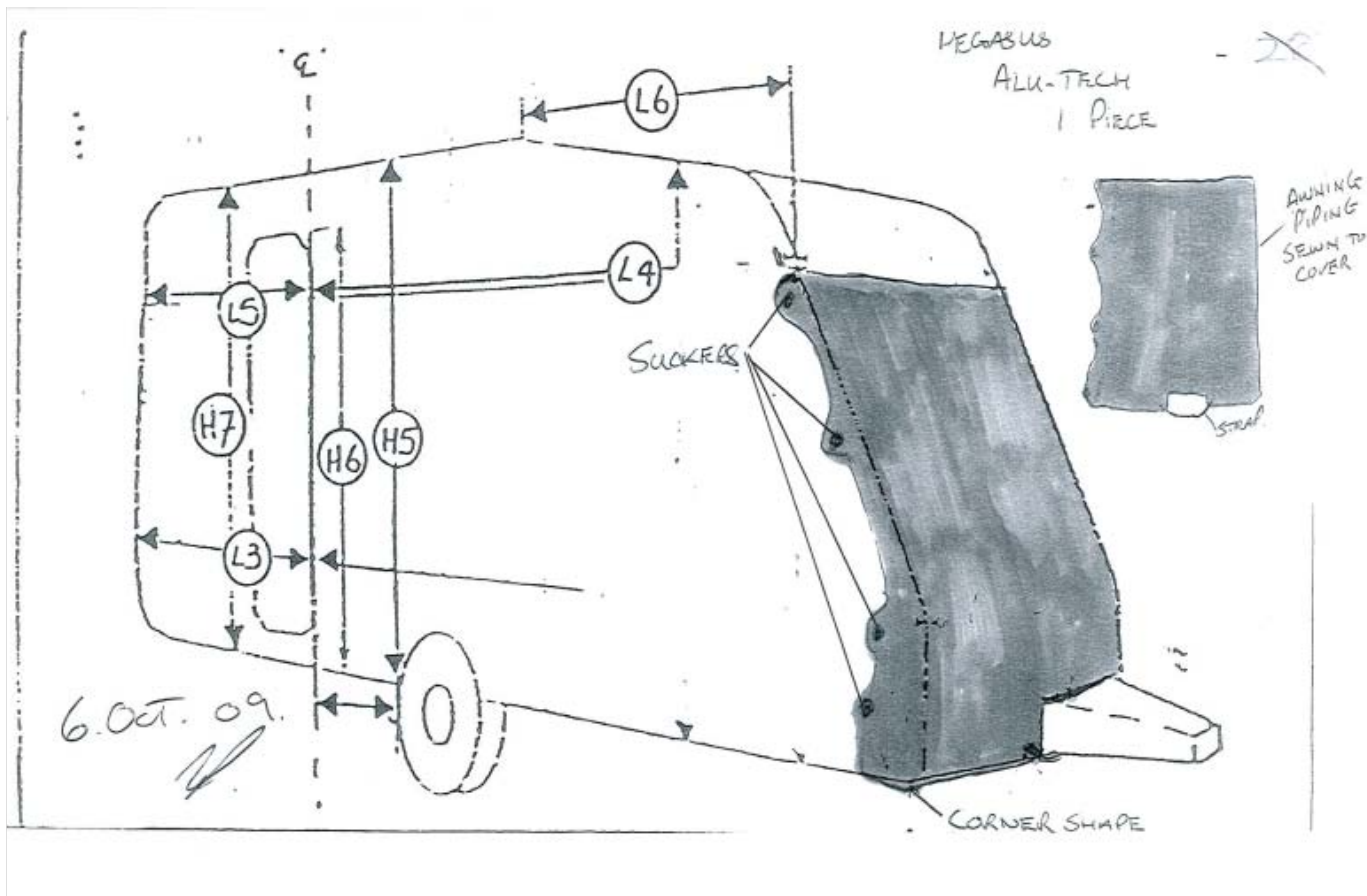
91. This is a photograph taken of Mr Grindrod's test. It is a version of the Defendants' design iterations once a strap strip had been introduced.
92. As its name suggests, this type of product was designed to fit a variety of caravans. The shape of different caravans could be accommodated by the variable length of the straps.
93. This product, as designed by the Claimant, incorporates the strap strip feature. Without going into unnecessary detail, the variants of the strap strip produced by one or both of the parties involved whether it was in one or two pieces, the number and positioning of the straps, and the shape of the fabric part. It will be appreciated that the front vertical edges of caravans are not straight, and nor is the awning rail, so in the UFTP the strap strips have to be designed to achieve proper coverage and fitting for a variety of shapes.

94. The second product, referred to as the A2 design, was also known as the tailored Bailey front towing protector.

95. At the time of the events to which this action relates, Bailey was in the process of bringing out a new range of caravans which only had an awning rail on one side. In addition, the materials of which they were made were particularly prone to damage while being transported.

96. The strap strip approach could not be used on the side without an awning rail. The Claimant and the Defendants both resorted to the use, on that side, of strong suckers, of the kind used to transport glass, to attach the towing cover on that side. On the side of the cover where there was an awning rail, a strip of piping was used.

97. An illustration of this kind of design is as follows:



98. (This is a design drawing of one of the Claimant's A2 designs, showing the sucker side).
99. An illustrative photograph of one of the Claimant's A2 designs (not identical to the design drawing) is as follows:



100. A feature which this photograph does not show very well (and nor does the design drawing) is the shape of the bottom corner of the cover on the sucker side. This was designed to a cutting pattern which, when cut and sewn, would create a sort of box-shaped corner which fitted intimately with the corner of the caravan. I will deal with that point of detail when I come to the statutory exclusions.

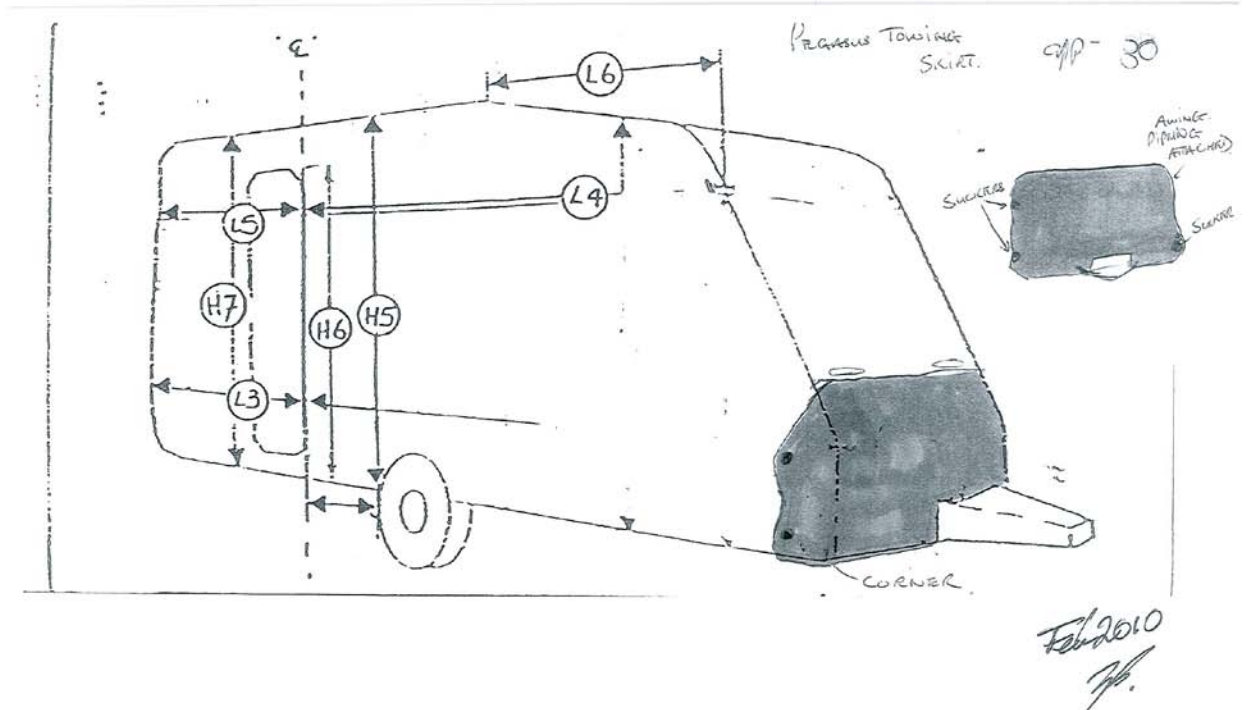
101. An illustrative photograph of the Defendants' A2 is as follows:



