

Neutral Citation Number: [2017] EWHC 2172 (Pat) Case No: HC-2015-000953

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT
SHORTER TRIALS SCHEME

Royal Courts of Justice Rolls Building Fetter lane, London EC4A 1NL

Date: 25TH August 2017

Before:

THE HON MR JUSTICE HENRY CARR

Between:

NEPTUNE (EUROPE) LIMITED

Claimant

- and -

DEVOL KITCHENS LIMITED

Defendant

HUGO CUDDIGAN QC and JONATHAN MOSS (instructed by **Gowling WLG) for the**

Claimant

HENRY WARD (instructed by **Bristows LLP) for the **Defendant****

Hearing dates: 19, 22, 23 and 26 June 2017

Judgment Approved

Mr Justice Henry Carr:

Introduction

1.

This is a claim by the Claimant (“Neptune”) for infringement of UK unregistered design rights and infringement of a Community Registered Design in respect of kitchen furniture. At the start of the trial Neptune was also pursuing a claim for copyright infringement in a kitchen brochure, and the Defendant (“DeVOL”) was pursuing a counterclaim for unjustified threats in respect of a letter before action which it had received. Each of these claims was commercially unimportant and legally unpromising. They were both abandoned during the parties’ closing submissions.

2.

This claim was heard under the Shorter Trial Scheme. Practice Direction CPR 51N provides at [2.3] that the Shorter Trial Scheme will not normally be suitable for cases including an allegation of fraud or dishonesty; cases which are likely to require extensive disclosure; cases where extensive witness or expert evidence is relied upon; or cases which raise multiple issues. In this case, the unregistered design claim involved an allegation of dishonesty, in that it was said that DeVOL was not telling the

truth about whether it had copied Neptune's kitchen design. Extensive disclosure was given and extensive evidence of fact and expert evidence was relied upon. The claim gave rise to multiple issues, in that Neptune originally relied upon unregistered design rights in 12 items of kitchen furniture (now reduced to 11) and in respect of each item, it pleaded a list of multiple features which it described as "key features".

3.

In contrast to registered design claims, where copying is irrelevant, unregistered design claims require proof of copying, which is likely to give rise to disclosure, significant cross-examination and, in all likelihood, an attack on credibility. Where multiple designs are in issue, and multiple features need to be considered, this does not necessarily mean that the case is unsuitable for the Shorter Trial Scheme. It does mean, however, that if it is to be heard as a Shorter Trial, the case needs to be controlled from an early stage by robust case management.

4.

At the pre-trial review, I ordered that the issues of liability in relation to the unregistered design rights were to be tried based upon 3 designs selected by Neptune and 3 designs selected by DeVOL. With hindsight, it would have been better if I had limited the parties to a single design each, as the same issues could have been fully argued. In future (irrespective of whether the claim is part of the Shorter Trial Scheme) where multiple designs are in issue, it would be sensible to confine the liability trial to an appropriate, and limited, selection.

Background facts

Neptune

5.

Neptune was founded in 1996. Initially, it sold freestanding hammocks and then progressed to the design of garden furniture. It began the production of interior furniture, and in particular kitchen furniture, in about 2002. Between 2002 and 2006, Neptune's product range expanded and it sold its furniture through a distribution network. In 2011, Neptune opened its first own branded store and it now has about 20 stores.

6.

Neptune is very successful. It has received recognition in the form of awards for its kitchens. Amongst other awards, in 2014 it was a Gold Award Winner in the Best Luxury Kitchens category in the House Beautiful Awards for Best Furniture in relation to its "Limehouse" kitchen collection. In 2017, it appeared in Country and Town Houses' Great British Brands, which is a selection of 150 luxury brands. This shows, as is evident from inspection of the kitchen units in issue, that Neptune kitchens are very attractive and of high quality. However, there is no evidence that Neptune's kitchen range which is alleged to have been copied in these proceedings, which is known as "the Chichester range", has received any such awards, nor as to the criteria pursuant to which these awards are made.

7.

The Chichester range was designed in about 2006, although there is some dispute about the extent to which certain designs in issue in these proceedings were taken from pre-existing Neptune designs. Mr John Sims-Hilditch, the Managing Director of Neptune, explained in his first witness statement that Neptune's intention with the Chichester range was to bridge the "modular" (cheap) and "bespoke" (expensive) markets by producing high quality modular kitchens that would give the impression of a bespoke kitchen, without costing as much. This aim was achieved by the incorporation

of a number of design features, which Neptune characterises as the key features of the designs relied upon.

8.

For example, the Chichester range used “fully framed” kitchen cabinets where the doors are hung onto a visible outer frame, rather than being fitted with internal hinges, where only the door is visible from the outside of the cabinet. Mr Sims-Hilditch said that in 2006 a fully framed kitchen look was associated with bespoke kitchens, whereas the frameless look was typical of modular kitchens. In addition, the Chichester range contained options for furniture of varying widths, so that kitchen spaces could be filled with a run of individual pieces without bespoke manufacture.

