

O/262/12

REGISTERED DESIGNS ACT 1949 (AS AMENDED)

CONSOLIDATED PROCEEDINGS IN RESPECT OF:

**REQUESTS (NO. 06/10, 7/10, 8/10, 11/10, 9/10 & 10/10) BY NEIL CORBETT
TO INVALIDATE SIX REGISTERED DESIGNS (Nos. 4010208, 4010209, 4010210,
4014175, 4015125 & 4015126)
IN THE NAME OF DIANE GILLESPIE**

AND

**REQUESTS (25/09 & 26/09) BY DIANE GILLESPIE
TO INVALIDATE TWO REGISTERED DESIGNS (Nos. 4010139 & 4010140)
IN THE NAME OF NEIL CORBETT**

THE BACKGROUND

1) The protagonists in these consolidated set of proceedings are Ms Diane Gillespie on the one hand and Mr Neil Corbett on the other. All eight designs the subject of the dispute are in respect of whelping boxes. Ms Gillespie and Mr Corbett each own a number of registered designs. They each request the invalidation of the other's designs. It is sufficient to say that the primary grounds for requesting the invalidation of each others' designs are based on sections 11ZA and 1B of the Registered Designs Act 1949 (as amended) ("the Act") which, in combination, mean that a design registration may be declared invalid if it does not meet the Act's requirements of novelty and individual character. Both parties filed evidence. Neither party requested a hearing, both being content for a decision to be made from the papers filed in the proceedings.

2) The earliest registered designs are owned by Mr Corbett. His claims are that his registered designs defeat the novelty of Ms Gillespie's later registered designs. Ms Gillespie claims that her designs (particularly 4010208 and 4010210) were put into the public domain prior to Mr Corbett filing his two registered designs and, so, Mr Corbett's designs are not valid; Ms Gillespie believes that Mr Corbett copied her designs when she put her designs onto the Internet. As the respective claims are based, essentially, on comparisons between the various designs the subject of the registrations (albeit Ms Gillespie claiming that articles made to her designs have been made available to the public prior to Mr Corbett's filings) I will begin by comparing the designs in question, identifying whether the designs do or do not differ in overall impression from any competing design.

SECTION 11ZA/1B - THE LEGISLATIVE CONTEXT

3) Section 11ZA of the Act provides the capacity for a registered design to be invalidated on the ground (section 1B) that it was not new or that it did not have individual character. Section 1B reads:

"(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.

(2) For the purposes of subsection (1) above, a design is new if no identical design whose features differ only in immaterial details has been made available to the public before the relevant date.

(3) For the purposes of subsection (1) above, a design has individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date.

(4) In determining the extent to which a design has individual character, the degree of freedom of the author in creating the design shall be taken into consideration.

(5) For the purposes of this section, a design has been made available to the public before the relevant date if-

- (a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and
- (b) the disclosure does not fall within subsection (6) below.

(6) A disclosure falls within this subsection if-

- (a) it could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned;
- (b) it was made to a person other than the designer, or any successor in title of his, under condition of confidentiality (whether express or implied);
- (c) it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date;
- (d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or
- (e) it was made during the 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his.

(7) In subsections (2), (3), (5) and (6) above “the relevant date” means the date on which the application for the registration of the design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.

(8) For the purposes of this section, a design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and have individual character –

- (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the complex product; and
- (b) to the extent that those visible features of the component part are in themselves new and have individual character.

(9) In subsection (8) above “normal use” means use by the end user; but does not include any maintenance, servicing or repair work in relation to the product.”

The approach to the comparison

4) The approach to the comparison of designs was set out by the Court of Appeal in *Procter & Gamble Co. v Reckitt Benckizer (UK) Ltd* [2008] FSR 8. The key points are that:

- a) Where there are differences between the designs, the tribunal must assess the overall impressions created by the designs as wholes.
- b) In order to be valid, a registered design must create a clearly different visual impression from the prior art.
- c) The assessment should be made when the designs are carefully viewed through the eyes of an informed user of the article in question; imperfect recollection has little role to play.
- d) The informed user will be aware of which aspects of the design are functional when it comes to considering the overall impression it creates.
- e) Smaller differences are sufficient to create a different impression where the freedom for design is limited.
- f) The assessment should be made by comparing the impressions created by the designs at an appropriate (not too high) level of generality.

5) In terms of the legal principles, further guidance can be seen in the decision of Mr Justice Arnold in *Dyson Ltd v Vax Ltd* [2010] F.S.R. 39 ("*Dyson*"). Some of the key points from this are that:

- g) In terms of functional aspects, the fact that there may be another way of realizing the same technical function does not mean that that functional aspect contributes to the design characteristics, but, if that aspect has been designed for both its function and its aesthetic qualities then it may still play a part in the assessment.
- h) In terms of design freedom, this may be constrained by (i) the technical function of the product or an element thereof; (ii) the need to incorporate features common to such products; and/or (iii) economic considerations (e.g. the need for the item to be inexpensive). The more restricted a designer is, the more likely it is that small differences will be sufficient to produce a different overall impression on the informed user.
- i) In terms of the existing design corpus, it is more likely that smaller differences will be sufficient to produce a different overall impression on the informed user when the prior art and registered design are both based on common features of the type of article in question. Smaller differences are less tolerable when striking features are involved.
- j) In terms of overall impression, Mr Justice Arnold stated:

“46 It is common ground that, although it is proper to consider both similarities and differences between the respective machines, what matters is the overall impression produced on the informed user by each design having regard to the design corpus and the degree of freedom of the designer. In this regard both counsel referred me to the observations of Mann J. in *Rolawn Ltd v Turfmech Machinery Ltd* [2008] EWHC 989 (Pat); [2008] R.P.C. 27 :

“123. ... A catalogue of similar features was relied on by Rolawn, but that exercise is a useful one only so far as it assists to verbalise a visual impression.