102. The variants of this design used by the parties related to the positioning of the suckers, and the shape of the fabric extending along the sucker side of the caravan (in the depiction above it is scalloped, but the Defendants in particular investigated whether it could have a straight edge).

103. The third product was referred to as the B2 or "skirt". It was essentially a truncated A2, extending up only to about the level of the grab handles.

104. An illustration of this general kind of design is as follows:



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105. (This is a design drawing of one of the Claimant's B2 designs; it is important here to point out that there is a dispute about whether this particular variant of the B2 design was actually marketed, since the design which the Defendants accept was marketed looks less like the Defendants' products – I deal with this below).

106. An illustrative example of the Defendants' B2 is as follows:



107. This was also a tailored product, specifically for Bailey Caravans. Bailey requested it because the full height A2 product turned out to trap dirt between it and the caravan, causing damage when they moved relative to one another.
108. The variants of this design which I have to consider include a number of rather different shapes and approaches adopted by the Claimant during its design work as well as some different treatments of the grab handles by the Defendants during their work.
109. It is worth saying at this stage that I felt the B2 design to be something of an irrelevance, or at least to add nothing or very little to the other arguments over the facts. The reason is that there seemed to be no dispute that the Defendants arrived at their B2 design by taking their A2 design and (notionally) cutting off the top portion. That was the Defendants' evidence; I found it entirely plausible and I do not think that it was really challenged by the Claimant. Accordingly, it seems to me as a matter of practical reality that if the A2 design was copied then so was the B2, while if the A2 design was not copied then the B2 was not either.

110. I ought also to mention that the Defendants at one stage made an application for a registered design for their product. This was explored in the evidence to some extent but seemed to me to add nothing really material to the rest of the case.

The pleaded designs

111. The Claimant pleaded three designs. The designs are in each case for a towing cover, and in each case the Claimant relies on a number of specific features. It is simplest to set out the Claimant's Particulars of Claim, paragraph 9, sub-paragraphs (7) to (10):

“II The A1 Design

...

(7) United Kingdom design right subsists in the design of the following aspects of shape and/or configuration of the Claimant’s said A1 design:

- a. The "strap strip", consisting of 2 broadly rectangular sheets which are to be connected to the caravan awning rail and the main front cover via piping and straps respectively. Neither the piping nor the straps themselves are claimed per se.*
- b. The width of the said strip.*
- c. The incorporation and location of piping along one edge of each of the 2 broadly rectangular sheets. (The Claimant's design used 2 distinct sheets (see drawings CF 27 and CF 79, August 2009) whereas now (see drawing CF79, 17 November 2009) a single piece of piping is used to link the 2 sheets).*
- d. The extension of the piping along the entirety of such edges.*
- e. The use of 5 fixing straps to connect the 2 strap strip sheets to the front cover, and the locations thereof; the use of 6 fixing straps for such purpose, and the locations thereof; and the use of 8 fixing straps for such*

purpose, and the locations thereof. (Each of these 6 and 8 fixing strap arrangements has been copied, hence each is separately claimed).

f. The incorporation and location of 2 reflective panels on the front cover, one on each side.

g. Any combination of any of the above aspects.

III. The A2 design

(8) ... United Kingdom design right subsists in the design of the following aspects of shape and/or configuration of the Claimant's said A2 design:

a. The incorporation and location of piping along one edge of the front cover. The piping is not claimed per se.

b. The extension of the piping along the entirety of such edge, save that it stops just before the corner detailing.

c. The incorporation and location of three curved extensions along the opposite edge of the front cover to the piping, and the hole in the middle of each such extension. The suckers which are placed in such holes are not claimed per se.

d. The incorporation and location of 2 reflective panels on the front cover, one on each side.

e. The shape and configuration of the corner detailing on the two bottom corners of the cover.

f. Any combination of any of the above aspects.

IV The B2 design

(10) United Kingdom design right subsists in the design of the following aspect of shape and/or configuration of the Claimant's said B2 design:

a. The overall shape and configuration of the skirt itself;

b. The incorporation and location of the two cut outs, which centre on the grab handles of the caravan;

c. *The shape and configuration of the two bottom corners of the skirt.”*

112. I will refer to individual features where necessary by reference to the paragraph numbers of the Claimant’s pleading.
113. It will be seen that the design features are pleaded at a fairly general level. No specific dimensions are relied upon, and little in the way of shape (the strap strip is required to consist of two broadly rectangular sheets, and feature 9(8)(c) requires three curved extensions on one side of the A2 towing cover). This by no means implies that design right cannot exist, since the right may extend to features of configuration as well as shape, but I have to bear it in mind when I come to consider the statutory exclusions from protection and in particular the method or principle of construction exclusion.
114. Although argument focused on the pleaded features individually, it is important to bear in mind that the designs relied on are designs for towing covers as a whole.
115. It is also worth pointing out that the Claimant's pleading expressly states certain matters to be excluded from what is claimed (the piping which fits into the morning channels itself, and the suckers used for attaching the A2 cover along one side in themselves). This is because the Claimant recognises that at least those facets of the design are excluded from protection by the "must fit" provision.

The sequence of events in overview

116. The Claimant started selling towing covers in 2002. These were according to what I have described above as the predecessor design.
117. In August 2009, a Mr John Parker of Bailey caravans asked Mr Proctor and his wife to visit Bailey. Mr Parker asked the Claimant to design towing covers for existing models of Bailey caravans (which had an awning rail on each side). Mr Parker also wanted towing covers designed for Bailey’s new caravans with a single awning rail, which were to be launched at the NEC caravan show in October 2009.

The towing covers for the new caravans were required in advance of the show in order to be used to transport demonstration models to the show.

