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Case No: HP-2018-000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 12th September 2019

Before:

MR. RECORDER DOUGLAS CAMPBELL QC
(Sitting as a Judge of the High Court)

Between:

(1) PHILIP PRICE
(2) SUPAWELL LIMITED
(3) SUPAHOME BY MAPLE LIMITED
- and -

Claimants

(1) FLITCRAFT LIMITED
(2) FLITCRAFT TIMBER FRAME LIMITED
(3) GARRY FLITCROFT
(4) THOMAS FLITCROFT

Defendants

MR. TIM AUSTEN (instructed by **RHF Solicitors**) for the **Claimants**
MR. DANIEL BURKITT (instructed by **Aticus Law**) for the **Defendants**

APPROVED JUDGMENT

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MR. RECORDER DOUGLAS CAMPBELL QC:

Introduction

1. In this action I granted summary judgment in relation to patent and copyright infringement by the first, second and fourth defendants – but not the third defendant – on 12th June 2019. The relief I granted included various injunctions. I refer in particular to paragraphs 5 to 8 of the order I made on that occasion, which state as follows:

“5. The first, second and fourth defendants, and each of them, be restrained (whether acting by their directors, officers, servants or agents or otherwise howsoever) from

(a) infringing (or authorising, causing, assisting or enabling others to infringe) the first claimant’s United Kingdom patents nos. GB 2 415 714 C and GB 2 436 989 B; and

(b) infringing (or authorising, causing, assisting or enabling others to infringe) copyright in the first claimant’s Appendix 3A Works and the Appendix 3C Works as defined in the Amended Particulars of Claim.

6. The first, second and fourth defendants shall on or before 28 June 2019 destroy (such destruction to take place at the defendants’ business premises at Tarnacre Hall Mews, St Michaels, Preston, Lancashire PR3 0SZ)

(a) all patented products in relation to which United Kingdom patents nos. GB 2 415 714 C and GB 2 436 989 B and each of them are infringed, and any articles in which any such products are inextricably comprised, that are in the possession, power, custody or control of the first, second and fourth defendants; and

(b) all articles in the possession, power, custody or control of the first second and fourth defendants, the copying or communication to the public of which would constitute infringement of copyright in the Appendix 3A Works or the Appendix 3C Works (as defined in the Amended Particulars of Claim) and each of them.

7. The first, second and fourth defendants shall on or before 28 June 2019 remove all copies of the Appendix 3A Works and the Appendix 3C Works (as defined in the Amended Particulars of Claim) from the Flitcraft Ecobuild website and the Flitcraft Website howsoever accessible or able to be viewed by visitors to such websites.

8. The claimants are entitled to have a proper officer attend the said destruction ordered at paragraph 6 above, upon provision of reasonable notice by the first, second and fourth defendants, and the first, second and fourth defendants shall on or before 5 July 2019 serve on the claimants an affidavit sworn by a proper officer on behalf of the first, second and fourth defendants confirming that the first, second and fourth defendants have fully complied with paragraphs 6 and 7 above.”
2. I was not asked on that occasion for permission to appeal. I understand from my review of the papers that an application was subsequently made to the Court of Appeal for permission to appeal that order but I was not told anything about that application for permission to appeal.
3. The application I heard yesterday is the claimants’ application for committal which is dated 10 July 2019. As issued it sought committal of the fourth defendant, Mr. Thomas Flitcroft, and also a Ms. Charmain Wilson or, alternatively, a fine: see paragraphs 2 and 3 of that application notice. I should say that of the four defendants in this action, D1 and D2 are companies; D3 and D4 are individuals; and Ms. Charmain Wilson is a director of both D1 and D2 as is D4, Mr. Thomas Flitcroft.
4. The claimants’ central allegation is that despite the grant of summary judgment plus the relief to which I have referred, the defendants have carried on with business as usual carrying on essentially the same acts as before.

Procedural history of the application

5. I now turn to the history of this application. It first came before me on 29 July 2019. Neither the fourth defendant nor Ms. Wilson was present on that occasion although counsel for the fourth defendant, Mr. Burkett, told me at around 10.45 a.m. that day that the fourth defendant was on his way. The fourth defendant subsequently provided an explanation for his non-attendance on that occasion which was not challenged before me by the claimants. As it happened, I was not satisfied that the fourth defendant had been given sufficient notice of that hearing and it was not practical to hear the application on another date prior to the Long Vacation. I therefore adjourned the hearing to 19 August 2019 making it clear I would be prepared to adjourn further if necessary. That date was subsequently adjourned to 11 September 2019 i.e., yesterday.
6. I was shown some evidence relating to Ms. Wilson’s health. It is not necessary for me to go into too much detail about that in this judgment, but I need to say something about it. I refer to Exhibit TF1 to Mr. Flitcroft’s first affidavit dated 26 July 2019. It seems that on 21 June 2019 Ms. Wilson was sent an appointment to attend a General Surgery department on Wednesday, 3 July 2019 at 9.00 a.m. This original appointment was subsequently varied by a letter (typed on 25 June 2019) to Saturday, 6 July 2019. I was also shown a letter from Dr. T. Kearney, a Consultant Endocrinologist, to a Dr. Leach of Edgworth Medical Centre which bears a date of 5 July 2019 but which appears to refer to a clinic of 3 July. The letter appears to be the first document which actually refers to Ms. Wilson’s illness. I have also been shown a letter from Dr. Gregory

Wilson, a consultant medical oncologist, dated 30 August 2019. The letter does not specifically state that Mrs. Wilson would be unable to attend court and nor did any of the other documents which I was shown.

7. The claimants nevertheless consented to adjournment of the hearing as against Ms Wilson to an unspecified date. I am not prepared to grant an open-ended adjournment to an unspecified date for reasons I explained in open court: in particular, the risk that the application gets forgotten about and never comes back to court. I will hear the parties on the length of adjournment I should order as regards Ms. Wilson. My provisional view is that by the end of this year, 2019, the parties should be able to decide whether this application is going to proceed against her or not.
8. I then turn to the subject-matter of the committal against the fourth defendant, Mr. Thomas Flitcroft. I begin with the procedural requirements. I can be very brief. For the purpose of this hearing there is no dispute that all relevant procedural requirements of Part 81 have now been complied with and I should therefore consider the committal on the merits.

The alleged contempts

9. I now turn to consider the alleged contempts in turn. The operative paragraphs are set out at paragraphs 12 to 19 of the claimants' document entitled "Statement of Reasons for Committal" dated 10 July 2019. I do not intend to read these out verbatim but I will summarise them as follows.
 - i) The first is an allegation of infringement of the patents, GB patents 2 415 714 C and 2 436 989 B. Three particulars are given in support of that allegation.
 - ii) The next is infringement of copyright in the Appendix 3A Works and the Appendix 3C Works. Again, three particulars are given in support of that allegation.
 - iii) The next is that the fourth defendant is said to be the controlling mind of the first and second defendants and has authorised, caused, assisted or enabled others to do any of the acts aforesaid.
 - iv) The fourth relates to an allegation that the defendants have not complied with the obligation to destroy all patented products in relation to which the patents are infringed.
 - v) The fifth relates to the claimants' entitlement to have a proper officer attend the said destruction.
 - vi) The sixth relates to destroying all articles, the copying or communication of which would constitute infringement of copyright in Appendix 3A Works or the Appendix 3C Works.
 - vii) The seventh relates to removing all copies of the Appendix 3A Works and Appendix 3C Works from the relevant website.

viii) The eighth and final allegation is that no confirmatory affidavit has been provided to confirm destruction of the said destruction and removal.