125 ... As Jacob LJ indicates, consideration has to be given to the level of generality to be applied to the exercise - the concept is inherent in the concept of ‘overall impression’ - but generality must not be taken too far. Just as, in his case, it was too general to describe the bottle as ‘a canister fitted with a trigger spray device on the top’, in the present case it is too general to describe either product as ‘a wide area mower, with rigid arms carrying cutters, and whose arms fold themselves up at a mid-way point’, and so on. One of the problems with words is that it is hard to use them in this sphere in a way which avoids generalisation. But what matters is visual appearance, and that is not really about generalities. ...

126 ... In every case I come to the clear conclusion that a different overall impression is produced by the Turfmech machine. In each case it would be possible to articulate the differences in words, but the exercise is pointless, because the ability to define differences verbally does not necessarily mean that a different overall impression is given any more than a comparison of verbalised similarities means that the machines give the same overall impression. ...”

The informed user

6) Matters must be judged from the perspective of an informed user. In assessing the attributes of such a person I note the decision of Judge Fysh Q.C. in the Patents County Court in *Woodhouse UK PLC v Architectural Lighting Systems* [2006] RPC 1, where he said:

“First, this notional person must obviously be a user of articles of the sort which is subject of the registered design – and I think a regular user at that. He could thus be a consumer or buyer or be otherwise familiar with the subject matter say, through use at work. The quality smacks of practical considerations. In my view the informed user is first, a person to whom the design is directed. Evidently, he is not a manufacturer of the articles and both counsel roundly rejected the candidature of “the man in the street”.

“Informed” to my mind adds a notion of familiarity with the relevant matter rather more than one might expect of the average consumer; it imports a notion of “what’s about in the market?” and “what’s been about in the recent past?”. I do not think that it requires an archival mind (or eye) or more than an

average memory but it does I think demand some awareness of product trend and availability and some knowledge of basic technical considerations (if any).

In connection with the latter, one must not forget that we are in the territory of designs and thus what matters most is the appearance of things; as Mr Davies reminded me, these are not petty patents. Therefore focus on eye appeal seems more pertinent than familiarity with the underlying operational or manufacturing technology (if any).”

7) I also note that the above approach regarding the informed user was subsequently followed by Lewison J. in the High Court in *The Procter and Gamble Company v Reckitt Benckiser (UK) Limited*, [2006] EWHC 3154 (Ch) and later accepted as appropriate by the Court of Appeal in that case. In *Dyson*, Mr Justice Arnold stated:

“19 In *Grupo Promer Mon Graphic SA v OHIM (T-9/07)*, judgment of March 18, 2010, the General Court of the European Union held at [62]: “It must be found that the informed user is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied. The informed user is particularly observant and has some awareness of the state of the prior art, that is to say the previous designs relating to the product in question that had been disclosed on the date of filing of the contested design, or, as the case may be, on the date of priority claimed.”

8) The case referred to by Mr Justice Arnold above was subsequently appealed to the Court of Justice of the European Union where, now published as Case C-281/10 P, *PepsiCo, Inc. v Grupo Promer Mon Graphic SA, Office for Harmonisation in the Internal Market* it was stated:

“It should be noted, first, that Regulation No 6/2002 does not define the concept of the ‘informed user’. However, as the Advocate General correctly observed in points 43 and 44 of his Opinion, that concept must be understood as lying somewhere between that of the average consumer, applicable in trade mark matters, who need not have any specific knowledge and who, as a rule, makes no direct comparison between the trade marks in conflict, and the sectoral expert, who is an expert with detailed technical expertise. Thus, the concept of the informed user may be understood as referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question.”

9) The informed user is not, therefore, a casual user but must instead be deemed to be a knowledgeable/particularly observant user of whelping boxes and will possess those characteristics set out in the preceding case-law.

THE DESIGNS' OVERALL IMPRESSIONS

10) Ms Gillespie's registered designs are numbered: 4010208, 4010209, 4010210, 4014175, 4015125 & 4015126. Mr Corbett's registered designs are numbered: 4010139 & 4010140. I will begin by setting out what the informed user's overall impression of each of them will be. Not all of the provided representations are set out below (the annex to this decision contains fuller details), but I confirm that I have borne in mind all of the representations when deciding on their overall impression:

Mr Corbett's design 4010139



11) The above design is square or rectangular in nature. It is shallow in height in comparison to its width and depth. It has a cut out section to the front. As can be seen from the representation in the annex, the cut out section can be filed with further panels so as to close it. It has internal rails to the sides and the back, the back rail joins to the side rails. It has additional bolt like elements (two on the front and two on the back) in line with where the internal rails meet the box; this suggests that the bolt like elements assist in the affixing of the rails. The construction is panel like, being formed by what appears to be upvc panels.