118. Mr Proctor therefore set about designing a new towing cover for the existing Bailey caravans, which would be a universal cover in the sense that it would fit a variety of sizes, and would not be bespoke to any particular caravan shape. He devised the strap strip, which at this stage was in two pieces, i.e. two pieces of awning tape each attached to a sheet of fabric.
119. At this stage the Claimant hired Mr Lord.
120. The NEC caravan show duly took place in October and the Defendants were present as well as the Claimant.
121. Mr Proctor was dissatisfied with the performance of Mr Lord at the caravan show, although Mr Lord saw matters differently and felt he had done a good job of selling.
122. Following that show, according to Mr Proctor (see paragraph 20 of his witness statement), Mr Lord was sent out with the Claimant's company van with samples from the first production batch of the A1 to sell to dealers. This corroborates to some extent Mr Lord's evidence that prior to the caravan show and indeed for most of the period of his employment by the Claimant he was office bound.
123. Mr Lord was off sick for a week in November and following his return to work he was dismissed. There is a direct conflict of evidence about whether he took with him any samples or design drawings or other materials.
124. In December 2009 Mr Lord applied for a job with the Defendants. He met Mr Douglas Long and Mr Elliot Long for an interview.

125. In January 2010 the Defendants offered Mr Lord a job and he started work with them on 1 February 2010 in a sales capacity.
126. At almost the same time as Mr Lord joined the Defendants, they began work on designing front towing covers.
127. Initially, the Defendants were working on a universal front towing protector. Several versions were produced. The first 3 attempts did not have a strap strip and the straps attached to the awning rail individually. I will return to the detail of this below.
128. In late February 2010 there was a further caravan show again at the NEC and the Defendants assert that feedback received at and after the show led to a further version being produced at the beginning of March. This still did not have a strap strip.
129. In mid-March 2010 the Defendants produced their first version of a universal front towing protector with a strap strip. This was referred to in the evidence as version four.
130. The Defendants' evidence was that the change from individual straps to a strap strip arose when Mr Elliot Long attempted to install an earlier version with individual straps to a caravan at Dickinsons during a fitting session on 9-10 March 2010. He and Mr Smith said that Mr Elliot Long found the individual straps very fiddly; that he became irate; that he said words to the effect of "why can't we make it in one piece" and that was the idea of the strap strip, with the details of its implementation then being worked out by Mr Smith. This is not accepted by the Claimant.

131. At some time in March or April 2010, when the Defendants were still progressing the design of their universal front towing protector, they started work in parallel on the design of a full height tailored front towing protector for the Bailey caravans with a single awning rail. According to the Defendants' evidence, the idea of doing this arose from purchasers of such caravans contacting the Defendants to say that the new aluminium fronts of the caravans were being damaged in transport. Again, this is not accepted by the Claimant.

132. On 10 June 2010 Mr Lord made a sales call to Mr Swain of Bailey. Although, as I said above, the Claimant does not accept the evidence of Mr Lord or of Mr Swain this meeting is evidenced by an e-mail of 14th of June 2010 from Mr Lord to Mr Swain which states that Mr Lord showed Mr Swain two front towing protectors (there were two because there were two different widths of Bailey caravans of the single awning rail type).

133. Very shortly after the 10 June 2010 meeting the Defendants came up with the first version of their front towing skirt. It looked like this :



134. And it was thereafter refined into the product appearing above at paragraph 106.

135. According to the Defendants' evidence, Mr Smith and Mr Elliot Long were essentially responsible for the universal front towing protector, Mr Douglas Long with assistance from Mr Smith was primarily responsible for the full height Bailey towing protectors, and Mr Smith was primarily responsible for the Bailey skirt (which, as I said above, is asserted to have been in essence just a cut down version of the full height Bailey protector).

The parties' cases in essence

136. The Claimant contends as follows:

- a. After some years of selling the predecessor design, it came up with the new strap strip design.
- b. It employed Mr Lord partly in order to sell the new design and he became familiar with it and had in his possession samples (and also samples of the A2) as well as drawings of the Claimant's designs on his laptop.
- c. He then left on bad terms taking with him samples and drawings.
- d. He applied to the Defendants for a job and by agreement with Mr Elliot Long and Mr Douglas Long he was hired specifically to facilitate copying of the Claimant's designs; his ability to provide information for such copying was what made him attractive to the Defendants.
- e. Thereafter Mr Elliot Long, Mr Douglas Long and Mr Paul Smith deliberately and knowingly copied the Claimant's designs of the A1, the A2 and the B2.
- f. They had the necessary information for such copying either from samples brought by Mr Lord, or from drawings brought by Mr Lord, or from purchasing the Claimant's products on the market, or by seeing pictures of the Claimant's products in marketing materials or on the internet.

137. The Claimant also contends that the Defendants' witnesses (excluding Mr Grindrod and Mr Swain) have all given deliberately untruthful evidence about what they did.

138. In the circumstances of this case it seems to me that the Claimant's case must be all or nothing: either the Defendants' witnesses all cooperated in copying and in giving untruthful evidence, or they did not. I do not think there is any room for an argument that, for example, Mr Elliot Long and Mr Douglas Long each separately copied.

139. In oral closing submissions the Claimant's counsel more or less accepted this as a practical matter and it remains the Claimant's primary case that the Defendants'

witnesses all acted together as I have indicated. It is however suggested in the Claimant's written closing submissions that it is possible that Mr Elliot Long copied the strap strip but Mr Douglas Long did not copy the A2. I do not think this is realistic. The Long family and Mr Smith clearly work very closely together and more specifically Mr Elliot Long and Mr Douglas Long acting separately with one copying and the other not would not be consistent with the Claimant's case that Mr Lord was hired specifically to facilitate copying, because Mr Elliot Long and Mr Douglas Long both participated in his recruitment.

140. The Defendants' case is that:

- a. They had had an interest in producing front towing protectors for some time but had not acted on it.
- b. Mr Lord was hired for his sales ability and not for his knowledge of the Claimant's products.
- c. They started their work on the universal front towing protector based on something akin to the predecessor design and introduced a strap strip as I have explained above.
- d. They had no need to copy because they were already skilled in designing caravan and other covers.
- e. They were motivated to produce covers for the new Bailey caravans because they were reported to be prone to damage and Mr Douglas Long came up with the design independently of the Claimant using his general skill in designing covers, the idea of using suckers coming from his knowledge of how windscreens are carried in car production.
- f. Mr Smith then cut down that design to make the skirt.
- g. There are individual explanations for any further similarities between the parties' products such as the scalloped edge on the A2 design.

Overall approach

141. There are two matters of overall approach which I must deal with at this stage (I will deal with the law in relation to the statutory exclusions from design right protection when I come to that topic).
142. The first is that I must bear in mind that when assessing whether there has been copying, similarities in functional features may well arise from parties independently dealing with the same practical problem. See, for example, *Farmers Build v. Carrier Bulk Materials Handling* [1999] RPC 461 at 481 and 482 per Mummery LJ.
143. The second relates to the standard of proof. The Defendants say that while the standard of proof is the same for all facts alleged in civil proceedings (the balance of probabilities) the seriousness of the allegations under consideration is itself an important factor to take into account when assessing the balance of probabilities. They rely on the speech of Lord Nicholls in *Re H Minors* [1996] AC 563 at 586.
144. I accept this principle and I think it is applicable in the present case where the allegation is of a concerted campaign of copying by at least four people, followed by a concerted campaign of lying about it and covering it up. I would only accept such an allegation if there were compelling evidence in favour of it. I do not think there is such compelling evidence. In fact, I do not think there is even anything close to it. So although I have borne this principle in mind and accept the Defendants' submissions, I would have reached the same conclusion in any event.
145. Apart from the inherent implausibility of such a serious allegation, I think there are a number of high-level points which make the Claimant's case still more unlikely.
146. First I cannot see the logic in the Defendants hiring Mr Lord in order to copy the Claimant's products. If the Defendants had wanted to copy they could just buy the Claimant's products on the market as and when they came out.