10. These are the matters I have to consider and decide.

The parties' pleaded cases

11. Before going into details of these alleged breaches, Mr. Austen, who appeared for the claimants, made a number of helpful submissions in opening which focused the areas of dispute I have to decide. First, he did not rely on both of the patents. In particular he did not rely on the '989 patent; he only relied on the '714 patent. Secondly, he drew my attention to some details of the pleading. It is convenient to mention these here.
12. I refer to the amended particulars of claim at paragraph 13. This sets out the allegation that the defendants have carried out the acts specified in paragraphs 2 to 9 of the particulars of infringement. I was taken to these paragraphs of the particulars of infringement, the key ones for this purpose being paragraphs 3 and 4. Paragraph 3 sets out a number of allegations of infringement of the 714 patent. Mr. Austen made it clear that despite the reference to a number of claims of that patent, he was restricting his submissions to claim 1 of the 714 patent. He was also restricting his allegation of breach to two particular methods of infringement, one being as set out in paragraph 3(i) and the other as set out in paragraph 3(iii). I will refer to these as "direct infringement" and "indirect infringement" respectively.
13. I was also taken to the patent itself. My attention was specifically drawn to a number of the figures and some of the description as well as claim 1. The specific allegations of infringement are set out in paragraph 4 of the particulars of infringement. Mr. Austen focused his submissions on a product referred to in that paragraph as "Injectawall". The Injectawall product is more fully described in the defendants' brochure relating to that project.
14. I will now refer to this brochure, which was the subject of evidence and cross-examination, in more detail. It is contained as an exhibit to an affidavit of Mr. Neil Middleton, a director of the second and third claimants, dated 11 July of this year. Mr Middleton told me that this brochure had been obtained by his solicitor, Mr Festenstein, and in re-examination he was taken to 2 emails exhibited to Mr Festenstein's 3rd witness statement dated 25 July 2019. These emails show that employees of the First Defendant sent 2 copies of what they each described as "our current 2019 brochure" on 18 June and 4 July respectively. On the latter occasion the brochure was sent by Bev Green, who described herself as an Admin Manager.
15. The first page of the brochure appears at bundle 3, tab 10, page 162. I was struck by the figure in the top left of the front page which appears to me identical to figure 1 of the '714 patent. Mr. Austen explained to me that this is a matter still going forward to trial and this drawing is referred to in the particulars of claim as the Appendix 3B Work.

16. Mr. Austen also drew my attention to a drawing of the Injectawall product on page 164 of the hearing bundles. This contains text describing the Injectawall product and also a marked up diagram, which is annexed to this judgment at Annex 1. He explained to me how each and every element of claim 1 of the ‘714 patent could be seen in the diagram and in particular when read in the light of the accompanying text. He drew my attention in particular to what was described as the “Extruded Polyurethane Foam 50 mm” in the picture, which was described in the text as follows:

“The exterior side is faced with a breathable waterproof membrane and 50 mm of cavity insulation.”

17. I underline the words “50 mm of cavity insulation” because in this brochure it is clear that the “50 mm of cavity insulation” refers to the 50mm extruded polyurethane foam. Mr. Austen also pointed out that extruded polyurethane foam is specifically mentioned as suitable for the second layer at page 5, first full paragraph of the ‘714 patent.
18. Continuing with this brochure, Mr. Austen drew my attention to page 165 of the bundle which refers to a product called the “Eco Pack”. It is not suggested the Eco-Pack product infringes: it was not mentioned in the particulars of infringement. A feature of the Eco-Pack product is that it has quilted insulation of 150 mm. The Injectawall does not use quilted insulation.
19. Returning now to the particulars of claim and the particulars of infringement, these also contain allegations of infringement of the claimants’ copyright works. I refer for instance to paragraphs 14 to 18 of the particulars of claim and the passages of the particulars of infringement referred to therein. The Appendix 3A Works are photographs of buildings. The Appendix 3C Works are photographs of the claimants’ structurally insulated panels. These allegations are set out in more detail in paragraph 11 of the particulars of infringement. This refers to reproduction of the relevant Works in a variety of ways in a variety of places including on websites, on various signs and leaflets and brochures and in banners. It does not refer to any use of copyright works on vans.
20. That deals with the particulars of claim. I now come to the defence. The defence was signed by Mr. Thomas Flitcroft, the fourth defendant and the respondent to this application, on behalf of the first and second defendants and also himself on 11th March 2019. So far as the allegation of patent infringement was concerned, there were four and only four lines as follows in paragraph 15:

“As to paragraph 13, it is admitted the first defendant has undertaken work with the benefit of the Patents as it is entitled to do as the owner of the Patents (and all rights with respect to the same). There has been no infringement as alleged or at all and consequently the defendants do not plead to the acts said to constitute infringement at paragraphs 2 to 9 of the particulars of infringement.”

Similarly at paragraph 21 the only defence raised to the allegation of copyright infringement was also a defence claiming proprietorship.

21. I have now dismissed these defences in that I have granted summary judgment and no permission to appeal has yet been granted by the Court of Appeal. No other defences to the claims of patent infringement or copyright infringement are mentioned. So far as patent infringement is concerned, I also asked Mr. Flitcroft's counsel, Mr. Burkitt, during the hearing as to whether he could give any reason as to why the diagram of the Injectawall product in the defendants' brochure which Mr. Austen showed me did not establish infringement by the product shown therein. He was unable to give me any such reason.
22. After that lengthy introduction I come to the committal application itself. First, I will set out the court's approach generally. Secondly, I will make some general comments on the witnesses whose evidence I heard. Thirdly, I will conduct a detailed review of each of the eight alleged breaches which I have identified.

The Court's approach to committals generally

23. First, so far as the court's approach generally is concerned, there is no dispute about this. My attention was drawn by Mr. Burkitt to the judgment of Proudman J in *FW Farnsworth v Lacy* [2013] EWHC 3487 (Ch), summarised in the White Book, Volume 2, at page 1444. I do not propose to read that out but to summarise it as follows. It was originally expressed as three points but it could, in my judgment, be regarded as five, as follows:
 - i) First, all of the following factors have to be proved to the criminal standard of proof. That is an issue here.
 - ii) Secondly, it must be shown that the defendant has received notice of the order in question, being an unambiguous order. There is an issue here as to whether the order was sufficiently unambiguous in certain respects.
 - iii) Thirdly, it must be shown that the defendant acted or failed to do the act in question. There was no separate point on this.
 - iv) Fourthly, it must be shown that the defendant's act or omission was done intentionally in the sense of deliberately rather than merely inadvertently. I would stress that an intention to breach the order is not necessary provided that the act itself is deliberate rather than merely inadvertent. The intention to breach the order or lack thereof, is of course still relevant to penalty. This is an issue on the present application as well.
 - v) Fifthly, did the defendant have all necessary knowledge of all the relevant facts? There was no separate point on this.