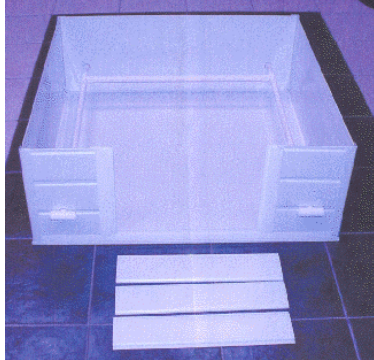
Mr Corbett's design 4010140



12) The above design is almost cube like in structure. It has a hinged flat roof facilitating partial opening. It has internal rails on what appears to be all sides. The side rails join to the front and back rails. There are additional bolt like elements on

the sides where the back (and I assume front) rails meet the box. It has a long mesh like grill on the front with a cut out above it representing three overlapping circles. As in the design above, the construction is panel like.

Ms Gillespie's design 4010208



13) The above design is square or rectangular in nature. It is shallow in height in comparison to its width and depth. It has a cut out section to the front. The cut out section can be filed with further panels so as to close it. It has internal rails to the sides and the back, the back rail joins to the side rails. It has additional bolt like elements (two on the front and two on the back) in line with where the internal rails meet the box; this suggests that the bolt like elements assist in the affixing of the rails. As in the designs above, the construction is panel like.

Ms Gillespie's design 4010209



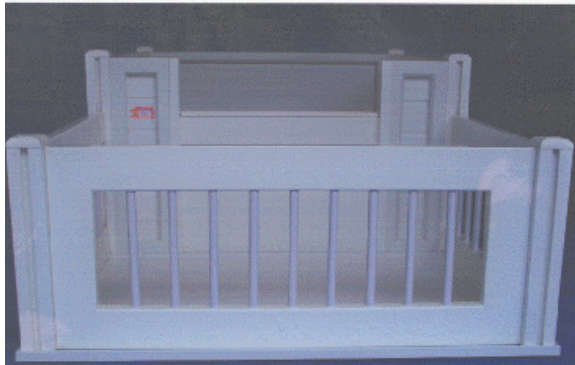
14) The bottom portion of the design is similar (or even identical) to the design described above, but in addition to those features this design incorporates a pitched roof which has a see-through mesh and a (triangular) cut out to the front, but not at the back. As in the designs above, the construction is panel like.

Ms Gillespie's design 4010210



15) The above design is cube-like. It has a flat roof which (as can be seen in the additional representations) can be fully opened, the whole flat roof tilting backwards. It has a rectangular opening in the roof towards the front, and two openings towards the top of the front panel one of which is rectangular and one of which is squarer. It is not possible to see from the representations whether this design incorporates internal rails. As in the designs above, the construction is panel like.

Ms Gillespie's design 4014175



16) The above design features a box like construction with the addition of what I can only describe as a pen. The pen may be affixed to the front of the box or (as shown in the further representations) to the side. The box itself is taller than the box of 4010280 but is still not fully cubed. The box contains a cut out section to the front which can be filled with further panels, although, not to its full height. The box contains square rails to the sides and back of the box. As in the designs above, the construction is panel like. The front of the box contains additional rectangular elements applied over the box front on either side of the opening.

Ms Gillespie's design 4015125



17) The box itself is taller than the box of 4010280 but is still not fully cubed. The box contains a cut out section to the front which can be filled with further panels, although, not to its full height. The box contains square rails to the sides and back of the box. It also has additional profiles on the front (either side of the cut through) creating a squared U like appearance on each side. As in the designs above, the construction is panel like.

Ms Gillespie's design 4015126



18) This is another box like construction with a cut away section which, like a number of the other designs, can be filled in with further panels. It is shallower in height when compared to its width and depth. It is predominantly purple coloured. When the panels are present the manner of construction and the contrasting panel colour creates an H appearance. There are cylindrical side and back rails, the back rails connecting to the sides. There are additional dot elements on the front and back which presumably assist in the affixing of the rails. As in the designs above, the construction is panel like.

DIFFERENT OVERALL IMPRESSIONS?

19) It is possible to make a number of findings (at least in relation to whether the overall impressions clearly differ) without having to analyse the evidence in any real detail. Firstly, it is abundantly clear that Mr Corbett's 4010139 and Ms Gillespie's 4010208 (as depicted below) are extremely similar:

Mr Corbett's 4010139	Ms Gillespie's 4010208

20) Being similar to does not automatically lead to a finding of there being no difference in overall impression. However, I come to the view that this is, nevertheless, the outcome. I have described the overall impressions in virtually identical terminology. Whilst there may be some difference in exact dimension (Mr

Corbett's design being slightly wider and shallower than that of Ms Gillespie), this has little impact in the scheme of things. This finding should come as no real surprise to either party given that they claim against each other on the basis that the designs do not differ in overall impression. **These designs do not possess individual character from each other.**

21) Secondly, I also consider it clear that Ms Gillespie's 4010209 & 4014175 do differ in overall impression from both of Mr Corbett's designs. The designs are:

Mr Corbett's 4010139 & 4010140	Ms Gillespie's 4010209 & 4014175
 <p>The illustration sheet shows two views of a white, rectangular, wheeled dog box. The top view is labeled 'FRONT OF WHEELED BOX WITH PANE' and the bottom view is labeled 'SIDE VIEW OF WHEELED BOX. L & R HEIGHT ARE THE SAME. SLEEPER PURCHASED'. A third image at the bottom shows a similar box with a lid and a door.</p>	 <p>The first photograph shows a white dog house with a pitched roof and a door. The second photograph shows a white pen enclosure with vertical bars and a door.</p>