147. Second, towing protectors were not (and are not) big business. They sell for under £100 and sales volumes are not large. This is illustrated by the fact that the maximum amount expected to be recovered in this action according to the claim form is only £25,000. It seems to me very unlikely that the Defendants would have undertaken what is alleged of them for such a small amount of money. In saying this I take account of the fact that the Defendants saw the towing protectors as products which could act as “door openers” to bigger sales of other products, but even so the amount at stake remains very small.
148. Third, I accept the evidence of the Defendants, and I do not think it is really open to any serious dispute, that they were easily capable of coming up with a workable design on their own. They clearly had the skills and experience.
149. Fourth, while this dispute has focused very strongly on the strap strip type of design and while I accept that the strap strip was at least a modest improvement on the predecessor design, it is only one feature of what I have said was not a very important product. I think a concerted campaign to copy something so relatively minor is unlikely.
150. Fifth, I have mentioned above that when the Defendants began to design their universal front towing protector they went through three design iterations before coming up with anything with a strap strip. This is obviously unlikely if their intention from the very beginning had been to hire Mr Lord so as to find out about the Claimant's products and to copy them systematically. After all, there was very little new or interesting in the Claimant's universal front towing protector other than the strap strip, as illustrated by the fact that the only pleaded feature not related to the strap strip in the A1 product is the “incorporation and location of 2 reflective panels on the front cover, one on each side”, feature 9(7)(f).
151. On this fifth point, the Claimant's main response was that Defendants must have decided that they did not want to use the strap strip initially, and only incorporated

it when they found it was necessary (a secondary argument that the Defendants were not initially aware of the strap strip was not strongly pursued and is not consistent with the allegation of an intention by the Defendants and Mr Lord to copy from the outset). I do not think there is any logic to this. It runs again into the fact that the strap strip was really the only conceivably interesting thing about the Claimant's universal front towing protector. And the difference in cost between the strap strip and individual straps was clearly very small. If the Defendants had intended to copy the Claimant's products then I am sure the copying would have included the strap strip from the beginning. The fact that the early designs did not include the strap strip is a powerful indication that the Defendants did not have the intention which the Claimant alleges, but were following their own independent design process.

152. Sixth, I do not think there is any convincing evidence that the Defendants were aware when they hired Mr Lord that the Claimant's front towing protectors had any interesting features to copy. They were aware at a general level that the Claimant was selling something according to the predecessor design, which was just a very simple front sheet attached to the awning rail. But it was clear from the evidence that pictures of the Claimant's new towing protector with strap strips were not in circulation.

153. Below, I deal with some of the more detailed points in relation to copying. Suffice to say at this stage that none of them is close to a "smoking gun"; there is no evidence of copying of fanciful features, or of the existence of features in the Defendants' products whose only explanation can be copying. Furthermore, I do not think there is any evidence of material inconsistencies between the Defendants' witnesses, although for reasons explained above I do not attach the greatest weight to this. My overall impression of the general consistency of the Defendants' witnesses was that their accounts tallied to the sort of degree one would expect if they were telling the truth, given the difficulty of recalling relatively minor points of detail sometime after the event.

154. For these reasons and the other more detailed reasons appearing below I have really no hesitation in rejecting the Claimant's allegation of concerted copying and untruthfulness, and my conclusion is also fortified by my impression of the witnesses' demeanour while giving oral evidence.
155. That does not mean, however, that the Claimant's initial suspicions were misplaced. When the complaint which led to this action was first made the position as it appeared to the Claimant was that it had come up with a new product and that following Mr Lord's move to the Defendants, the Defendants had almost immediately produced a front towing cover with the strap strip feature; a little later it came up with two directly comparable products for Bailey caravans with some degree of objective similarity.
156. Although it follows from my finding that there was no copying that the Defendants must have strongly felt on receipt of the initial complaint that they had nothing to answer for, my impression is that their position was developed very aggressively and rapidly became entrenched, without a willingness to recognise that the Claimant's position was reasonably held even if mistaken. Matters were not helped either by the Defendants' unwillingness to recognise that they had had an interest in the Claimant's products, and could have gained access to them if they had wanted to. I return to this below.
157. I will now deal with the more detailed points of fact. Doing this chronologically is difficult and confusing because of the many designs and sub-designs involved on both sides, and the fact that development of them was often going on in parallel. So I will try to organise my reasoning by topic.

Access

158. In a copyright or design right case it is of course important for the Claimant to show that the Defendant could have had access to the Claimant's product or design. The Claimant may not be able to show directly that the Defendant actually did have access, especially if the Defendant is willing to be untruthful. So frequently

the Claimant makes its case by showing the possibility of access coupled with objective similarity between its product and the Defendant's.

159. In the present case, the Claimant alleges several routes of possible access by the Defendants to the Claimant's designs. Since quite a lot of time was spent at trial debating the possibility of access I will deal with the arguments, although for reasons which I will explain I think both parties overcomplicated it.

160. First and foremost, the Claimant alleges that Mr Lord took actual samples of the Claimant's A1 and A2 products with him to the Defendants when he started work there. I have found that Mr Lord had possession of A1 and A2 products during his time at the Claimant. This was for entirely proper reasons: he had them in the company van when he went on sales trips. The Claimant, through Mr Proctor, asserts that Mr Lord did not return such covers. This evidence was rather vague and general and was not accompanied by specific evidence that Mr Lord was known to have samples in his possession when he was dismissed or that a check had been carried out of the company van to see what remained. Mr Lord denied taking the samples.

161. Second, the Claimant alleges that Mr Lord had electronic copies of the Claimant's design drawings on his laptop and took them to the Defendants. This allegation only emerged for the first time in Mr Proctor's witness statement in July 2011, despite quite extensive correspondence about the issue of access. Mr Proctor, in the statement, said that he saw one or more design drawings on Mr Lord's laptop in the Claimant's office. I was not at all persuaded by this because there appeared to be no reason why Mr Lord would have had such drawings on his laptop for legitimate purposes, and if he had transferred the drawings to his laptop for improper purposes I very much doubt if he would then have opened them up in the Claimant's office. Further, the primary copies of such design drawings were hard copies and although Mr Proctor said that some electronic copies existed in the Claimant's business there was no evidence that the relevant design drawings were ever scanned. Had Mr Proctor seen Mr Lord with design drawings on his laptop I

think it very likely he would have commented on it at the time and that the Claimant would have included it as part of its case much earlier. Mr Lord again denied this allegation.