DeVOL

9.

DeVOL has designed and sold furniture since the 1980s. In particular, it has marketed a traditional Georgian kitchen, known as “the Classic range”, since 1989. From about 2000, various units in the Classic range were included in a CAD library. The Classic range covered a range of different sizes, and cabinets in the CAD library were included in a range of different widths. Customers could have units made to measure. It was a bespoke kitchen range which included certain standard options. It included both freestanding furniture and fitted runs. Page 1 of the Annex to this Judgment contains photographs showing the general appearance of the Classic range, which looks similar to the general appearance of the Chichester range.

10.

As a result of the recession in 2008, DeVOL found that its business was threatened by a downturn in the luxury kitchen market. It decided to extend its product range to include third-party kitchen furniture. Accordingly, DeVOL approached Neptune and expressed an interest in selling the Chichester range. DeVOL chose the Chichester range because of its similarity to the Classic range, both of which were Georgian in style, with prominent “cock-beading” and moulding. A Chichester range kitchen was installed in July 2008 at DeVOL’s premises in Loughborough.

11.

DeVOL was a successful retailer of the Chichester range, and between November 2008 and March 2010 its turnover was approximately £16,000 per month, with additional consequential sales.

However, in 2010 the relationship between the parties

broke down, for reasons which are not relevant to these proceedings, and by August 2010 DeVOL had ceased the supply of Neptune’s products.

12.

In 2009, whilst it continued to sell Neptune kitchens, DeVOL decided to create its own range of modular kitchens which, at that stage, it planned to sell in addition to Neptune’s Chichester range. Rather than the traditional Georgian style of the Classic and Chichester ranges, it adopted a simpler “Shaker” style. Designs for the DeVOL “Shaker range” were first created for a customer in September 2009, and the Shaker range was offered for sale generally in May 2010.

Inception of Neptune’s claim

13.

DeVOL points out that Neptune knew about the DeVOL Shaker range from 2011. However, no complaint was made until, at the earliest, late 2013, and no claim was brought by Neptune until

March 2015. Although the progress of this claim was undoubtedly very slow, and suggests that it was not a matter of pressing concern to Neptune, this is not relevant to any pleaded defence to liability.

14.

Initially, Neptune alleged that the DeVOL Shaker range was a copy of Neptune’s own Shaker range, which is known as “the Suffolk range”. However, Neptune learnt that its Suffolk range post-dated the creation of the alleged infringements, and that case was not pursued. Instead, Neptune alleged that its Chichester range had been copied. No-one has suggested that Neptune’s Suffolk range was copied from the DeVOL Shaker range. This indicates, as is also apparent from consideration of the many photographs in evidence, that kitchens in the same or similar styles can look like each other without being copies.

Bespoke and modular kitchens

15.

Neptune contends that there was a split in the kitchen furniture market between bespoke and modular kitchens. I agree that kitchens can be categorised as either bespoke or modular, and that it is a useful general distinction. Mr Charles Smallbone, the co-founder of the well-known kitchen design company Smallbone of Devizes, who gave expert evidence on behalf of DeVOL, explained that a modular kitchen incorporates cabinets designed and specified to a restricted set of dimensional criteria, which can be constructed from a standard set of components, and hence may be less costly to produce than a bespoke kitchen, as the bespoke alternative may incorporate a number of specially dimensioned items made uniquely for the client making the purchase.



16.

However, I do not consider that this is, or was at any time, a rigid or mutually exclusive distinction. Mr Smallbone explained, and I accept, that high-end bespoke kitchens such as those designed by Smallbone of Devizes used several parts, such as door and frame components, which could be shared across multiple units of modular standard size. These could be used in a bespoke kitchen, the design of which would be completed by integration of more specially dimensioned cabinets. Such kitchens comprised a selection of standard modular cabinets together with individual items designed specifically for the client.

The Unregistered Designs

17.

The 6 designs which were selected by the parties to determine the issue of liability are shown below. Designs 5, 7 and 9, which I shall consider first (together with Design 12), were selected by Neptune. Designs 2, 6 and 12 were selected by DeVOL.

2	Chichester Wine Rack		5	Chichester 1 Door Base Cabinet	
6	Chichester 1 Drawer Cabinet		7	Chichester Curved End Cabinet	

					
9	Chichester 1 Door Wall Cabinet		12	Chichester 2 Door Glazed Cabinet - straight	

18.

It is important to note that, save where it seeks to exclude certain specified features of the Designs, Neptune relies upon the entirety of each of the articles shown above, rather than aspects or parts of such articles. It relies upon key features of each of the designs, but does not claim a separate design right in any of these features, whether alone or in combination; see [8] of the Re-Re-Amended Particulars of Claim.

19.