22) Mr Corbett's closest design is 1010139, however, the additional elements in Ms Gillespie's designs, the pitched roof in 4010209, and the pen enclosure in 4014175, create quite noticeable differences which will, undoubtedly, form part of the informed users' overall impression. **Therefore, Ms Gillespie's above two designs have individual character compared to those of Mr Corbett (and vice versa).**

23) Thirdly, I will give my views on the more cube like pens of the parties, namely:

Mr Corbett's 4010140	Ms Gillespie's 4010210
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24) There are similarities in terms of both being cube like and their appearance being panel like due to their material of construction. However, although both roofs are flat, they open differently. There are differences to the front panel as one has two openings (one square the other rectangular) compared to a mesh like panel and above it a series of three overlapping holes. There is a further difference in the roof as Ms Gillespie's design has a rectangular whole whereas Mr Corbett's does not. Both the identified similarities and differences feature in what the informed user will appreciate from the designs. Other than the basic cube-like, panel like construction, the primary differences contribute significantly to the visual appearance. Whilst the openings may be functional (to provide visibility and ventilation) there is a wide degree of freedom in how this can be achieved and, indeed, the designers have done so in quite different ways. **Despite having some similarities, I consider that the overall impressions are clearly different and the designs have individual character compared to each other. The parties are in no better position to argue a lack of individual character on the basis of their other designs, they are even further apart.**

25) In terms of my overall impression comparisons, that leaves Ms Gillespie's 4015125 and 4015126. The closest design of Mr Corbett is 4010139, so the comparison is between:



26) Although a closer call than the previous two assessments, I consider the differences between the designs to be sufficient to provide individual character. The

proportions appear to differ, with Mr Corbett's design having a shallower look. Furthermore, the additional profiles on the front and on the corners of Ms Gillespie's designs produce a different look, focusing more vertically than horizontally. The impact of colour also assists the second of Ms Gillespie's designs. **Therefore, Ms Gillespie's above two designs have individual character compared to those of Mr Corbett (and vice versa).**

27) In view of the above findings, the following consequences flow:

- i) Ms Gillespie's request to invalidate Mr Corbett's design 4010410 fails.**
- ii) Mr Corbett's request to invalidate Ms Gillespie's designs 4010209, 4010210 & 4014175 fails.**
- iii) Mr Corbett's request to invalidate Ms Gillespie's designs 4015125 and 4015126 fails.**
- iv) Mr Corbett's request to invalidate Mr Gillespie's 4010208 and Ms Gillespie's cross request to invalidate Mr Corbett's 4010139 have the potential to succeed.**

28) At point iv) above I stated that both parties' requests have the potential to succeed. The reason for this will become apparent when I discuss the validity of the respective designs.

VALIDITY – 4010139 & 4010208

29) I will begin by considering the validity of Mr Corbett's design 4010139. Ms Gillespie cannot rely on her design registration per se because it was filed after Mr Corbett's design. The evidence must, therefore, demonstrate that Ms Gillespie's design was publically disclosed prior to the relevant date, the relevant date being the date on which Mr Corbett applied for his design, namely: 4 February 2009.

30) Ms Gillespie claims that her design has been made available to the public and sold by her since 1992. She states that after advertising her whelping boxes on the Internet a direct copy then appeared from Mr Corbett. She refers to her unique designs and that customers have bought products from Mr Corbett in the belief that they were from Ms Gillespie. She claims that Mr Corbett has deliberately copied her designs. In terms of the evidence filed by Ms Gillespie with her statement of case, she provides:

- i) An eBay email message from tebroc-2008 (later evidence demonstrates that this is Mr Corbett) to will0-8 in which it is stated that a whelping box being sold (the design of which is not identified) is a "re-design". It is added that the whelping box on eBay is used for display only, of which all his other whelping boxes are upgrades because people have been copying it.
- ii) Another eBay email message from puggycat8 to warwickupvc (later evidence demonstrates that this is Ms Gillespie) which starts with the words "Hi, I thought you and the other guy were the same company". Ms Gillespie

states that the message is from one of Mr Corbett's customers so, in other words, Mr Corbett is "the other guy". However, no other emails are provided to put this in context, nor what designs are being discussed. Puggycat8 then goes on to identify problems with the whelping boxes supplied by the "other guy".

- iii) Photographs of a whelping box that Ms Gillespie states was first made in 1992. The photographs include sheets of newspaper inside the whelping box which date from 1992.
- iv) Other photographs of whelping boxes which, according to Ms Gillespie, are from her many customers dating from 1992 to the present time.
- v) An invoice and a cheque as payment to Warwick UPVC from December 1997. The item being invoiced is a "small whelping box".