162. I think it is right to take these two factual points (samples and design drawings on the laptop) together. I attribute the second, at least, to Mr Proctor's poor recollection. I do not think he was being untruthful although there may have been a little wishful thinking on his part. On the first point it seems to me that the clash is really between Mr Proctor saying that it is *possible* Mr Lord took samples on the one hand, and Mr Lord on the other saying that he definitely did not. Overall, and coupled with my general impression of Mr Lord's truthfulness, it seems far more likely that he did not.
163. Third, the Claimant alleges that the Defendants could have bought samples of the Claimant's products on the market. The Defendants admit that they did buy samples. There was some evidence at trial to the effect that it was done for the purposes of the proceedings and after the allegedly infringing design process. Since trial, invoices have been produced verifying that the dates of purchase were consistent with that explanation. That does not necessarily mean that the Defendants could not have made other purchases at other times and failed to disclose them, however.
164. There was a complex dispute at trial about which version of which design was marketed by the Claimant, and at what dates. I do not find it necessary to resolve this, save to the extent that I am satisfied that at least some A1 covers incorporating some sort of strap strip were sold by the Claimant prior to the Defendants starting their allegedly infringing design process.
165. There are two points of detail about the case in relation to access by purchasing products. One is that a single feature of the Bailey covers is accepted by the Claimant not to have been incorporated in any actual product prior to the Defendants including it in their design, and on that point the allegation is that the

Claimant told Mr Swain of Bailey about the feature and that he passed it on (without any ill intent, I add) to the Defendants. I deal with that below but it does not impinge on the overall analysis of the case: if the Defendants had in general copied by purchasing the Claimant's products it would still be quite possible that that feature was arrived at independently. The other is that the Defendants dispute that what was called the first version of the Claimant's B2 design was ever put into production; the point could have been important because that first version looked more like the Defendants' design than the later version(s).

166. The evidence on this latter point is rather incomplete and indirect. Mr Proctor was clear in his oral evidence that the first version had been sold. On the other hand I have already referred to his weak recollection, and there is no photograph of it or sales documentation recording it specifically. The Defendants point out that it was not pleaded specifically, which has some minor force. They also say that if Mr Proctor had indeed made the B2 by cutting down an A2 he would not naturally have arrived at the first version of the B2 but instead more probably would have gone straight to the second version. On that last point, I disagree: the first version does look consistent with a cut-down A2, more indeed than the second version.
167. Weighing these matters up I conclude by a narrow margin on the balance of probabilities that the first version of the B2 was sold by the Claimant. Even though Mr Proctor's recollection was not good, he seemed to remember this matter fairly well and I think that is credible. However, the point does not take the Claimant far because there is no evidence that the first version of the B2 specifically, rather than some other version, was available for the Defendants to purchase at the relevant time. And in its closing submissions the Claimant backed away from this aspect of the access argument, almost to the point of dropping it altogether.
168. Finally, the Claimant relied on possible access via sales literature or material on the web. It transpired however that there was no representation of a strap strip towing cover at any show or in any advertisement or on the Claimant's own website prior

to the Defendants' allegedly infringing design process beginning. I think it is fair to say that this route of access rather faded from the Claimant's arguments. I did not see any materials of this kind which seemed to me plausible as containing sufficient detail of the Claimant's products to be worth copying.

169. I have said above that I found the dispute about access overcomplicated by both sides. My reason, in short, lies simply in the nature of the Claimant's case. If it were true that the Defendants and Mr Lord made a conscious plan to copy which they followed through and then concealed then one would not expect any evidence of actual access to survive. All that the Claimant could possibly expect to prove would be that access was possible, and that has always been fairly apparent.

Interest by the Defendants in the Claimant's products

170. Again, a lot of time was spent on this at trial; again, I think it was overcomplicated. However, on this point I think the blame for overburdening the case lies squarely on the Defendants. In a specialised market with only three players it would, as the Claimant argued, have been surprising if the Defendants had not shown an interest in, and kept an eye on, the Claimant's products. Appreciable time would have been saved if the Defendants had admitted that they had in fact done so.
171. As I said above, I do not think the Defendants' reluctance to face up to this point squarely was an indication of guilt about copying. It arose from defensiveness and perhaps a general hostility towards the Claimant. However, since there was quite extensive evidence and argument about it I will briefly state my conclusions.
172. I think the fact that the Defendants were interested in the Claimant and its products is evidenced by the following matters at least.
173. First, and as I have already said, in a niche market with few players one would expect each to keep an eye on the others.

174. Second, one would expect that to be all the more so at a time when, on the Defendants' case, they were planning to launch a new product.
175. Third, the notes of Mr Elliot Long and Mr Paul Smith for the first meeting at the Defendants after the arrival of Mr Lord both refer to the Claimant by name.
176. Fourth, immediately after his arrival at the Defendants Mr Lord joined an internet forum for the discussion of caravans. It was one of the postings on this forum that the Defendants alleged to have been falsified, and I deal with that above. Although it was clear that the posting in question did not contain an express reference to the Claimant, it was posted in a thread concerned with the Claimant's product. Furthermore, it made an indirect but deprecatory reference to the Claimant's products.
177. Fifth, there was evidence of the Claimant and Defendants making claim and counterclaim about one another's products in marketing literature.
178. Sixth, and as I have also mentioned above, at one stage Mr Paul Smith asked Mr Lord to contact the Claimant to find out how its Bailey tailored product was attached.
179. I therefore conclude that the Defendants did keep an eye on the Claimant's products in a general sense. That does not mean that they knew details or specific design features of those products and it does not by any means prove copying. As the Claimant submitted itself, for a business to keep an eye on its competitors and their products is quite normal and proper.

Specific events and indicia said to evidence copying

180. There are a number of particular incidents and product features on which the Claimant relies as evidence of copying. I will deal individually with those that the Claimant put at the forefront of its case. There are other more minor ones as well,

but it is not proportionate to deal with every single one in this already long judgment, and they do not add weight beyond the ones I do intend to deal with.

Coincidence in timing of Mr Lord's recruitment and the Defendants' design effort

181. As I said above, one of the things that made the Claimant's initial suspicions reasonable is that Mr Lord was recruited by the Defendants just before the Defendants came up with their first towing cover, a product which included the strap strip.
182. The Defendants' explanation was that both events – the recruitment of Mr Lord and the new product – arose from a general desire on the part of the Defendants to give a bit more drive to the caravan side of the business. They also say that they had had a general idea of the possibility of doing a towing cover for some years, in particular because Mrs Grindrod had mentioned it as a possibility a number of times.
183. There clearly was a connection between the designing of the new product and the hiring of Mr Lord to this extent: the Defendants thought that a new product such as the front towing cover would give Mr Lord a toehold or foot in the door when making sales calls. And it is clear that Mr Lord was to be the Defendants' first full-time dedicated sales representative.
184. The Defendants also gave evidence that the front towing cover made sense because it was for use in the spring and summer mainly and could be sold just in advance of those seasons, whereas the full covers which the Defendants had been selling for some time were for use in the autumn and winter. So front towing cover products would allow for better year-round sales and for better use of production capacity throughout the year. The Claimant did not say that this was implausible.
185. I found the Defendants' evidence on this issue plausible and consistent and I accept it, especially coupled with my conclusions above as to the low likelihood of the

Defendants hiring Mr Lord with the specific intention of copying the Claimant's products.

The Defendants' first strap strip version

186. And as I said above, the first three versions of the Defendants' universal towing cover did not have a strap strip, but used individual straps with pieces of awning tape at the caravan end.
187. The case of the Claimant is that if it had been obvious to use the strap strip then the Defendants would have done so in the very first version. The Claimant says that the strap strip was in fact an ingenious idea and an improvement which did not occur to the Defendants but was copied.
188. The Defendants on the other hand say that they originally used individual attachments but that Mr Elliot Long came up with the idea of a single piece of awning tape when he became frustrated with the difficulty of fitting individual pieces.
189. I think the strap strip was an improvement. But it was a relatively simple one. In my view once one experienced the difficulty with individual strap attachments the idea of the strap strip at its broadest conceptual level could well occur to a designer quite easily.
190. Given that, I think the Defendants' case is perfectly plausible. The first three versions may well not have presented too much of a problem because for example they were fitted to caravans with relatively snug awning rails so that the individual pieces of piping did not slip.
191. The fact that the predecessor design type of towing cover was sold for some years before Mr Proctor developed the strap strip fortifies the view that the problem, such as it was, was not too severe and did not occur too frequently.