The key features relied on by Neptune are easier to see than to describe. Pages 2 and 3 of the Annex show views of the Chichester and Shaker door base cabinets (Design 5). In relation to Design 5, [13] - [13A] of the Re-Re-Amended Particulars of Claim define the design as the shape of the whole piece of furniture which includes the following key features (the images in the Annex indicate where these features are said to be found in the Chichester and Shaker cabinets):

(1)

dimensions of height 89cm, width 60cm and depth 56cm;

(2)

a cutaway feature on the bottom of the side panel;

(3)

stiles (the vertical strips of the frame of the front panel) extending to the floor and a lower rail (the horizontal strip

of the frame of the front panel) framing a recessed adjustable kickboard;

(4)

the stiles extending horizontally beyond the body of the cabinet to form 'ears';

(5)

a cabinet door, featuring a single sunken panel, set 'inframe' with visible butt hinges;

(6)

the shape of the four interior cabinet columns, with a saw tooth profile along one edge, and co-operating trapezoid inserts upon which shelves rest; and

(7)

the shape and configuration of the combination of (i) the two rear rotatably adjustable feet and (ii) the front feet, themselves comprised of both the said stiles and the parts of the bottom of the side panel that have not been cut away.

20.

Paragraph [8A] of the Re-Re-Amended Particulars of Claim sets out certain features which Neptune claims to be entitled to exclude or disclaim from the designs relied upon. There is an issue between the parties as to whether this is permissible as a matter of law. These are as follows:

(i)

Cock-beading and moulding.

(ii)

Handles, screws and screw holes.

(iii)

Rear mounting brackets for the wall-mounted products.

(iv)

Certain top panels.

Is Neptune entitled to exclude the features which it has identified?

21.

The primary relevance of this question is in respect of the beading and moulding, which can be seen on the front view of the images of the Chichester door base cabinet (Design 5). It is absent from the Shaker range. This is a striking difference between these ranges, and is the distinction between Georgian and Shaker styles.

22.

DeVOL's argument that the cock-beading and moulding cannot be excluded is as follows: Until 1 October 2014, [section 213](#) of the Copyright, Patents and Designs Act 1988 provided that:

“(1) Design right is a property right which subsists in accordance with this Part in an original design.

(2) In this Part ‘design’ means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article.” (emphasis added).

23.

On 1 October 2014 [section 213\(2\)](#) was amended by the [Intellectual Property Act 2014](#) to delete the words “any aspect of”. The effect of this amendment was considered by

HHJ Hacon in *DKH Retail Ltd v H. Young (Operations) Ltd* [2014] EHC 4034 (IPEC) at [10] - [18]. He concluded that the effect of the amendment is:

“that it no longer permits a claim to unregistered design right to extend to designs other than those specifically embodied in all or part of the claimant's article, i.e. no more UK unregistered design rights in abstract designs...”

24.

Mr Ward contended that, by seeking to strip away features (and in particular the beading and moulding) which appear in the pleaded designs, Neptune is attempting to rely upon rights in abstract designs. Any such attempt, he submitted, is no longer permissible following the amendment to the Act. He further submitted that the cockbeading and moulding is not surface decoration, and therefore is not excluded from the scope of the designs by [section 213\(3\)\(c\)](#).

25.

Mr Cuddigan QC responded as follows:

i)

The cock-beading and moulding is exclusively decorative, and is accordingly excluded as surface decoration.

ii)

All of the designs in issue predate the [Intellectual Property Act 2014](#). Acts of alleged infringement were committed before 1 October 2014. The amendment to [section 213\(2\)](#) is not retrospective and does not deprive it of rights that subsisted prior to 1 October 2014, and a fortiori of rights that were infringed prior to that date.

iii)

[Section 213\(2\)](#) as amended continues to define “design” as including “parts” of an article. It makes no difference whether those parts are identified by their presence, or by the absence of excluded parts. The designs relied on by Neptune are not abstract, and Neptune is seeking to rely upon “parts” of the designs, rather than “aspects”.

Can the cock-beading and moulding be excluded as surface decoration?

26.

Whether a feature is surface decoration is a value judgment for the Court in each case. The correct approach is summarised in Russell-Clarke and Howe on Industrial Designs (9th Edition) at [4-037]:

“A feature which is truly three-dimensional, rather than a surface feature, will fall outside the scope of the exclusion from design right (i.e. will therefore be covered by design right), regardless of whether its purpose is functional or decorative. The fact that a design feature exists in a third dimension, but only a small third dimension, does not mean that it must be surface decoration: there is a value judgment for the Court to make”.

27.

Neptune relies upon the decision of Floyd J (as he then was) in *Mark Wilkinson Furniture Ltd v Woodcraft Design (Radcliffe) Ltd* [1998] FSR 63, where it was held that cock-beading on kitchen units was surface decoration. That was a value judgment on the facts of that case, and I do not consider that it establishes any proposition that decorative mouldings in general, or cock-beading in particular, should be regarded as surface decoration.

28.

The cock-beading and moulding on Chichester units is a prominent and striking part of the shape of the doors. It is truly three dimensional. It is an important design feature, which differentiates a Georgian style kitchen from a Shaker style kitchen. As such, in my judgment it is not surface decoration, and cannot be excluded as such.