The witnesses

24. I now turn to the witnesses. I heard oral evidence from the Mr. Middleton, the Managing Director of the second and third claimants, and also from Mr. Flitcroft himself. Mr. Flitcroft himself did not have to give evidence but he chose to do so.

25. An application to cross-examine Mr. Middleton was made by the defendants at the end of Mr. Austen's opening. I had no idea that that application was going to be made and nor, I believe, did Mr. Middleton. However, he consented to cross-examination. In my judgment he was a good witness. He gave good answers to the questions clearly and simply. He made concessions where necessary. Mr. Middleton also referred to, and exhibited, some evidence given by the claimants' solicitor, Mr. Festenstein. No application was made by the defendants to cross-examine Mr. Festenstein.
26. I now consider Mr. Flitcroft's evidence. I cannot say he was a good witness. This was for the following reasons.
27. First, Mr. Flitcroft gave evidence that he is the "controlling mind" of the first and second defendants as opposed to his father, Mr. Flitcroft senior, the third defendant. Mr. Flitcroft junior is 21 years old. He got his own age wrong in the original version of his first affidavit served on 26 July 2019 when he said he was 22. It was not until 10 September, over six weeks later – only two days ago – that he corrected his own age to 21. By profession he is a joiner. D1, on the other hand, is a substantial company. Mr. Flitcroft said (in his second affidavit at paragraph [11]) that it currently employs 20 people. Mr. Flitcroft also said that as at 10th September 2019 it currently has £1.3 million in unfulfilled orders. D4 was taken in cross-examination to a press interview given by his father published under the heading "Homes for the Future". That is at bundle 4, tab 19, page 484. Mr. Flitcroft junior agreed that in this article his father presented Flitcraft Timber Frames as being his father's business.
28. Mr. Flitcroft junior's cross-examination was, to my mind, vague as to how often he visited the premises of the first and second defendants and as to what he did when he was there. He agreed he did not go every day and not even every week. He most recently visited the premises, which he said was with his father, last week. The time before that when he visited the premises was three weeks before. D4 also said there were "meetings" every month though he did not say who attended the meetings, what they were about, or where they were held.
29. D4 identified in his second affidavit at paragraph [10] what he called an "established management team" comprising three individuals, Rick Aston, Beverley Green and Ryan McDermott. So far as Beverley Green is concerned, he stated in his affidavit that Ms. Green is "the stock buyer and office book-keeper". However Ms. Green described herself to the claimants' solicitors as being the "Admin Manager" when she supplied a copy of the brochure which I have already mentioned to Mr. Festenstein, so there appears to be a discrepancy as to what Ms. Green actually does and what her job title is. If Mr. Flitcroft junior really is the controlling mind of the first defendant then, even as a 21 year old joiner who only visits the premises intermittently, he would be telling all these people what to do every day and would be familiar with their work. I also agree with the claimants that whilst it is easy to see why someone who sends out brochures to customers is an Admin Manager; it is more difficult to reconcile her job description of Admin Manager with being a member of an "established management team". An Admin Manager is more likely to support the management team.

30. There were also occasional pauses in his oral evidence when he looked across the court where his father and another employee of D1 or D2 were sitting. That is behaviour which I would expect from a 21 year old joiner who was out of his depth but not what I would expect from the controlling mind of a company employing 20 people with a turnover of millions who was directing an established management team. That aside, both sides were content to accept that D4 was indeed the controlling mind of D1 and D2. Despite my considerable doubts, I will proceed on that basis.
31. Secondly, my attention was drawn to the very different signatures apparently produced by Mr. Flitcroft during this case. As I have already said, he signed the defence three times. He also signed his original affidavit. The references for that are bundle 1, tab 6, pages 44 to 45 and bundle 4, tab 16, page 252. But Mr. Flitcroft gave a completely different signature on his re-sworn affidavit at bundle 4, page 642 (and see also p 637). By “re-sworn affidavit” I mean the first affidavit which was re-sworn for technical deficiencies. Mr. Flitcroft said these were both his signature and that he changed his signature all the time. It is unusual for anyone to change their signature all the time and I asked him why he did so. I did not get any satisfactory answer. I was not given any other examples of Mr. Flitcroft changing his signature all the time. However, it was less obvious that anything turns on this second point.
32. Thirdly, I was not impressed with Mr. Flitcroft’s evidence as regards what steps he took to ensure that any infringing products were destroyed. I will consider this in more detail in its proper context.
33. Fourthly, I had concerns about his evidence at what I shall call the change to the new specification of Injectawall. Again, I will consider this in more detail in its proper context. But as a result, I will exercise caution in accepting Mr. Flitcroft’s evidence.

The 8 alleged breaches in detail

1 – patent infringement

34. I now turn to the first ground for committal, alleged patent infringement. It therefore goes to the injunction granted in paragraph 5(a) of my order. Matters developed somewhat during the course of the application whereby the claimants relied on three distinct matters to show a continued infringement, and hence a breach thereof.
 - i) The first was a number of photographs taken at the defendants’ premises at various dates.
 - ii) The second was the number of orders described as the “unfulfilled orders” accepted by the defendants after the date when the injunction was granted (or rather, served).
 - iii) Thirdly, there were the defendants’ brochures. There were in fact two. One is the one I have already mentioned, which was referred to in argument as the “old” one although it was, itself, new when issued.

Another brochure was located by Mr. Middleton more recently and exhibited by him to a witness statement dated 10 September 2019. This new brochure was put to Mr. Flitcroft in cross-examination without objection and Mr. Flitcroft accepted this was indeed the defendants' new brochure. I note that figure 1 of the patent still appears on the top left of this brochure. I was also told that the Appendix 3A and 3C images had been removed from this version of the brochure.