192. The Defendants say that after the general idea of a strap strip was devised by Mr Elliot Long, Mr Smith developed the detail a little further when he pointed out that a single piece strap strip would not work, because of ruching and other problems associated with having a fixed length for differing sizes and shapes of caravans. Mr Smith's reasoning seems to me to be simple, logical and correct.
193. I therefore conclude that the Defendants conceived the general idea of a strap strip for the first time entirely independently of the Claimant. The similarity between the Claimant's products and the Defendants' products in this respect is explained by their having followed, separately, broadly the same design logic.

The gap

194. If a strap strip consists of two pieces of fabric, then there is a risk that when fitted to the caravan there will be a gap between them which will not be protected from dirt and the like. Whether such a gap is in fact created in a given situation will depend on the shape of the pieces of fabric, the positioning of the straps and the size and shape of the caravan. That leads to a problem with trying to design a universal towing protector which by its nature is required to fit a variety of sizes and shapes of caravan.
195. The Claimant experienced this problem, and came up with a solution which involved more careful positioning of the straps and the provision of a little spare fabric to cover any gap.
196. The Defendants also experienced this problem. It came to light when an early version of the Defendants' universal towing cover was tested by Mr Grindrod, as I have mentioned above.
197. The Claimant alleges that first it made the mistake, then the Defendants obtained details of the Claimant's erroneous design with the result that, because the Defendants were copying blindly, the same mistake occurred in the Defendants'

design, only to be corrected when the Defendants saw the Claimant's improved design.

198. The Claimant's position involves matters having unfolded in a very particular chronology. I do not think this was demonstrated. But in any case I do not think the gap issue can help the Claimant because of the evidence of Mr Grindrod: as I said above, that evidence shows that the Defendants carried out genuine testing and refinement based on testing. It makes clear that the Defendants genuinely experienced the gap problem, and once the problem has been observed the solution, I find, is fairly trivial: better strap placement and/or spare fabric.

The scalloped edge on the A2

199. The edge of the Claimant's A2 design on the sucker side is illustrated by the drawing at paragraph 97 above.
200. This is referred to in the pleadings as "the incorporation and location of three curved extensions along the opposite edge of the front cover to the piping". It is simpler to refer to it as the scalloped edge, which is my expression rather than one devised by the parties. Note that in the drawing at paragraph 97 above, there are, as the Claimant would express it, three curved extensions but four suckers, the bottom sucker not being in a curved extension.
201. This is a potentially important point because there is some objective similarity between the Claimant's A2 design and that of the Defendants, and because this feature is not said to be excluded by "must fit" or by the method or principle of construction exclusion.
202. The Defendants' A2 design looked like this:



203. It was common ground that it would be possible to have a straight rather than scalloped edge. Indeed, one would expect that to be the first possibility considered if only because of its simplicity. In fact, the Defendants did consider a straight edge and there was evidence about their thinking on the subject. The evidence of Mr Douglas Long was that he was worried that a straight edge would leave excess fabric between the suckers, and that because in addition the suckers meant that the fabric was proud of the caravan by a few centimetres, it would flap in the wind badly.
204. Mr Douglas Long's explanation seemed entirely plausible to me, and coupled with the evidence that the Defendants specifically thought about the issue at the time and even considered experimenting to test it, it leads me to reject this part of the Claimant's case. As with the strap strip itself, I am satisfied that the similarity between the parties' products is down to their both having faced the same functional problems and having tackled those problems by similar, independent and fairly simple design analysis and solutions.

Grab handles on the B2 skirt

205. On both parties' products the skirt has cut-outs through which the grab handles project, as shown in the photograph at paragraph 106 above.
206. This is said to be an indication of copying, but it presents a difficulty to the Claimant because it accepts that the Defendants made a design with such cut-outs before they could have seen the Claimant's actual product in the market.
207. The Claimant addresses this by alleging that Mr Swain of Bailey had seen one of the Claimant's sample skirts with this feature, and then told the Defendants about it.
208. However, Mr Swain's oral evidence did not support the Claimant's theory. First of all, he could not remember if he had seen the Claimant's skirt product. Second, he said that he positively remembered suggesting the cut-outs to the Defendants. As he explained, the grab handles on the Bailey caravans in question had LED lights on them as an attractive feature, and he therefore proposed that the grab handles should be visible to the user.
209. I therefore do not think that this incident helps the Claimant. Indeed, it illustrates how features of this general kind and complexity can easily be devised by different people approaching the same problem.
210. In addition, as the Defendants point out, there is no positive evidence from the Claimant that Mr Swain really did see one of the Claimant's skirt designs with cut-outs prior to the Defendants adopting that feature.

The statutory exclusions

211. As I said above, the Defendants assert that any features which they did copy (their primary case being they did not) are excluded from protection by design right under the "must fit" or "method or principle of construction" provisions of section 213 CDPA 1988, or both.

212. In the light of my finding on the primary issue that there was no copying, I intend to deal with these points relatively briefly.

213. The relevant parts of section 213 are as follows:

“(3) Design right does not subsist in—

(a) a method or principle of construction,

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

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

214. There was little dispute on the basic law in relation to these provisions.

215. In relation to the method or principle of construction exclusion, both sides cited the following passage from the judgment of Neuberger LJ in *Landor & Hawa International Ltd v. Azure Designs Ltd* [2007] FSR 9, which I intend to apply:

‘13. Thirdly, the textbooks support this approach to interpretation. The Judge quoted a passage from Russell-Clarke on Copyright in Industrial Designs (seventh edition), at para 3–80, which analyses the effect of s 213(3)(a) in these terms:

“A method or principle of construction is a process or operation by which a shape is produced, as opposed to the shape itself. To say that a shape is to be denied registration because it amounts to a method or principle of construction is meaningless. The real meaning is this: that no design shall be construed so widely as to give to its proprietor a monopoly in a method or principle of construction. What he gets is a monopoly for one particular individual and specific appearance. If it is possible to get several different appearances, which all embody the general features which he claims, then those features are too general and amount to a method or principle of construction. In other words,

any conception which is so general as to allow several different specific appearances as being made within it, it is too broad and will be invalid.”

14. The Judge agreed with that analysis, and so do I. It is a view which is supported by the editors of Copinger and Skone-James on *The Law of Copyright* (15th edition). At para 13–55, they state that the purpose of the section is “to ensure that designers cannot create an effective monopoly over articles made in a particular way”. Jacob J appears to have taken the same view in paras 14 and 15 in *Isaac Oren -v- Red Box Toy Factory* [1999] FSR 785 . Having decided that “it is possible to make a device visually very different from Mr Oren's designs but which works the same way”, he went on to hold that “[i]t follows that there is no principle monopolised here — only a visual embodiment of a device constructed in accordance with a principle” ...’

216. In relation to must fit, both parties referred to *Dyson Ltd. v. Qualtex (UK) Ltd* [2006] RPC 31 among other authorities. I intend to apply the principles identified by the Court of Appeal in *Dyson*, paragraphs 27 and 28. What the Court of Appeal said there was as follows:

‘27. I say this sub-section is “so-called” because that is the term by which it is known. Mr Arnold rightly said that its language did not actually say “must-fit” (just as the next sub-section, so-called “must-match” does not actually say that). I agree that one must go by the actual language and not by the epithet or even the notion behind the epithet. The Judge rightly so said at [34].