Is the amendment to [section 213\(2\)](#) retrospective?

29.

In DKH Retail (supra) it was common ground between Counsel that the amendment to [section 213\(2\)](#) was fully retrospective. This would have the consequence that an act committed prior to 1 October 2014 which was an infringement at that date retrospectively ceased to be an infringement. In Whitby Specialist Vehicles Ltd v Yorkshire Specialist Vehicles Ltd and others [\[2014\] EWHC 4242 \(Pat\)](#); [\[2016\] FSR 5](#) at [41] Arnold J expressed doubt as to whether this conclusion was correct. However, he did not decide the point as it was not necessary to do so in the case before him.

30.

In Action Storage Systems Ltd v G-Force Europe.com Ltd and another [\[2016\] EWHC 3151 \(IPEC\)](#) Judge Hacon said at [427]:

“In DKH Retail there was common consent between Counsel that s.1(1) was therefore of immediate effect, although it made no difference on the facts of that case and the point was given no close attention. In Whitby Specialist Vehicles Ltd v Yorkshire Specialist Vehicles Ltd ... Arnold J doubted that the subsection had immediate effect, pointing out that this could retrospectively affect the protection afforded to the owner of a design right. I agree that this is an unlikely result”

However, he also did not decide the issue, as he concluded that the Claimant in Action Storage was not asserting design right in aspects of the design.

31.

The direction in which the case-law is heading is therefore clear. It is appropriate to decide the issue in this case as it has been fully argued. This question is considered in Russell-Clark & Howe at [4-008]. The authors agree with the provisional view of Arnold J in Whitby. They point out that it would be most unusual for a statutory provision to extinguish accrued causes of action in respect of acts which were unlawful under the law in force when they were committed, and clear statutory language would be required to achieve this.

32.

This principle is expressed in Bennion on Statutory Interpretation (5th Edition) at section 97. This records the general presumption against retrospective operation of statutes: “Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.” Bennion explains the reasons for this presumption:

“The essential idea of a legal system is that current law should govern current activities. ... If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow’s backward adjustment of it. Such, we believe, is the nature of law”

33.

An argument in favour of the DKH position is set out in Copinger and Skone James on Copyright (17th Edition) at [13-58] - [13-60]. It is suggested that the amendment to [section 213\(2\)](#), unlike the other amendments to unregistered design law made by the

2014 Act, was not intended to make any substantive change to the definition of a design, but only to clarify the existing position. If the amendment to [section 213\(2\)](#) was merely declaratory of existing law, then no question of retrospectivity arises. I do not accept that the amendment to [section 213\(2\)](#) is merely declaratory of existing law. On the contrary, as explained below, I consider that it made a

substantive change to the law by preventing claims in respect of disembodied features, arbitrarily selected, which are not, in design terms, parts of the design.

34.

There is no indication in the [Intellectual Property Act 2014](#) that the amendment to remove “aspects” was intended to extinguish accrued rights of action for past infringements which occurred prior to 1 October 2014. In my judgment, the amendment does not have this effect. The law applicable to such acts is the law in force at the time they were committed. This leaves the more difficult question of whether the amendment applies to acts of infringement committed after commencement of the [Intellectual Property Act 2014](#) on 1 October 2014.

35.

[Section 1 of the Intellectual Property Act 2014](#) should be read in its entirety. It provides that:

“(1) In [section 213\(2\) of the Copyright, Designs and Patents Act 1988](#) (unregistered design right: meaning of “design”), in subsection (2), omit “any aspect of”.

(2)

In section 51 of that Act (copyright infringement: exception for certain designs), in subsection (3), in the definition of “design”, omit “any aspect of”.

(3)

In [section 213\(4\)](#) of that Act (unregistered design right: meaning of “original”)—

(a)

after “commonplace” insert “in a qualifying country”, and

(b)

at the end insert “; and “qualifying country” has the meaning given in section 217(3)”.

(4) Subsection (3) applies only to designs created after the commencement of that subsection.”

36.

It will be seen that subsection (3) is expressly stated by subsection (4) to apply only to designs created after commencement on 1 October 2014. No equivalent provision is made in respect of subsection (1), which indicates that the omission of “any aspect” from the definition of “design” in [section 213\(2\)](#) is intended to apply to designs created before commencement of the Act. Russell-Clarke at [4-008] suggests that this supports a distinction between accrued causes of action for infringements committed prior to 1 October 2014 (to which the amendment does not apply), and claims in respect of acts of infringement committed subsequently (to which the amendment does apply). The authors state that:

“... the change is retrospective to the extent that a design right subsisting before commencement in an “aspect” ceased to subsist on commencement so that acts committed after that date cannot infringe, even if the design was created before commencement.”

37.