35. I annex to this judgment at Annex 2 the relevant part of the defendants' new brochure, from bundle 4 at page 628. So far as the diagram of the Injectawall system is concerned, there is no doubt that this has changed from the diagram shown in the earlier brochure. Specifically there is no longer the extruded polyurethane foam on the outside of the breather membrane. However, the text in the new version of the brochure still refers to "50 mm of cavity insulation". In the original brochure that same text referred to the 50 mm extruded polyurethane foam. So, on the face of it there is, or may be, an inconsistency between the text and the drawing.
36. The defendants disputed all of these arguments from the claimants and had a counter-argument of their own. That was their argument that at the hearing before me on 29 July 2019 I had made express provision whereby the claimants could have an independent expert inspect the defendants' premises (see paragraph [5] thereof) and the claimants had taken no steps for such purpose. I was given no reason by the claimants as to why there was no such inspection, merely what the claimants accepted was a hindsight rationalisation as to why this might not have been requested.
37. In summary the defendants' argument on this, as on many of the other alleged breaches, was that the alleged breach was not shown to the criminal standard and even if there was some technical breach, it was inadvertent.
38. I now consider these four points in more detail. First, as regards the photographs, I agree with the defendants that the photographs do not prove anything more than some sort of panels being present on some sort of lorries at various dates. Mr. Middleton believed these were deliveries from the defendants rather than to the defendants but, even if this is correct, Mr. Middleton fairly agreed he could not see from the photographs what the construction of the panels was. For instance, it was not possible to see whether the insulation was injected or quilted.
39. Secondly, I turn to the orders. There is no doubt that Mr. Flitcroft's exhibit to his first affidavit shows a large number of orders and it is not disputed that at least some of them are as yet unfulfilled. I do not propose to go through each and every one of these, but I will refer to a number of examples.
 - i) For instance, at bundle 4, page 410, there is an order which was signed by the customer on 26th July 2019, which is after the date of the injunction. It says that this order is for "140 mm Injectawall, I-joists, cranes and ancillary".

- ii) Another example is to be found on page 414. This is another official order. In this case it was signed on 11th July 2019 by the customer and 17th July by Flitcraft Limited. This refers to “90 mm Injectawall”.
 - iii) A third example, if a third one is needed, is to be found on page 416. That was signed by the customer on 5th July 2019 and on behalf of Flitcraft on 9th July 2019. This also refers to “140 mm Injectawall”.
40. I was not shown the specification or any quotation for any of these orders although the fourth full paragraph of each of them states that “the Quotation” shall mean a certain numbered and dated quotation, and “the Specification” shall mean the specification in or referred to in that Quotation.
41. It was not suggested that the products which are the subject of these particular orders had yet been manufactured or installed. However, I reject the defendants’ submission that that of itself is the end of the matter. This is because under s 60(1) of the Patents Act other acts, such as disposing of a product or even offering to dispose of a product still amount to infringement as well as using and keeping the product. If the product which is the subject of any given order is in fact an infringing product, I see no reason why entering into the order would not be an act of infringement. Indeed, offering to dispose of an infringing product would still infringe even if no actual order was entered into.
42. So the key question in so far as these orders are concerned is whether the subject matter of any given order is an infringing product. In this respect I agree with the defendants that one cannot conclude a product infringes simply from the name. I made no such finding when granting summary judgment.
43. That brings me to the third matter, namely the brochures. It is clear on the evidence that the old brochure was still being supplied on 4 July because Ms. Green of the Management Team of the defendants supplied the claimants’ solicitor with a copy of it on that date. As I have said, the defendant was unable to give any reason as to why the products shown in the old brochure would not infringe. I can see no reason why supplying the old brochure to a potential customer is anything other than an offer to dispose of the product shown therein. In particular, I cannot think of any other conceivable reason for distributing the brochure to potential customers and no other reasons were given by the defendants. The whole point of sending brochures to potential customers is to get orders for products shown in the brochure.
44. So it follows, in my judgment, that by continuing to distribute the old brochure after my order was served, the defendants – and here I was given no reason to distinguish between D1 and D2 as the companies and D4 as their controlling mind – thereby breached the injunction. In this respect I am satisfied to the criminal standard of proof. Indeed, there was no real attempt to dispute the basic facts i.e. that two copies of the brochure in question were supplied to Mr. Festenstein on the dates he gave and as shown in his email.
45. I have also considered whether this breach was inadvertent. In my judgment there is nothing inadvertent about sending the old brochure to the claimants’ solicitors. It was a deliberate act, not an accidental one.

46. Furthermore, I am not satisfied the defendants took my order at all seriously either in relation to the matter of patent infringement – which I am now considering – or in the relation to the destruction of patented products, or in relation to the removal of infringing copies of Appendix 3A and 3C Works, or in relation to provision of the affidavit. The defendants’ approach to all these matters was casual and they did not seem to care whether or not they got it right or how quickly they complied with my order; indeed, even if they complied with my order at all. The defendants’ decision to adopt such a casual approach to all these issues, including the issue of patent infringement, was itself a deliberate act not an inadvertent one and all of the subsequent acts said to be inadvertent were merely consequences of the deliberate decision to adopt the casual approach.
47. I also note that the defendants at all material times following grant of the injunction knew that their only defence to the patent action, which was a claim to have owned the patent, had been rejected. So there was even less excuse to carrying on offering the infringing product to customers.
48. That deals with the old brochure, and in particular the product shown therein, but what about the new brochure? Mr. Austen did explore the issue of indirect infringement of the ‘714 Patent by acts done in relation to the new product via some questions in cross-examination. However in closing he did not suggest to me that infringement in relation to the products shown in the new brochure was shown to the criminal standard if and in so far as the Injectawall products were actually supplied and installed as per the diagram in the new brochure. In my judgment he was right not to do so since the issue of whether acts done in relation to the products shown in that diagram infringed was not in issue at the time of the summary judgment application and it would, in my view, require a new trial.
49. The claimants, however, relied on the text in the new brochure. Mr. Austen said showed that the product actually being supplied was not that shown in the diagram at all; it was the old product all along.
50. Mr. Flitcroft gave evidence to me about the new brochure. He said that the text in the new brochure was a “typo” and that the defendants had changed to a new specification of the Injectawall product as shown in the diagram in their new brochure on 1 June. Specifically he said that orders placed until 1 June had the old product and those placed after 1 June had the new product. This was not something he had mentioned in either of his two affidavits and nor did he refer to any documents to support his view. He claimed that the lack of any reference to this point was because he did not think the change was relevant. I do not find that a satisfactory explanation in the circumstances. I appreciate that Mr. Flitcroft is not a patent lawyer; he is a 21 year old joiner, but he has been professionally represented throughout.
51. In closing, Mr. Burkitt submitted to me that Mr. Flitcroft had said that the reason for the change was feedback from customers about condensation. I do not recall that evidence being given and neither did Mr. Austen. For instance, neither Mr. Austen nor I even recalled any evidence about feedback from customers, let alone feedback about condensation. If there is a transcript of the hearing which

took place before me yesterday it would show whether Mr. Flitcroft did indeed say that.