31) In Mr Corbett's counterstatement it is stated that he is a manufacturer and distributor of whelping boxes which he has sold on eBay under the name "tebroc-2008". He says that he is the originator, proprietor and designer of the whelping boxes the subject of his designs. He states that the designs were conceived from his knowledge of porcine rearing equipment (sows with piglets face the same risk of suffocation as puppies) hence, why in the email to will-0-8, he described his designs as a re-design. Various documents are attached to his counter-statement including:

- i) A Paypal print showing what is said to be his first sale of a product designed to 4010139; the print is dated 11 January 2009.
- ii) His registration certificates for his designs showing the filing dates of 4 February 2009.
- iii) A print from eBay relating to Warwickupvc showing feedback for this seller. Highlighted is an entry on page 2 for feedback dated 4 February 2009 which is stated to be a whelping box made to Mr Corbett's design (he does not say which one) the sale is said to be from 30 January 2009 (although this date is not provided on the print). I note that under this entry it is indicated that "detailed item information is not available"; it is difficult to know, therefore, why Mr Corbett believes that the design was made to his design. The item is encoded 23032228391 and described as "NEW 24 by 30 normal font Whelping Box PVC plastic inc door". The use of the word NEW is highlighted as indicating a design newly made available to the public around the date of the application for invalidation.
- iv) A print from the website of warwickwhelpingboxes.co.uk which has the same address as Warwick conservatories Windows and Doors which Mr Corbett believes to be linked company. It is stated that the feedback in the above document up to and including November 2007 is in relation to window/door products and not whelping boxes.

- v) A WHOIS print for warwickwhelpingboxes.co.uk showing that Ms Gillespie registered the domain name in April 2009.
- vi) A print from the Internet archive tool Way Back Machine showing that there is no historical record for the above domain.
- vii) A Google search report (for the period 1 January 1992 - 31 December 2008) for the term "warwick whelping boxes" which show hits for a link present on a dog breeding website which points to warwickwhelpingboxes.co.uk.
- viii) A further print from WaybackMachine for the dog breeding site which shows that the links page has no history. It is highlighted that the page it links to (warwickwhelpingboxes) has a copyright date of 2009.
- ix) Extracts from the website of the Intellectual Property Office for Ms Gillespie's registrations (4010208 and 4010210) from which he notes that the dates of filing for both are 11 February 2009 which he says is one month after his first sale and one week after his applications.

32) In relation to the photographs provided by Ms Gillespie, it is stated that the newspapers do not prove anything because a photograph could be taken today with an old newspaper inside. It is stated that there is nothing to date the other photographs. He says the same about the cheque and the invoice in that they could have been completed today; he asks for proof such as a bank statement to verify the documents.

33) All of the above evidence comes from the respective statements of case and counterstatement. This constitutes evidence as per Rule 21(1)(a) of the Registered Designs Rules 2006. Both sides also filed further evidence in support of their claims. I have to say that the evidence is voluminous and, at times, not easy to follow. I do not intend to summarise it on a piecemeal basis but instead draw out from it the following:

- i) Ms Gillespie makes numerous references about Mr Corbett's business. This is not particularly relevant to whether Ms Gillespie publically disclosed her design or not, therefore, I need say no more about this here.
- ii) Ms Gillespie provides various pieces of financial information much of which Mr Corbett criticises in his evidence (criticisms include cheques not matching bank account details and invoices not running in order). Whilst noting the criticisms, I accept the materials for what they are. My view of them is that they demonstrate sales of whelping boxes for some considerable length of time; there is no evidence to suggest that the materials have been produced fraudulently for the purposes of the proceedings and the comments made about them by Mr Corbett appear to be nothing more than speculation. That being said, I agree with Mr Corbett that such materials alone do not inform the tribunal as to the designs disclosed.

- iii) Further exchanges between Ms Gillespie and Mr Corbett about the photographs of whelping boxes containing the 1992 newspapers. Ms Gillespie, in response to criticism from Mr Corbett, states that it would be near impossible to recreate the photograph and that it should stand as factual evidence. She also ties the depicted whelping box to an invoice at Exhibit K relating to the sale of a “whelping box” in 1992 for an amount which matches a bank statement entry from the same period. Mr Corbett states that the newspaper from 1992 may have been kept and used at a much later date and/or that it is possible to purchase past editions of newspapers (an example of a retailer selling such items is detailed in his Exhibit 3); Ms Gillespie subsequently contacted one such retailer and she informs the tribunal that the newspaper from 1992 is not available. Again, Mr Corbett appears to be making nothing more than speculative comments and his evidence does little to counteract Mr Gillespie’s evidence. I accept that the photograph was taken on or around 1992.
- iv) Ms Gillespie provides a diary from 1992 and, also, her initial sketches which are reminiscent of her design. Mr Corbett’s criticisms follow a similar vein to that above, namely, that a diary could have been kept but not filled in, with the details added at a later date. I do not accept Mr Corbett’s criticisms.
- v) Ms Gillespie provides a witness statement from Daren Addison of H.E.L Reed & Co Accountants who gave advice to Ms Gillespie in 1992 about taking her business forward. He confirms to seeing the original sketches as described above. Mr Corbett comments on the time that has elapsed since then and on the inconsistency of giving Ms Gillespie advice on her business but not advising her to file for a registered design; he also comments that the signature on Mr Addison’s witness statement does not match his signature on the exhibited diary (although it seems similar enough to me). Again, I regard Mr Corbett’s comments as nothing more than speculation. Ms Gillespie’s evidence is accepted as fact.
- vi) Ms Gillespie provides witness statements from some of her customers (Nicola Coleman and Karen Sherlock) and ties invoices to such sales (from November and September 2008 respectively). Neither provides photographs of the whelping boxes purchased. Mr Corbett questions the authenticity of the evidence as they both contain the consistent use of a grammatically incorrect term which leads him to conclude that the same person wrote them all. This is noted, but it is often the practice for a solicitor to draft a witness statement for the witness. Nothing which Mr Corbett states leads me to conclude that the content of the witness statements should be disbelieved.
- vii) Ms Gillespie refers to designs made available to the public on the website bristishbulldog.co.uk. On a forum on this website there is a thread started on 26 December 2008 about whelping boxes and which contain photographs originating from Ms Gillespie. Some of the whelping boxes have the words “Warwick” on them. Mr Corbett highlights that although the thread was started on 26 December 2008, the photographs were not