This conclusion is in accordance with the principles set out in Bennion which emphasise the need to apply the law as it stands at the date when the relevant act is committed. It is also supported by consideration of the purpose of the amendment to [section 213\(2\)](#). In *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at

[422], Laddie J explained how the very wide definition of “design” enabled a claimant to claim design right in small, arbitrary aspects of an article, thereby creating uncertainty:

“If the right is said to reside in the design of a teapot, this can mean that it resides in design of the whole pot, or in a part such as the spout, the handle or the lid, or, indeed, in a part of the lid. This means that the proprietor can trim his design right claim to most closely match what he believes the defendant to have taken. The defendant will not know in what the alleged monopoly resides until the letter before action or, more usually, the service of the statement of claim.”

38.

In case-law subsequent to *Ocular Sciences*, the Courts emphasised that the definition of “design” in [section 213\(2\)](#), prior to amendment, was very broad. In *Dyson Ltd v Qualtex (UK) Ltd* [\[2006\] EWCA Civ 166](#); [\[2006\] RPC 31](#), Jacob LJ said at [22]:

—“... UDR can subsist in the “design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article.” This is extremely wide—it means that a particular article may and generally will embody a multitude of “designs”—as many “aspects” of the whole or part of the article as can be ... But even with this wide definition, there is a limit: there must be an “aspect” of at least a part of the article. What are the limits of that? I put it this way in *A. Fulton Co Ltd v Totes Isotoner (UK) Ltd* [\[2004\] R.P.C. 16](#); [\[2003\] EWHCA](#)

Civ 1514 at [31]: “The notion conveyed by ‘aspect’ in the composite phrase ... is ‘discernible’ or ‘recognisable’”.

39.

The amendment to [section 213\(2\)](#) was intended to address this problem by narrowing the definition of “design”. Paragraph 10 of the Explanatory Notes to [the 2014 Act](#), cited by HHJ Hacon at [13] of the *DKH* decision, states that:

“Subsection (1) limits the protection for trivial features of designs, by making sure that protection does not extend to ‘any aspect’ of the shape or configuration of the whole or part of an article. It is expected that this will reduce the tendency to overstate the breadth of unregistered design right and the uncertainty this creates, particularly in relation to actions before courts.”

40.

UK unregistered design right lasts for up to 15 years. The amendment to [section 213\(2\)](#) cannot have been intended to allow claims for infringement of “aspects” of designs until expiry of all such design rights in 2029. This does not, in my view, accord with the legislative objective of preventing the continuing uncertainty that such a broad and ill-defined right can create.

41.

On the other hand, as Mr Cuddigan points out, it is necessary to consider whether even this degree of retrospectivity is contrary to art. 1 of the First Protocol to the European Convention on Human Rights, in that it would amount to retrospective confiscation of property rights in aspects of designs which existed on commencement of [the 2014 Act](#). I do not accept that this leads to a different conclusion. I agree with the view of the authors of *Russell-Clarke*, who state that:

“... the substance and reality is that the design of an article is normally protected by a bundle of design rights so that removing some from the bundle is in substance merely restricting the scope of infringement of the rights in the design even if in form it is extinguishing a distinct legal right or rights.”

42.

Accordingly, I conclude that the amendment to remove “any aspect of” a design from [section 213\(2\)](#) of the Act is not fully retrospective in that it does not extinguish accrued rights of action for infringements which occurred prior to 1 October 2014. However, it does apply to claims in respect of acts of infringement committed subsequent to that date.

43.

In the present case, as the alleged infringements commenced before October 2014 and continued thereafter, this conclusion only partially resolves the issue. Therefore, it is necessary to address the additional arguments advanced by the parties.

Is Neptune seeking to rely upon “parts” rather than “aspects” of the designs?

44.

This raises the subtle question of the difference between “parts” and “aspects” of a design. In my view, aspects of a design include disembodied features which are merely recognisable or discernible, whereas parts of a design are concrete parts, which can be identified as such. Returning to the example of Laddie J in *Ocular Sciences*, aspects of the design of a teapot could include the combination of the end portion of the spout and the top portion of the lid, which are disembodied from each other and from the spout and lid. They are not parts of the design.

45.

In my judgment, none of the features which Neptune seeks to exclude, nor the remainder of the designs after such exclusion, are properly characterised as aspects of the designs. For example, the cock-beading and moulding are concrete parts of the designs, which are created separately and then applied to the Chichester cabinets.

46.

The position would be different if Neptune was seeking to rely upon the combination of key features as a design, but that is not its case. I accept Neptune’s argument that, since the statute permits designs for parts of articles, it makes no difference whether those parts are identified by their presence, or by the absence of excluded parts. In my judgment, Neptune is entitled to rely upon the entirety of the designs in question, without the features which it seeks to exclude.

UK unregistered designs - the relevant legislation

47.

Section 226(1) - (3) of the [Copyright, Designs and Patents Act 1988](#) provides that:

“226 (1) The owner of design right in a design has the exclusive right to reproduce the design for commercial purposes—

(a)

by making articles to that design, or

(b)

by making a design document recording the design for the purpose of enabling such articles to be made.