52. It also seems to me there would have had to be a substantial amount of such feedback from customers in order to make it worthwhile changing a design which was already on the market. I would also expect there to have been some internal documentation from the defendants showing whether the old design actually had any problems with condensation, and whether the new design actually solved these problems with condensation. I was not shown any documentation falling into any of these categories either.
53. Mr. Flitcroft certainly did not suggest the change had anything to do with the litigation. That fits with the dates because the hearing for summary judgment did not even take place till 12 June and he said the change was made on 1 June.
54. I do agree that the new brochure itself does provide some documentary support for the idea of a new specification but, as the claimants pointed out, it is internally inconsistent as between the text and the diagram. In addition, if there really had been a change in specification on 1 June one would have expected to see documents about this change: not just those I have already indicated but documents communicating the change to customers, both those who had already placed orders for the old product and to those who placed orders for the new product.
55. Before deciding whether I accept Mr. Flitcroft's evidence about the change to a new specification on 1 June, I will consider the defendants' point about the inspection and, in particular, the claimants' failure to request one. I do not agree with the defendants that the claimants' failure to have an expert inspect the defendants' premises is a knock-out blow to the application. That is because it is not clear to me whether the product of claim 1 of the '714 patent actually exists at the defendants' premises or only when installed at the customer's premises. If it is the latter, then an inspection of the defendants' premises would not resolve the matter; all that would be seen is a collection of layers of material. In this context I note that a number of the figures of the '714 patent are said to be "not in accordance with the invention". Instead it is said that "when fully assembled" they "may represent a panel in accordance with ... the invention"; say, for instance, the description of Figures 3A to 3C, 5, 7, 9, 11 and 14 at pages 8-9 of the patent..
56. However, I do agree that the claimants' failure to request any inspection at all, even though express provision for it was made as recently as the last hearing, is something which I can and should bear in mind. It is not as if the claimants asked for it and were refused. They never asked at all. Mr. Middleton's only reason for the claimants' failure to ask for an inspection was that it was a "question of priorities" in the list of things to do.
57. I therefore return to the central question of whether I accept Mr. Flitcroft's oral evidence about the defendants changing to a new and non-infringing specification, by which I mean one not yet found to be an infringing specification of the Injectawall product, on 1 June. If I accept this evidence it follows the defendants have not breached the injunction by reason of their acts

in relation to the new specification because, as I have said, it would require a new trial to decide whether the product supplied as per the new specification infringes. Their breach would then be restricted to the continued distribution of the old brochure. I bear in mind my general reservation about Mr. Flitcroft's evidence, which I have mentioned before, together with the failure to mention the change in either of his previous affidavits and the lack of any documentation showing the change.

58. As against that, I have already accepted that the new brochure does provide limited documentary corroboration for the suggestion that the defendants have moved to a new specification. Mr. Burkett, for the defendants, also reminded me that just because I am not satisfied with Mr. Flitcroft's evidence on other matters does not mean I should reject his evidence on this point. Nor is it inherently incredible that the defendants have changed their product. Indeed, one might say that this is precisely what they should have done following the grant of summary judgment. If the claimants had requested an inspection of what the defendants were actually doing, it is possible that might have resolved the matter. As I have said, no such inspection was requested.
59. After anxious consideration I will accept Mr. Flitcroft's evidence on this topic for the purpose of this application. It follows that although the defendants have breached my order as regard the patent injunction, they have only breached it to the extent I have already indicated, i.e. the continued distribution of the old brochure showing the old Injectawall product. I am not satisfied on the evidence before me to the criminal standard that they carried on manufacturing or supplying the old Injectawall product.
60. Before going on, I would make some additional observations. The action is going to continue as against the third defendant, Mr. Flitcroft senior, in any event. I would also anticipate from Mr. Austen's cross-examination of Mr. Flitcroft junior, that the claimants intend to allege infringement of the patent in relation to the new specification perhaps by way of indirect infringement. If the evidence in the action against Mr. Flitcroft senior and/or in relation to the new specification establishes that Mr. Flitcroft junior has lied to me in his oral evidence (for instance, there never was any change in specification, or it was not as Mr. Flitcroft described, or it did not happen when Mr. Flitcroft said it did) then there will be serious consequences for Mr. Flitcroft junior. These may include, for instance, proceedings for contempt, perjury and/or attempting to pervert the course of justice. These are all serious matters. I make no findings of any kind about any of these matters; I am merely spelling out what is or should be self-evident.
61. Secondly, it seems to me that at some point in the future it may be possible to inspect what the defendants have actually installed at customer locations since my order was served. Such inspection might also show whether Mr. Flitcroft junior has lied to me in his oral evidence and, if he has, then the same consequences may follow. There is no such application for inspection before me and I say no more about it.
62. Thirdly, I also observe that since Mr. Flitcroft has only resisted the finding of contempt on the basis of evidence given in the witness box and not in either of

his two affidavits, that it follows that the claimants acted reasonably, in my view, in bringing the application for committal even in relation to this part of the application which has failed. The claimants had no reason to suppose Mr. Flitcroft was going to give any such evidence because he had not given it at any point earlier.

63. Fourthly, I do accept the basis on which I have found is not quite as set out in paragraph 12 of the reasons for committal. Paragraph 12 refers to the removal of panels by truck, the manufacture, keeping and supply of panels which infringe the patents and the use of patented processes in the manufacture of panels. This does not expressly refer to either the old or the new brochure, not even in subparagraph (b) which is closest.
64. However, I am satisfied there is no unfairness to the defendants in approaching the matter in the way in which I have done for a number of reasons.
- i) First, the claimants did not even know about the new brochure when issuing the application.
 - ii) Secondly, both brochures are the defendants' own so their content will come as no surprise to the defendants.
 - iii) Thirdly, both brochures were properly set out in the claimants' evidence and were properly explored in cross-examination before me. Both brochures were addressed in closing submissions. There was no complaint about any unfairness in this respect at the hearing.
 - iv) Conversely, it would, in my view, be unfair on the claimants for me to disregard what the evidence before me has established.
65. So, in conclusion, the first allegation of breach succeeds in part. I therefore turn to the second, namely, infringement of copyright in the Appendix 3A and 3C drawings.

2 – infringement of copyright

66. Infringement of copyright was referred to in three parts of my order. The first was at paragraph 5(b), an injunction; the second was paragraph 6(b), destruction; and the third was at paragraph 7 which is specific to the website. So far as paragraphs 5(b) and 6(b) are concerned, I agree with the defendants that these are not as clear as paragraph 7 as to what is actually required to be done.
67. I return to the specific instances set out in relation to this allegation of breach. The first is as follows:
- “13(a) The communication to the public of the Appendix 3A Works and the Appendix 3C Works on the Flitcraft Ecobuild website and the Flitcraft website”.
68. In his cross-examination Mr. Flitcroft did accept that what he described as one of 15 relevant works had not been removed from the website by 28 June 2019.

I do give him some credit for making that admission in the end but I do bear in mind two qualifications which undermine the credit I would otherwise have given.

69. The first is that Mr. Flitcroft had previously sworn a false affidavit in this respect. I refer to his first affidavit originally sworn on 26 July 2019, and re-sworn on 10 September 2019, at paragraph 7 where he said this:

“Contrary to what is said by Mr. Middleton in his affidavit of 10th July 2019, on the advice of my solicitor the Appendix A and Appendix C images were removed from the first defendant’s website at my instigation within 24 hours of the hearing on 12th June 2019.”