posted until 27 January 2009 at 6.00pm (a further design was disclosed on 29 January 2009 with a pitched roof appearing thereon); he also highlights that in the conversation the administrator of the website is familiar enough with Ms Gillespie to use her first name and that she indicates that Ms Gillespie is only starting to commercialise the whelping boxes. The 27 January 2009 is, however, still before the material date. The point that Mr Corbett appears to make is that his design, although not filed until 4 February 2009, was first sold by him on 11 January 2009 and so the publication on this website does not precede this date. However, the point is misconceived because publication of Ms Gillespie's design need only be before the filing date of Mr Corbett's design, not the date of first publication of his design. If Mr Corbett was relying on one of the exceptions in section 1B(6) then he should have been clearer. However, I find on the totality of the evidence that Ms Gillespie has not copied Mr Corbett's design. Ms Gillespie has been selling whelping boxes since 1992. The publication on this website supports prior disclosure of Ms Gillespie's design.

viii) Provided as an exhibit to Ms Gillespie's witness statement is a witness statement from Maureen Wombwell, a dog breeder. She purchased a whelping box from Mr Corbett and then approached Ms Gillespie for help with spare parts because it was defective. She then realised that there were two sellers (Ms Gillespie and Mr Corbett) selling the whelping boxes with the same visual appearance. She then placed an order with Ms Gillespie. Ms Wombwell confirms that in Mr Corbett's advertisement he claimed to have been producing the boxes for 15 years; this was a point highlighted by Ms Gillespie which she considers to be plainly false. Ms Wombwell believes that Ms Gillespie's designs have been copied. She does not, though, provide representations of the designs she had in mind. In relation to Ms Wombwell, Mr Corbett states that she never contacted him about any issues and, indeed, she left positive feedback for him. I do not regard this evidence as helpful as the design Ms Wombwell purchased is not clear.

34) The above summary does not represent a full evidence summary but it is sufficient for the purposes of the matters before me. I confirm, however, that I have given due consideration to all of the evidence filed. From the evidence, one thing is certain. That is, despite Mr Corbett's speculative comments, that there is no doubt that Ms Gillespie has been providing whelping boxes to the public since around 1992. The evidence combined easily proves this. The business may not have been a large one, the business may not have used the Internet for sales until more recently, the business may also have related to other more traditional UPVC products, but it is a relevant business nonetheless. However, I must also be satisfied that the design Ms Gillespie's relies upon has been disclosed to the public as part of this business. In her statement of case Ms Gillespie provided various photographs (and orders) from 1992 to date. As they are identified as "to date" most cannot be relied upon to establish a relevant disclosure. However, one of them is said to be from 1992 and is the one containing newspaper from 1992. I have already said that I am prepared to accept that this was made and sold around that time. It is, though, not the clearest photograph – it appears to be roughly the same configuration as Ms Gillespie's registered design but the internal bars appear to be missing as are the front panels

to fill the cut-through. That this represents a similar shape and configuration to Ms Gillespie's designs is supported by the sketches shown in her diary and which was shown to her accountant; these sketches show the same outline configuration with the bars (but not the additional panels to fill the cut-through). It is clear from her evidence that this is her original design for products sold to the public, which she ties to the invoices etc. Any doubt is removed by the photograph on the Bulldog message forum which depicts the following:



35) Ms Gillespie has provided her own written testimony, photographic evidence, and third party evidence. I do not regard the use of NEW on some of Ms Gillespie's eBay sales to undermine this, particularly as there is a good reason for using such a description (new as opposed to used). Taken as a whole I am satisfied that Ms Gillespie's design was disclosed to the public before the relevant date applicable to Mr Corbett's registration. **The consequence of this, together with my earlier finding regarding overall impression, is that Mr Corbett's registered design 4010139 is invalid.**

36) I next consider the validity of Ms Gillespie's registered design. The fact that Mr Corbett's design has been declared invalid does not mean that Ms Gillespie's design cannot also be held invalid. The relevant date for the assessment of the validity of Ms Gillespie's design is 11 February 2009. Mr Corbett's design had not been published in the Designs Journal by then, but he states that articles made to it were sold in January 2009 and, so, this counts as a public disclosure. Ms Gillespie claims that Mr Corbett copied her design. Even if what Mr Corbett sold in January 2009 was a copy of something sold by Ms Gillespie this does not matter for the purpose of the present proceedings because Ms Gillespie has herself publically disclosed the design and she has given evidence to this effect. Ms Gillespie cannot have it both ways. Her disclosures therefore also count against her. The only exception to this would have been if Ms Gillespie's disclosures occurred only in the 12 month period preceding the relevant date, but, given Ms Gillespie's evidence, this is not the case.