28. In his general consideration of the law, the Judge used the decisions of Laddie J in *Ultraframe v Fielding* [2003] RPC 435 at [73] and *OSI v. Aspect Vision Care* [1997] RPC 289 at p.424 to extract three propositions [34]:

“(i) It does not matter if there are two ways of achieving the necessary fit or connection between the subject article (the first one referred to in the sub-section) and the article to which it fits or with which it interfaces. If the design chosen by the design right owner is a way of achieving that fit or interface, then it does not attract

design right no matter how many alternative ways of achieving the same “fit” might be available.”

(ii) For the purposes of the sub-section, the article with which the subject article is interfacing can be part of the human body. This might have had relevance in the present case because some of the parts (triggers and a catch) are designed to interface with the human finger or thumb. However, Mr Arnold disclaimed reliance on this — he did not rely on the finger or thumb as a must fit item in the context of any article in the present case.

(iii) The sub-section operates to exclude design right even if the relevant part of the design performs some function other than the function described in the sub-section — for example, it is decorative, or has an additional function not falling within the provision. This additional function does not exclude the operation of the provision.”

217. Paragraph 28(ii) is not relevant to the present case. I also read the Court of Appeal in that case as having implicitly approved the analysis of Laddie J in *Ultraframe* (paragraph 73) as to the statutory purpose of s. 213(3)(i), namely preventing monopolies arising in spares and consumables by excluding from protection those features, but only those features, which enabled the spare part to fit.

218. There were two modest areas of dispute on the law. First, in relation to the strap strip the Claimant accepts that the piece of piping which slots into the awning rail is excluded by "must fit". The Defendants go further and say that the strap strip itself is excluded because it allows the caravan cover to perform its functions while held in place against the caravan. To that, the Claimant retorts that the interface is the piping and awning rail, and not the strap strip more broadly. The Defendants rely on *Dyson v. Qualtex* paragraphs 31 to 39 for the proposition that the "must fit" exclusion is not limited to interface features. I do not read *Dyson* that way: the point there was that the "must fit" exclusion is not limited to components which touch but also extends to such things as clearances. It does appear to me on the authorities (including *Dyson* itself in its approval of Laddie J in *Ultraframe*) that the "must fit" exclusion is directed primarily if not exclusively at interfaces, although I must bear in mind that that is not the language of the section itself.

219. The other issue of law related to the straps on the strap strip themselves (in relation to which the Claimant asserts design right over the number of straps and their position). The Defendants assert that that feature is excluded by must fit.
220. On this point, the Claimant's counsel referred me in oral closing submissions to *Baby Dan v. Brevi* [1999] FSR 377, which is to the effect that interface features within a larger overall design are not excluded by "must fit". *Baby Dan* has received some adverse comment in the textbooks (e.g. Laddie, Prescott and Vitoria, 4th Ed. paragraph 45.35), and has been suggested to be inconsistent with *Electronic Techniques (Anglia) Limited v. Critchley* [1997] FSR 401.
221. The Defendants did not really expand on their submission that this feature was excluded by "must fit" as a matter of law. As I said in the introduction to this judgment, I make no criticism of this because there are a large number of points in this case and as a matter of proportionality both sides, given the time and the amount at stake, have not argued every point exhaustively. Nonetheless, the result is that I have not heard full argument on the *Baby Dan* point; since it is not necessary to my overall decision on liability, and I have made what I believe to be all the relevant factual findings should the matter go further, I decline to decide it (the Court of Appeal also declined to decide it in *Ultraframe (UK) Ltd v. Eurocell Building Plastic Ltd* [2005] RPC 36).

Application of the law to the design features pleaded

222. I will deal with the A1 design first, and my decision on that will affect what I find on the A2 and B2 designs.
223. I will consider features 9(7)(a) to (d) together. They all relate to the strap strip. I interpret (d) to mean simply that the piping extends all the way along the edge of each sheet of the strap strip, by contrast with an arrangement having individual pieces of piping for each strap. That is how the Claimant interpreted it. The Defendants appear from their closing submissions to have interpreted it as relating

to whether there is one piece of piping with two sheets attached or two sheets each with its own piece of piping. Their understanding of feature (d) appears to have had a knock-on effect on their treatment of feature (c), where the picture is further confused by the fact that the feature is intended to be expressed to cover both one piece of piping with two sheets, or a two pieces of piping each with its own sheet.

224. The Defendants assert that these features are all excluded by “must fit”, on the basis that the strap strip as a whole is a feature which allows the cover to be attached to the caravan so that the cover can perform its function or functions. I identify the function in question as being protecting the caravan during towing. A subsidiary function is staying or being kept in place during towing.

225. I do not believe these features are excluded by "must fit". The interface between the caravan and the towing cover seems to me to be the piping which fits into the awning channel. It is a question of degree how far the interface reaches, but I agree with the Claimant's counsel that beyond the piping fitting into the awning channel there are a variety of ways in which the cover could be retained against the caravan and this as well as general impression leads me to conclude that “must fit” does not apply to the strap strip features.

226. I turn to method or principle of construction. The Defendants' case on this is expressed in a rather complicated way in their submissions, and in fact in them they do not allege that feature 9(7)(c) is excluded by method or principle of construction, but I think this is related to the parties' different interpretations of (c) and (d), and I think it is clear from what the Defendants have submitted on (d) that they do rely on method or principle of construction in relation to what the Claimant intended by (c).

227. I think that the way the Claimant has pleaded the strap strip features tends to give an overstated impression of the number and detail of the features on which it truly relies. As the Defendants point out, given a decision to use a strap strip (in the sense of sheets bearing buckles on one side and one or two pieces of piping on the

other), the shape of an ordinary caravan will dictate that the sheets are broadly rectangular and the distance of the awning rail from the front of the caravan will dictate the width of strap strip. Similarly, having piping on one edge and all the way along that edge arises directly from the general idea of a strap strip.

228. Nonetheless and by a narrow margin I think the strap strip features go beyond a mere idea or principle and I conclude that something having the features claimed will have, within limits, a specific appearance. Putting it the other way around, I do not think it is really possible to have different strap strips having those features but with significantly different appearances.
229. I turn to the use and location of 5, 6 and 8 straps respectively. This is not alleged to be a method or principle of construction (rightly so, in my view) but is said to be excluded by "must fit". This depends on the second point of law identified above, which I have declined to decide. I have of course decided, however, that there was no copying of this feature.
230. Finally on the A1 design there is the use and location of reflectors. Mere use of reflectors is quite plainly to my mind a method or principle of construction. As to location, both the Claimant's and the Defendants' designs have reflectors in somewhat varying positions. So for there to be any question of infringement of this feature one has to understand it as referring to the location of reflectors in a very general sense, in which case it seems to me that it is a method or principle of construction: the mere idea of putting a reflector on each side of the caravan somewhere near mid height.
231. I turn to the B2.
232. The B2 does not have a strap strip. On the non-sucker side it has simply a strip of piping which cooperates with the awning rail: features 9(8)(a) and (b).