70. I find that that is not true. I say that for the following reasons.
71. In his first affidavit Mr. Middleton specifically took issue with this. I refer to paragraph 3 of Mr. Middleton’s affidavit dated 11 July 2019 where he states as follows: “The defendants’ website at www.flitcraft.co.uk remains the same and the images ordered to be removed remained.” Mr Middleton then referred to certain images at pages 15 to 18 of the exhibit. It was put to Mr. Middleton in cross-examination that these images did not show a date but he was firm that these images were taken after 28 June (that being the latest relevant date for service of the order with a penal notice). I accept Mr. Middleton’s evidence.
72. I was also shown a fourth witness statement of Mr. Festenstein (the claimants’ solicitor) dated 28 July 2019 and exhibits. This was, in turn, exhibited by Mr. Middleton in his second affidavit, dated 28 August 2019. The affidavit of Mr. Middleton appears at bundle 4, tab 18 and the exhibits are at bundle 4, tab 19. I was specifically taken to pages 16 to 18 and 21 of the exhibit. This exhibit also shows that the offending pictures were not removed within 24 hours of 12 June; they remained on the defendants’ website until shortly before the hearing before me in July. This second piece of evidence was not effectively challenged in cross-examination either and I accept it.
73. Secondly, Mr. Flitcroft, and later his counsel, suggested that there was only 1 out of 15 pictures which he failed to take down when he should have done. In his reply speech, Mr. Austen, for the claimants, took me to a number of additional examples for both Appendix 3A and Appendix 3C. So it was not a one-off as Mr. Flitcroft admitted; there were multiple instances.
74. I am satisfied to the criminal standard that the breach that is set out in paragraph 13(a) is proved. Again, I am not satisfied that this was inadvertent. On the contrary, it is, in my judgment, another example of a deliberate decision by the defendants to take a casual approach and do a half-hearted job which resulted in them missing a number of works which should have been removed.
75. I then turn to paragraph 13(b) of the statement of reasons where the claimants complain about the communication to the public of at least three vans and two cars operated by the defendants having copies of the Appendix 3A Works displayed on the external surfaces. So far as this is concerned, I agree with the

defendants that it was not sufficiently clear to them that they should remove these works from their vans and cars. These were not mentioned either in the particulars of claim or in the order. In any event, Mr. Flitcroft told me that these have now been covered up on the vans and the vans are in the process of being re-covered. That evidence was not challenged. I therefore reject this allegation of contempt.

76. Paragraph 13(c) refers to the product and distribution of what is (now) confusingly called a “new brochure” by the defendants with copies of the Appendix 3A Works and 3C Works. It has become confusing because in this judgment and at the hearing I have referred to that as the “old brochure”. Mr. Austen took me to various examples of the Appendix 3A and 3C Works appearing in the old brochure. For instance, so far as Appendix 3A is concerned, he showed me an example called variously “Sversjön” or “Riversway, 2 Little Poulton”. So far as Appendix 3C is concerned, he showed me an example called the “Supawall-2”. Again I am satisfied that this amounts to breach as set out in paragraph 13(c) to the criminal standard and I do not accept this was inadvertent either. It was yet another consequence of the defendants’ casual approach towards compliance. I should, however, record, that it was not suggested that the new brochure contains any such examples and I make no finding of breach in relation to that brochure.
77. In this context Mr. Austen also sought to rely on other instances of alleged breach, such as use of the Appendix 3A and 3C images on Facebook and Twitter and on banners. These were not mentioned in the statement of reasons so I will disregard them. In my judgment it was not sufficiently clear from the order that the defendants were required to remove them. Mr. Burkitt also submitted, without dispute from Mr. Austen, the copyright images were not actually shown on either Facebook or Twitter. In any event they seem to be mostly historical or, in the case of the banners, in the process of being removed or destroyed. I would be interested to know when the removal or destruction process is complete so far as the banners are concerned, but I make no finding of breach. That deals with the second alleged contempt.

3 - authorising

78. So far as the third alleged breach is concerned, ie “authorising, causing, assisting or enabling others to do any of the acts aforesaid”, neither party said much about this given their common position that D4 was the controlling mind of D1 and D2. So to the extent that I have found breach of the first and second grounds, and indeed of any other grounds, it follows that the fourth defendant will be liable.

4 – destruction of patented products

79. So far as the next one is concerned, “destruction of patented products”, this refers to paragraph 6(a) of my order which I have already set out. So far as Mr. Flitcroft’s evidence is concerned, I will go to his first affidavit at paragraph 5 where he said this:

“There is nothing currently on site which could infringe the patents and nothing has been manufactured recently, not least since the court order of 12 June 2019 was made, which could infringe the patents.”

80. Mr. Flitcroft was cross-examined about the reason for this belief. As a result of that, it emerged that Mr. Flitcroft himself had done nothing beyond speaking to people he identified vaguely as his “team”. In closing Mr. Burkitt sought to argue that Mr. Flitcroft must have been talking about the three individuals mentioned at paragraph 10 of Mr Flitcroft’s second affidavit. I do not accept that submission. That was not the evidence. Mr. Flitcroft does not say that in his affidavit, nor did he say that in the witness box.
81. Mr. Flitcroft was also initially unable to explain what instructions he had given to his team to ensure that infringing products had been destroyed. He certainly did not claim that he had said anything to them about the new specification. Mr. Flitcroft told me he had simply left it to the unidentified team to work out for themselves whether or not products infringed the patent.
82. In my judgment that was wholly inadequate. In particular, it was unrealistic and inadequate to expect factory workers, or whoever the “team” was, to decide for themselves whether or not something infringed a patent, particularly so when Mr. Flitcroft did not even claim to have given them the patent so they could decide for themselves. In my judgment Mr. Flitcroft’s approach to destruction was simply another example of his half-hearted and casual approach generally.
83. Mr. Burkitt suggested that it was reasonable of Mr. Flitcroft to delegate the destruction to those who are more technically qualified. However there is no evidence that he actually did delegate it to those more technically qualified nor, as I said, that he gave anyone a copy of the patent or that he explained to anyone else what the issues in the case were - even though he is the one who signed the defence. In any event, getting rid of the old products and, for that matter, the old brochure, is not something which required technical knowledge.
84. For these reasons I do not accept that steps taken by the defendant amount to compliance with paragraph 6(a) of my order, whether by 28 June 2019 or at all. That is particularly so when I had already given judgment that the old Injectawall system infringed. What Mr Flitcroft should have done was actually quite simple. All he needed to do was ask his staff whether they still had examples of the old Injectawall product and, if so, then tell them to destroy it. It does not appear that he has done this even now. He should not have left it to them to work out what to do and what did or did not amount to an infringement. It follows that I find breach of this ground as well.