(2)

Reproduction of a design by making articles to the design means copying the design so as to produce articles exactly or substantially to that design, and references in this Part to making articles to a design shall be construed accordingly.

(3)

Design right is infringed by a person who without the licence of the design right owner does, or authorises another to do, anything which by virtue of this section is the exclusive right of the design right owner.”

48.

[Section 213\(3\)](#) - (4) specifies certain limitations on the scope of design right:

“213(3) Design right does not subsist in—

(a)

a method or principle of construction,

(b)

features of shape or configuration of an article which—

(i)

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

(ii)

are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part, or

(c)

surface decoration.

(4) A design is not “original” for the purposes of this Part if it is commonplace in the design field in question in a qualifying country at the time of its creation...”

Interpretation of the statutory provisions

Copying the design so as to produce articles exactly or substantially to the design

49.

The correct approach to considering whether an allegedly infringing article is produced exactly or substantially to the design was set out by Aldous J in *C & H Engineering v F. Klucznik & Sons Ltd* [1992] FSR 421 at [428]:

“Under section 226 there will only be infringement if the design is copied so as to produce articles exactly or substantially to the design. Thus, the test for infringement requires the alleged infringing article or articles be compared with the document or article embodying the design. Thereafter the court must decide whether copying took place and, if so, whether the alleged infringing article is made exactly to the design or substantially to that design. Whether or not the alleged infringing article is made substantially to the plaintiff’s design must be an objective test to be decided through the eyes of the person to whom the design is directed.”

50.

Neptune submits that this approach is over-simplistic, and that guidance can be found by analogy to infringement by reproduction of a substantial part of a copyright work. It relies upon a well-known passage in Lord Hoffman's speech in *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] UKHL 38; 2003 1 AC 551 at

[559] - [560], which explains that for the purpose of assessing whether a substantial part has been reproduced in a copyright claim, the Court should consider whether the original skill and labour, which was the reason for conferring copyright protection, has been copied:

"The House of Lords decided in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 that the question of substantiality is a matter of quality rather than quantity ... But what quality is one looking for? That question, as it seems to me, must be answered by reference to the reason why the work is given copyright protection. In literary copyright, for example, copyright is conferred (irrespective of literary merit) upon an original literary work. It follows that the quality relevant for the purposes of substantiality is the literary originality of that which has been copied. In the case of an artistic work, it is the artistic originality of that which has been copied."

51.

Mr Cuddigan submits that, by parity of reasoning, protection is conferred upon designs because of the originality of their shapes and/or configurations. Where there is copying of ideas expressed in a design which, in their conjoined expression, have involved original design skill and labour, and/or are the expression of the intellectual creation of their author, the resulting article will be substantially made to the design.

52.

However, an attempt to equate infringement of UK unregistered design right with infringement of copyright was specifically rejected by the Court of Appeal in *Wooley v A Jewellers* [2002] EWCA Civ 1119, where it was held at [19] that:

"19 ... As Aldous J observed in the passage I have set out in the *Klucznik* case, there is a difference between an enquiry into whether the item copied forms a substantial part of the copyright work and an enquiry whether the whole design containing the element which has been copied is substantially the same design as that which enjoys design right protection. The enquiry which the judge carried out was that set out in paragraph 119 of his judgment. At no stage did the judge refer to the different test applicable to design right infringement. On that test, it may not be enough to copy a part, even a substantial part. Regard has to be had to the overall design which enjoys design right. Here the judge was diverted to certain difficult questions arising as to substantiality in copyright infringement which may have no relevance to design right infringement."

53.

In contrast to copyright, it is not an infringement of a UK unregistered design to reproduce "a substantial part" of a design. The importance of this distinction may be illustrated by the facts of the present case. Apart from the features which Neptune has excluded, it relies upon the entirety of each of the articles of furniture which is said to embody the designs in issue, and does not rely upon parts or combinations of parts of such articles. Therefore, it is necessary to consider the differences as well as the similarities between *Chichester* and *Shaker* products. It will not be enough to show that a particular feature or combination of features (which in a copyright claim might constitute a substantial part) has been copied. Nor will it be enough to show that Neptune's key features have been copied, since those features, whether alone or in combination, have not been pleaded as a design right.

Ideas and their physical manifestation

54. Design right protects the physical manifestation of an idea, and does not protect the idea itself; Rolawn Ltd v Turfmech Machinery [\[2008\] EWHC 989 \(Pat\)](#) at [79] per Mann J. The point was succinctly expressed by HHJ Birss (as he then was) in Albert Packaging v Nampak Cartons & Healthcare Ltd [2011] EWPC 15; 2011 FSR 32 at

[18]:

“Mr Delaney submitted that although designs that serve purely functional purposes are not denied protection, it is important when identifying the aspect that is relied upon to have in mind that design right does not protect ideas per se (in the way a patent might) even though these ideas might have been important in arriving at the design in question. I accept that submission. Design right only protects aspects of the actual physical manifestation of an idea.”