233. To my mind these features really do consist of the interface alone, unlike the A1 with its strap strip. So I find these features excluded by must fit. The Defendants did not allege that they were excluded by method or principle of construction.
234. Feature 9(8)(c) is the scalloped edge and was not argued to be excluded on either basis.
235. Feature 9(8)(d) is the reflective panels and I find is excluded for the same reasons as apply to the equivalent feature on the A1.
236. Feature 9(8)(e) relates to the bottom corner detailing. It emerged at trial that there was an ambiguity in the way this feature was pleaded: it was not clear whether it referred to the two-dimensional shape of the fabric of the cover as cut but before it was sewn up, or whether it referred to the three-dimensional shape when fitted to the caravan, which is a sort of open box corner.
237. Mr Proctor agreed that in terms of two-dimensional shape, the parties' cutting patterns were significantly different. So if the pleading is interpreted that way there can be no infringement. I also think that that is not the natural way to interpret the pleading.
238. If the pleading refers instead to the three-dimensional shape, then I think the feature is clearly excluded by must fit: its whole purpose is to hug the corner of the caravan.
239. Finally I come to the B2.
240. Feature 9(10)(a) is the overall shape and configuration of the skirt itself. This is not alleged to be excluded. In passing, I note that the Defendants accept that, had there been copying, their skirt would have represented a substantial reproduction of the Claimant's version skirt. But they say that it would not represent a substantial reproduction of versions 2 or 3. I agree with this. The Defendants' skirt is really rather different from versions 2 and 3. This is why the point about the Claimant selling version 1 was potentially significant, and I have held that it did, but that it

was not proven that it was available for purchase by the Defendants at the relevant time.

241. Feature 9(10)(b) is the incorporation and location of grab handle cut outs. The Defendants say the feature is excluded by must fit, and I agree. The purpose of the cut-outs is physically to accommodate the grab handles, and their location is, evidently, determined by the position of the grab handles. There are other ways it could be done, of course, including the approach of stopping the skirt short of the grab handles as done in the Defendants' earlier models.

242. Feature 9(10)(c) relates to the bottom corners and as for the A2, I find that on the proper view of what the pleading means, the feature is excluded by must fit.

Conclusion

243. I decide that:

- a. The Defendants did not copy.
- b. Some but not all of the features relied on by the Claimant are excluded from protection by the must fit or method or principle of construction exclusions in the Act.
- c. The action therefore fails.

244. In the event that the parties cannot agree it, I will receive submissions as to the form of Order. As a matter of proportionality, I am prepared to do this on paper if the parties agree to that course. If the parties find it necessary to serve evidence in relation to costs, I strongly encourage them to keep it as short as possible, in order to be proportionate.

Postscript

245. For the purposes of its cross-examination of Mr Proctor, the Defendants’ solicitors prepared a cross-examination bundle; it contained various documents, some of which were already in the trial bundles, and others of which were not. For the purposes of their Counsel’s closing submissions the Defendants prepared a Comparison Schedule which contained images and drawings of the parties’ designs and products; not all of them were from the trial bundles, but most were. Some of the images were from the cross-examination bundle, including some images of paper models of the parties’ Bailey skirt corners.
246. When the cross-examination bundle was first provided to Mr Proctor, on the first day of the trial, it was on the basis that “most” of its contents were already in the bundles. The Claimant’s Counsel remarked “We will go with this but I am troubled by the ‘most’ bit. I am troubled by the word ‘most’”. This was a very reasonable remark confronted with quite a substantial volume of material, but as the evidence progressed no objection was in fact taken by the Claimant to any of the contents of the cross-examination bundle.
247. During the course of the Defendants’ Counsel’s closing submissions, Mr Acland QC invited me to ask for electronic copies of the images in the Comparison Schedule if I wanted them. Mr Acland introduced the bundle as intended to be “neutral”, and I indicated that the Claimant could add materials if it wanted to do so. The Claimant did not agree that the bundle was neutral, but initially raised no objection to it.
248. During the preparation of my judgment, I identified images which I thought would be useful to include. When I had a complete list, I sent it to both parties. In the list, I mainly identified the images I wanted by reference to the index of the Comparison Schedule. I also asked for a representative image of a single strap strip, which was provided after some discussion, in the course of which discussion I rejected some comparative images sent by the Defendants. The image which appears in the judgment above was, in the end, agreed between the parties.

249. Identifying the images I wanted to the parties, clearing up some confusion which arose, and agreeing the image of the strap strip all involved communications proceeding by reference to the Comparison Schedule.
250. When my judgment was almost completely finished, the Claimant indicated that it had concerns about the cross-examination bundle and about the Comparison Schedule and that it wanted to make an urgent application to expand its submissions as a result. My understanding from its communications is that, first, it had had more time since the trial to study the cross-examination bundle and had realised how much of it was not from the trial bundles and, second, that it was concerned that the Comparison Schedule had attained an undue and unfair degree of importance.
251. I did not think that an oral hearing of such an application would be appropriate or proportional and directed the Claimant to make written submissions in the first instance. I also indicated as follows: “(a) I have accorded no special status to the Comparison Schedule and when I asked for various images in electronic form, I did so by reference to the pagination in the Comparison Schedule for convenience only, (b) the only images in the judgment will be ones which were in the trial bundles prior to the addition of the Comparison Schedule and Cross-Examination bundle, with the single exception of the illustrative photograph of the strap strip agreed between the parties, and (c) I have paid no attention to any part of the cross-examination bundle which was not put to a witness”. The Claimant then indicated that it did not wish to proceed with any such application.
252. I reiterate the three points above. Since the matter was obviously one of concern to the Claimant, I will expand briefly.
253. When the cross-examination bundle was introduced, I took careful note of the Claimant’s Counsel’s reservations about it, quoted above, which I shared to some extent. Had objection been taken to any of the specific contents, I would have considered it and ruled on it, but there was no such objection. The cross-examination bundle was used to some extent to take Mr Proctor by surprise. For example, it included a number of internet archive print-outs to show that the

Claimant's website had not in fact included images of the new design of UFTP at various times, contrary to Mr Proctor's written evidence.

254. It would perhaps have been fairer and more efficient to provide the materials in the cross-examination bundle to Mr Proctor in advance in the way now common in patent actions, but I think the degree of surprise was modest and Mr Proctor did not appear thrown by it. I also think that the important thing for present purposes is that I have rejected the Defendants' attacks on Mr Proctor as a witness, other than in respect of his poor memory, which he and his wife both candidly accepted, and which emerged quite independently of the cross-examination bundle. So I do not think it is arguable that any advantage was gained by the Defendants.
255. As to the Comparison Schedule, I have had in mind at all times that it was not an agreed document and that it did not contain by any means all of the relevant designs, drawings or images in the proceedings. I do not in fact think it is especially tendentious or argumentative or one-sided and I do not think it was unfair for the Defendants' Counsel to express the hope, at least, that it would turn out to be neutral. As I have said and repeated above, I used it as a source of illustrative images and nothing more. I did not, in the event, even use it to make comparisons of the parties' products side by side. I reviewed its contents carefully in the light of the Claimant's objections.
256. Thus, while I am sure the concerns of Mr and Mrs Proctor when they observed references to the Comparison Schedule being made in the course of electronic images being provided for my judgment were genuinely held, they were, in the event, misplaced. I am not at all sure that it was right for the Claimant's objections to come so late, the bundles in question having been provided at trial and not objected to at all for a few weeks, but I do not need to consider that further as matters have transpired.