5 – inspection

85. The next ground is about the claimants’ entitlement to have a proper officer attending the said destruction: see paragraphs [6] and [8] of my order. I heard very little argument about this. Both sides approached it on the basis that it stood or fell with other complaints about destruction. I shall adopt the same

approach as the parties, which means I find that the defendants were in breach of this as well. In particular, the defendants were wrong to refuse permission for inspection where they did not comply properly with the requirements of the order as regards destruction. Again, this was a deliberate decision and not an inadvertent one.

6 – destruction of copyright works

86. The next point relates to destruction again but refers to the copyright works rather than the patent. Again, neither party advanced much argument on this. So far as paragraph 6(b) of my order is concerned, there is a breach because the old brochures were not destroyed. Mr. Flitcroft could simply have asked the staff to destroy copies of the old brochure but he did not do that and, on the contrary, Ms. Green was still distributing them. Once more it does not appear that he has done this even now. Again, I do not accept this was inadvertent; it was a direct result of the deliberate decision to adopt a half-hearted approach.
87. So far as paragraph 18 of the Statement of Reasons is concerned, which refers to the failure to remove copies of the Appendix 3A Works and 3C Works from the website, I have already dealt with this in relation to paragraph 13(a) of the Statement of Reasons. I do not understand there to be any difference between paragraph 13(a) and paragraph 18 for this purpose and so it follows that this breach is proved for similar reasons as I set out in relation to paragraph 13(a).

8 – the affidavit

88. That brings me to paragraph 19 which is the affidavit. This refers to the latter part of paragraph 8 of my order whereby,

“... the first, second and fourth defendants shall on or before 5 July 2019 serve on the claimants an affidavit sworn by a proper officer on behalf of the first, second and fourth defendants confirming that the first, second and fourth defendants have fully complied with paragraphs 6 and 7 above.”

89. This issue raises a number of points as follows.
- i) The first point is that no affidavit at all was served on 5 July. Mr. Flitcroft accepted this in paragraph 8 of his first affidavit. He did apologise for this and explained it was due to his concern about Ms. Wilson’s illness.
 - ii) The second point is that after the application for committal was lodged, the defendants applied for relief from sanction, in particular extending the time for compliance with this paragraph of my order until 26th July 2019.
 - iii) The third point is that when the affidavit was filed on 26th July 2019 it was, as the defendants now accept, technically deficient in that it was sworn before the defendants’ own solicitors, contrary to Part 32 Practice Direction paragraph 9.2. That was not corrected until 10th September,

the day before the effective hearing. Hence the claimants say that for this reason alone an extension of time until 26th July is not long enough to cure the default.

- iv) The fourth point is that the claimants submit that even now Mr. Flitcroft has still not complied with the actual substantive requirements for his affidavit. I will now consider these points.

90. In order to consider the first one, I will go to the relevant paragraph of Mr. Flitcroft's first affidavit. He explains in paragraph 4 as follows:

"I am very close to Charmain; I treat her as my mother and she treats me like a son. Since late May 2019 she has been unwell. Since late June 2019 she has been treated on an urgent basis at the Salford Royal Hospital. On 6 July 2019 she went there for an operation to remove her pituitary gland but the operation was postponed as the doctors also found abnormalities in her spine."

This evidence suggests that although Ms. Wilson has been unwell since late May 2019, she first found out about abnormalities on 6th July 2019.

91. I also had my attention drawn to paragraph 8 of the same document. It states as follows:

"I accept that I did not serve an affidavit on the claimants by 5th July 2019 in accordance with paragraph 8 of the order. I can only apologise for this omission. At the time I was preoccupied with Charmain's illness. I was going to the hospital with her and my father on an almost daily basis in late June/early July and I found it hard to deal with anything else. I did instruct my solicitor to appeal the order based on whatever counsel had drafted and advised on or about 3 July 2019 but apart from that I did not answer his calls until 10 July 2019 when I told him about Charmain."

92. As I have said, it is common ground that no affidavit at all was served. I have drawn attention to Mr. Flitcroft's reasons, in particular his evidence that he was very close to Ms. Wilson and he was going with her and his father to the hospital on an almost daily basis in late June/early July. The difficulty with this is that the documentary evidence does not show Ms. Wilson going to the hospital on an almost daily basis in late June/early July let alone Mr. Flitcroft and his father. The documentary evidence shows a planned operation for something not explained and which was delayed. The first written reference to serious medical issues comes in the letter of 5 July which appears to refer to a meeting on 3rd July. Paragraph 4 of Mr. Flitcroft's evidence is consistent with this date and suggests that the actual bad news may even have been discovered on 6 July.
93. I agree with the claimants that the affidavit should have been done or largely done by 3 or 5 July then given that the affidavit should simply have been confirming what steps had been taken by 28 June. I emphasise that none of this should be taken as casting any doubt on the bad news which Ms. Wilson does

appear to have received in July. That was not disputed before me either. The claimants' point was that it came just too late to fit Mr. Flitcroft's paragraph 8.

94. I also bear in mind that in his oral evidence Mr. Flitcroft said that he took on more workload for the first and second defendants due to Ms. Wilson's illness and he did not dispute that producing this affidavit was important to both the first and second defendants. It is difficult to see how Ms. Wilson's illness simultaneously caused Mr. Flitcroft to spend both more time and also to spend less time on the affairs of D1 and D2.
95. As regards the defendants' application for extension of time, the first point to note is that it was not made until after the expiry of the time limit in question. On the contrary, it was only made after the application for committal was issued. The defendants draw my attention to case law showing how a debilitating illness can amount to a good reason for relief from sanction. Mr Burkett refers, for instance, to *Mitchell v. News Group Newspapers* [2013] EWCA Civ 1537, [2014] 1 WLR 795. He also drew my attention to *Cranford Community College v Cranford College Limited* [2014] EWHC 2960 (IPEC), a decision of His Honour Judge Hacon, where relief from sanction was granted where one of the defaulting parties' witnesses had been preoccupied visiting his wife in hospital and spending time with her at home while she received treatment for cancer. As against that the claimants point out it was not Mr. Flitcroft's own illness but that of Ms. Wilson, however close their relationship.
96. The third point is the technical one about swearing the first version of the affidavit before Mr. Flitcroft's own solicitor rather than an independent one. Both sides agree this is contrary to the Practice Direction but it seems to me it would be wrong to find Mr. Flitcroft in contempt for this technical reason.
97. That brings me to the fourth point, i.e. the relevant affidavit has still not been supplied. It seems to me that in circumstances where the defendants did not "fully comply" with their obligations under paragraph 6 and 7 to destroy either the patented products or the infringing articles with respect to copyright; and where the affidavit served by Mr. Flitcroft does not even set out the totality of the half-hearted attempts in relation to either of these things which Mr. Flitcroft did make, I cannot logically conclude that the defendants have complied with this further obligation to confirm by affidavit that they had "fully complied" with the main obligations set out in paragraphs 6 and 7 of my order.
98. Mr. Austen also provided a further reason why the defendants had still not complied. The further reason is as follows. In paragraph 9 of Mr. Middleton's affidavit dated 28 August 2019, Mr. Middleton draws attention to paragraph 6 of my order, and refers to the fact that the defendants had informed the claimants there were "*no such articles in the power, possession custody or control of the defendants that were to be destroyed*". Mr Middleton added that he expected many articles (eg paper leaflets and exhibition boards that show the Appendix 3A and 3C Works) to still be in their possession and said that the breach was not addressed by Mr. Flitcroft in this affidavit at all.