37) The provisions relate to public disclosure (which beyond the exceptions referred to in section 1B(6), include those by the designer) and not simply to who created the design first. **I therefore find that Ms Gillespie's design is also invalid.**

SUMMARY OF FINDINGS

38) Mr Corbett's requests to invalidate Ms Gillespie's designs:

4010208 - succeeds

4010209 - fails

4010210 - fails

4014175 - fails
4015125 - fails
4015126 - fails

39) Ms Gillespie's request to invalidate Mr Corbett's designs:

4010139 - succeeds
4010140 - fails

COSTS

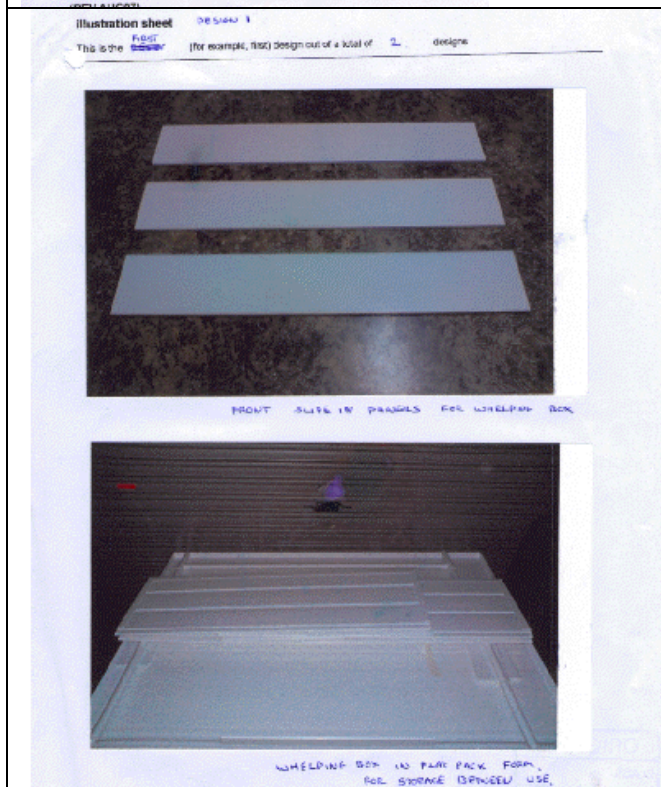
40) Both sides have won and lost. The proceedings were consolidated so I do not consider it necessary to attempt to carve up costs based on exact measures of success. Both sides shall simply bear their won costs.