Method or principle of construction

55.

The more generalised and abstract the feature relied upon, the more likely it is that it will be regarded as a method or principle of construction. In Landor & Hawa International Ltd v Azure Designs Ltd [\[2007\] FSR 9](#) the Court of Appeal approved the formulation of this exclusion set out in Russell-Clarke on Copyright in Industrial Designs (7th Edition) at [3-80] (per Neuberger LJ at [13]):

“... no design shall be construed so widely as to give its proprietor a monopoly in a method or principle of construction. What he gets is a monopoly for one particular individual and specific appearance. If it is possible to get several different appearances, which all embody the general features which he claims, then those features are too general and amount to a method or principle [of construction]. In other words, any conception which is so general as to allow several different appearances as being made within it, is too broad and will be invalid.”

56.

HHJ Birss summarised this approach in the Nampak case (supra) at [22]:

“22. This exclusion operates to limit the level of generality at which a definition of the design to be relied on can be stated: the more abstract the definition relied on, the more likely it is to fall foul of the exclusion – see Mann J in Rolawn at [91] - [96]...”

Configuration

57.

A claim to “configuration” as distinct from “shape” allows for claims to the relative arrangement of parts or elements of an article. In Magmatic Ltd v PMS International Ltd [\[2013\] EWHC 1925 \(Pat\)](#) Arnold J summarised this principle as follows:

“82 I considered the meaning of the word “configuration” in [section 213\(2\)](#) at some length in CliniSupplies Ltd v Park

[\[2012\] EWHC 3452 \(Ch\)](#) at [36]-[53]. I concluded that the interpretation of “configuration” adopted by Pumfrey J in Mackie Designs Inc v Behringer Specialised Studio Equipment

(UK) Ltd [1999] RPC 717 and JCM Seating Solutions Ltd v James Leckey Designs Ltd [2002] EWHC 3218 (Ch), namely that “configuration” bore a wider meaning than “shape”, and included the relative

arrangement of parts or elements of an article, should be taken to represent settled law at first instance.”

58.

However, there are limits to the extent of abstraction which is permissible in respect of a configuration claim, as the more generalised the claim, the more likely it is to be regarded as a method or principle of construction. That was the conclusion reached by Pumfrey J in JCM Seating (supra) where he said, in relation to a configuration claim, that:

“... it seems to me quite clear that in the present pleading the process of abstraction has gone too far. It has ceased to be associated with any particular appearance of an article at all. It has become a method or principle of construction.”

Commonplace

59.

In Ocular Sciences (supra) Laddie J explained that the commonplace exclusion applies to “any design which is trite, trivial, common-or-garden, hackneyed or of the type which would excite no peculiar attention in those in the relevant art”. The analysis must be conducted by reference to material “shown to be current in the thinking of designers in the field at the time of creation of the designs”, per Jacob LJ in Lambretta Clothing v Teddy Smith Ltd [\[2004\] EWCA Civ 886](#); [\[2005\] RPC 6](#) at

[56].

60.

Following the amendment to [section 213\(2\)](#), it is more difficult for the Claimant to define the shape of a design at a higher level of abstraction than its physical manifestation in the relevant article. As explained by Arnold J in the Whitby case (supra) at [45], this makes it harder for the Claimant to prove infringement, and also makes it harder for the Defendant to prove that the design is commonplace. Nonetheless, the commonplace exclusion remains a useful cross-check on the breadth of a claim to infringement – the more generalised the definition of the design relied upon, the more likely it is to encompass designs which would “excite no peculiar attention in those in the relevant art”.

Moving or dynamic features

61. UK unregistered design right applies to both functional and aesthetic designs.

Neptune submits that it would therefore be surprising if it did not allow for account to

be taken of the way in which particular parts of an article moved in use, but was instead restricted to “frozen” views of a dynamic article. I accept this submission. In respect of moving parts, it would not be possible to consider their functionality if their dynamic features were excluded from consideration.

Derivation of the DeVOL Shaker range

62.

I now turn to the facts of this case, and begin by considering the sources used by DeVOL in the design of its Shaker range. Two witnesses gave evidence on this issue on behalf of DeVOL, namely Paul O’Leary, who is its founder and major shareholder and has been involved in its business since it was formed as a partnership in 1989, and Robin McLellan, who is the Managing Director of DeVOL and is a designer. He joined DeVOL as a placement student in September 2005 and as an employee in July 2007.

63.

Mr O'Leary explained in his first witness statement that the Shaker range was based upon integrated parts taken from the Classic range, but replicated in the Shaker style of furniture. He stated that it was DeVOL's Classic range that formed the basis of the Shaker range, not the Chichester.

64.