99. I was shown a reply to that criticism by Mr. Middleton by Mr. Flitcroft in his second affidavit at paragraph 12.4. In response to the evidence of Mr. Middleton, to which I have just referred, Mr. Flitcroft responded as follows:

“As to paragraph 9 there are no infringing articles on the first defendant’s premises, including printed material or exhibition boards.”

This just deals with “the premises” and not the possession, power, custody or control. I did not hear any submissions in answer to this from Mr. Burkitt, eg as to why paragraph 12.4 of Mr. Flitcroft’s second affidavit constituted compliance with the order I made. In the absence of any such submissions I accept the claimants’ case that this is a further reason why the affidavit still has not complied with the obligations even today.

100. I therefore conclude as follows in relation to this ground.

- i) First, I am satisfied to the criminal standard that no affidavit had been given by 5 July 2019.
- ii) Secondly, I am satisfied this was deliberate rather than inadvertent. I do accept it is entirely understandable why Mr. Flitcroft felt unable to give his attention over the period 3rd to 5th July but, in my judgment, that goes to mitigation rather than a defence. I also accept the claimants’ submission the affidavit should have been largely done by then anyway, given that it should merely have been confirming steps taken prior to 28 June.
- iii) Thirdly, I accept the breach continues to this day since no satisfactory affidavit has been served even now. In particular, there is no affidavit which explains to my satisfaction what steps the defendants had actually taken before 28th June 2019 to ensure destruction of all patented products as per paragraph 6(a) of my order, or all articles, as per paragraph 6(b) thereof. For the same reason I do not accept that any contempt has now been purged.
- iv) Fourthly, since the breach continues to this day, it follows that the defendants’ application for relief from sanctions by way of an extension of time until 26th July does not cure the problem; even assuming that such application was promptly made and should otherwise be granted. I therefore reject that application for relief from sanctions.

Overall conclusion

101. In overall conclusion then, the claimants have succeeded on most parts of their application but not on everything. I have, I hope, clearly indicated those respects in which I found the defendants to be in breach of my order. I propose to adjourn this matter for sentencing as I previously indicated to the parties and their representatives yesterday. I also indicated yesterday the main reason for adjourning is to provide Mr. Flitcroft junior the opportunity to consider my judgment and, in particular, to provide him with an opportunity to purge his

contempt in those areas where I have found him to be in contempt. It will then be up to Mr. Flitcroft to decide whether he wishes to take that opportunity.

102. I will now hear counsel as to when I should list the matter for sentencing and any consequential directions, for instance, evidence and skeleton arguments. I also direct that any evidence and skeleton arguments should consider in particular:
- i) first, whether the custody threshold has been passed;
 - ii) secondly, if so, how long a custodial sentence is appropriate;
 - iii) thirdly, whether any committal order should be suspended pursuant to Part 81.29, if so, then upon what terms and conditions;
 - iv) fourthly, whether there should be a fine as well as or instead of a custodial sentence; and,
 - v) fifthly, if there should be a fine, in what amount it should be having regard to such matters as the defendants' ability to pay and the overall punishment as a whole.
103. Bearing in mind the desirability of dealing with as many issues as possible at the same time, I would also invite the parties to consider whether I should make any directions for the trial of Mr. Flitcroft senior and/or as to the issue of whether the new specification said to have been introduced on 1 June 2019 also infringes. I do not make any orders about that today; I merely invite the parties to consider whether I should do so on the adjourned hearing.
104. That is my judgment on the application.

(Discussion followed)

Annex 1 – the old brochure

Exhibit 1 B111 page 39

FLITCRAFT

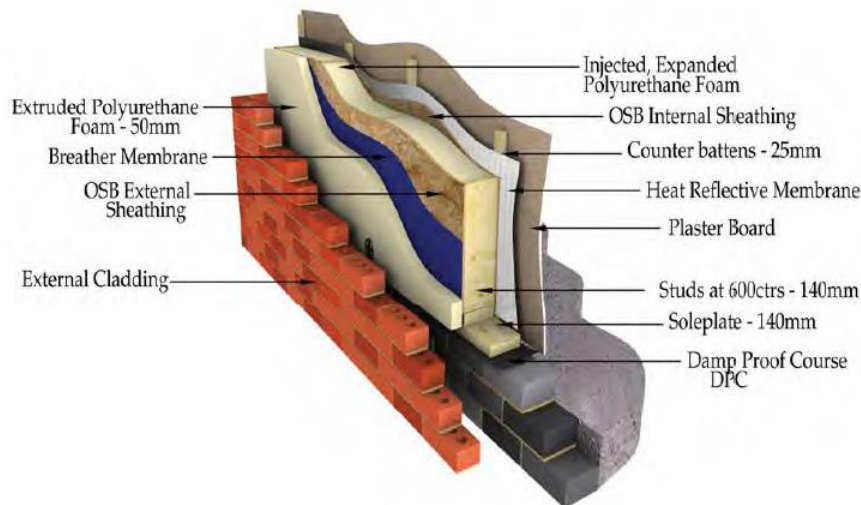
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Annex 2 – the new brochure



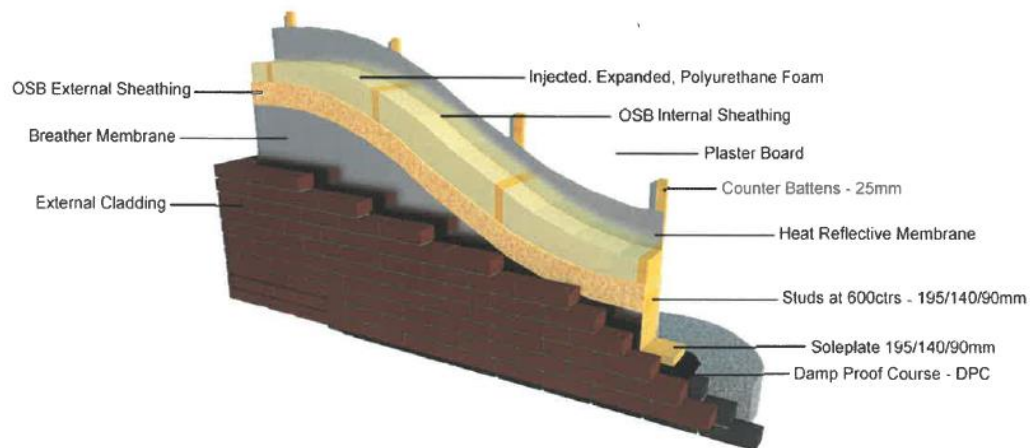
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