Dated this 5th day of July 2012

**Oliver Morris
For the Registrar
The Comptroller-General**

ANNEX – FURTHER REPRESENTATIONS

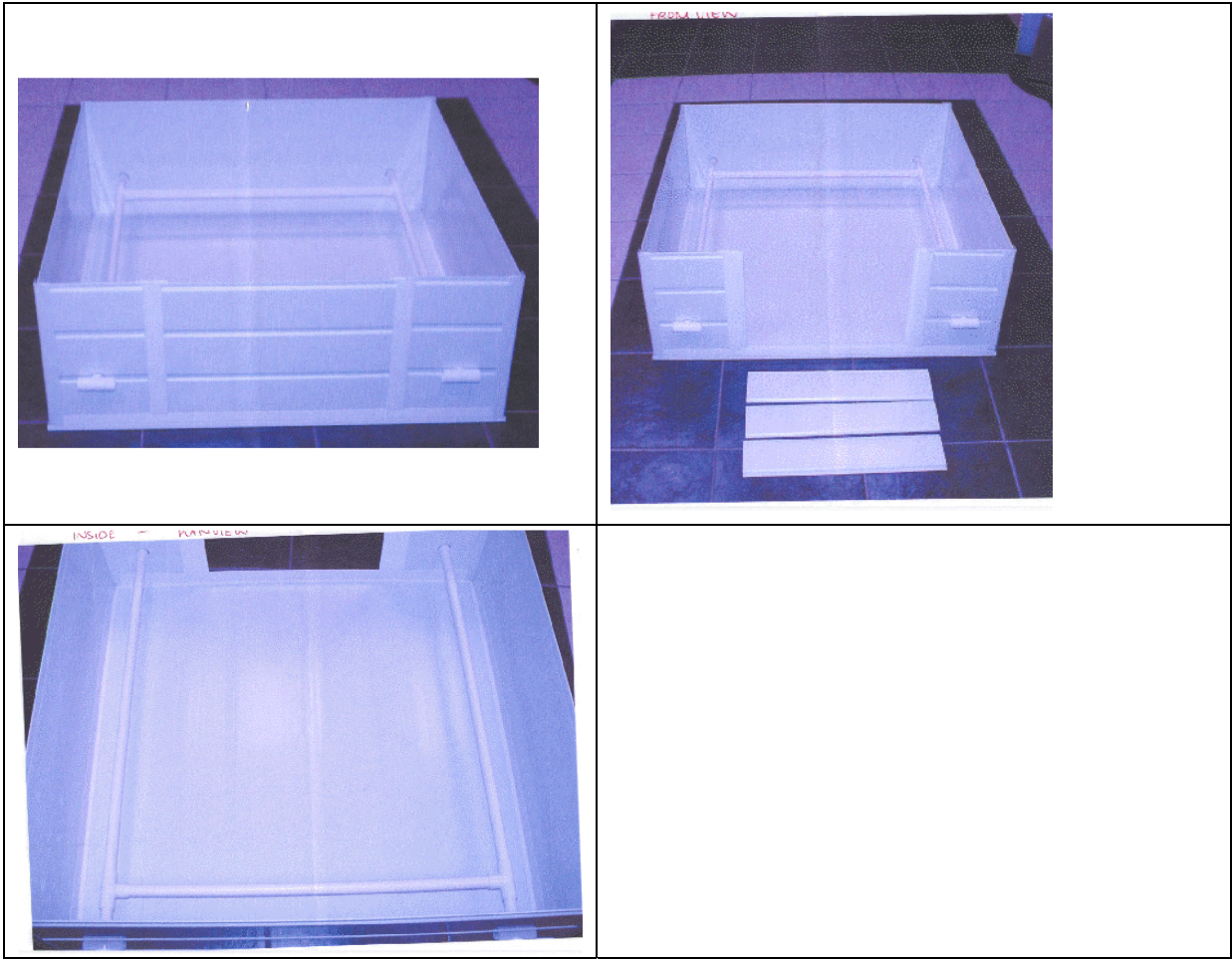
Design 4010139



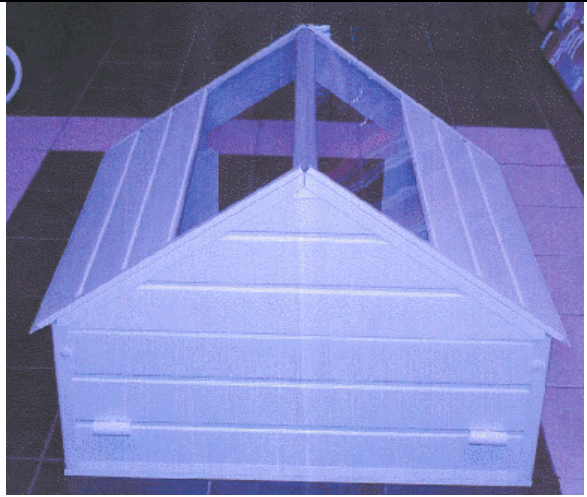
Design 4010140



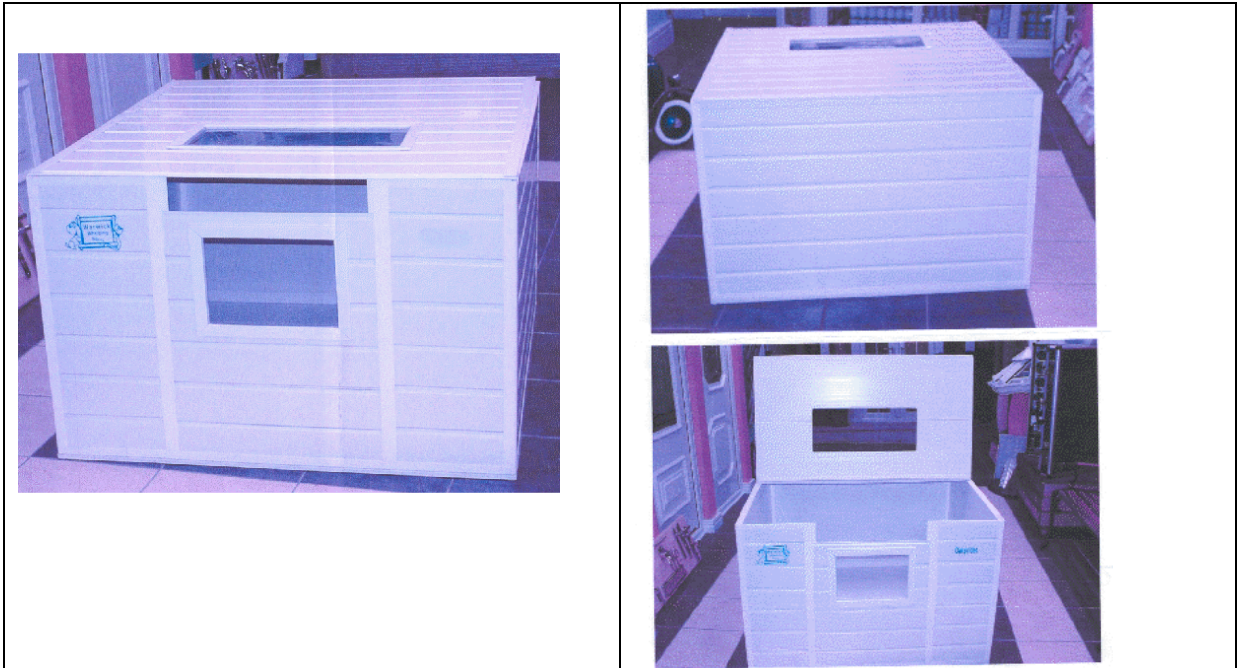
Design 4010208



Design 4010209



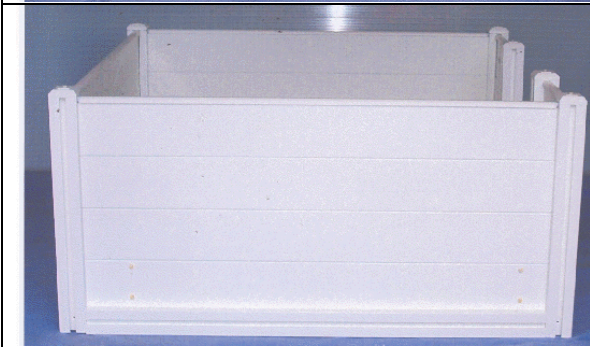
Design 4010210



Design 4014175



Design 4015125



Design 4015126