Mr McLellan said in his first witness statement that the Shaker range resulted from DeVOL's decision to create and manufacture its own modular range and was based upon the Classic range, but in the Shaker style of furniture. As the Shaker range was largely based on the Classic range for its proportions, DeVOL referred directly to the existing Classic AutoCAD catalogue. He referred to an extract from the AutoCAD confirming that the original document was created in May 2001. The extract also shows a modification of the Classic range to the Shaker range, which was saved on 17 August 2010. Mr McLellan then provided a detailed account of the development of the design features in the Shaker range, including the key features identified by Neptune from their Chichester range, which I shall consider later in this Judgment.

65.

I accept that the Shaker range was based on the Classic range. The Shaker range looks very similar to the Classic range (as shown in the photographs and brochures of the Classic range in this case). The Classic range CAD library was the starting point for the Shaker range, as shown by the metadata in the Shaker CAD library. I find that the Classic range was the primary design source for the Shaker range.

66.

However, I do not accept that the design of the Shaker range was entirely uninfluenced by, and owed nothing to, DeVOL's knowledge of the Chichester range. Mr O'Leary and Mr McLellan were very familiar with the Chichester range. At a high level of generality, the Chichester and Shaker ranges share certain features which were unusual in kitchen furniture, which would not be the case if the Shaker range had been designed independently of the Chichester range. This gives rise to a number of issues that I will need to address, including the credibility of DeVOL's witnesses, and the extent to which the physical manifestation of these features has been substantially reproduced in the DeVOL products.

67.

Neptune also submitted that other individuals within DeVOL, who had played some part in the design of the Shaker range, had not been called to give evidence, and that their absence was critical. For example, Mr McLellan mentioned that Mr Ben Creed had had some input into the design. Of course, in some cases, the absence of a witness may be important and may lead to adverse inferences being drawn by the Court. But not in this case. I am satisfied that, having read their statements and heard their evidence, Mr McLellan and Mr O'Leary were able to provide an account of the

genesis of the Shaker range which is sufficient for me to decide the issues raised in this case. In the light of their evidence, the idea that another designer within DeVOL might have made a decision to copy the Chichester range is unsupported speculation.

Design 5 - similarities and differences (Appendix pages 2 and 3)

68. I shall begin by considering the key features and then compare the relevant articles as a whole, without reference to the excluded features.

Height of 890mm and depth of 560mm

69.

As to the height of 890mm, Mr McLellan explained at [46] of his first statement that this dimension was chosen by reference to the height of kitchen appliances. Most kitchens incorporate an integrated dishwasher, which is commonly 820mm or 850mm high, and a washing machine and tumble dryer which are commonly 850mm high. Mr McLellan and Mr O'Leary decided that the top rail forming part of the frame of the cabinets should be 35mm high so as to match the height of the upright. As a result, they ended up with an overall height of 890mm, equal to the appliance height, plus a 5mm tolerance to allow for an uneven floor, plus the 35mm top rail. He claimed that this resulted in an overall unit height with a work surface of 920mm/930mm, depending on whether 30mm or 40mm thick work surfaces were used. The experts agreed that these are standard worktop heights in the kitchen industry.

70.

During cross-examination, it emerged that 890mm was the height of the Classic base cabinets including the worktops, and the height without the worktops was 860mm. I bear this in mind, but I do not consider that it makes any difference. I accept Mr McLellan's explanation that the 890mm dimension was chosen in the Shaker range by reference to the height of kitchen appliances to be incorporated, together with the height of the upright and a small tolerance. I reject the allegation that this dimension in the Shaker base cabinet was copied from the Chichester base cabinet.

71.

As to the depth of 560mm, it is standard for kitchen cabinets to extend 600mm from the wall. A void of 40mm behind the unit is also standard, and thus the depth of 560mm is standard for such cabinets. Mr Cuddigan QC, wisely, did not pursue this feature with any enthusiasm, if at all. I reject the allegation that this dimension in the Shaker base cabinet was copied from the Chichester base cabinet.

Cutaway feature

72.

Mr McLellan explained at [61] of his first witness statement that the cutaway feature on the Shaker base cabinet causes the adjustable rear foot to bear on the floor rather than the side of the cabinet. If the cheeks were square at the bottom, this would require the cabinet to be scribed down, which would be time-consuming, particularly on uneven floors. The cutaway feature on the Shaker cabinets was designed to be easy to manufacture using only a panel saw. The Classic range had a cutaway side panel in 2001. Various photographs of side cutaways on Classic range designs, which pre-date DeVOL's involvement with Neptune, are shown at, for example, G2/23/180 - 183.

73.

The Shaker and Chichester cutaways are very different shapes. The Chichester cutaway is an elegant curve, whereas the Shaker cutaway is made with a single straight saw cut. Nonetheless, Neptune submitted that they are both parts of a class of shapes which leave some material at the front but none at the back, which it characterised as an "asymmetric cutaway". Mr Smallbone was not aware of other kitchen manufacturers with asymmetric cutaways.

74.

In my view, the "asymmetry" of the cutaway is no more than an idea, or method or principle of construction, expressed at a high level of generality, in an attempt to find a common feature in two

quite different shapes. I do not regard it as an indication of copying, but rather a consequence of the functions of this feature. As Neptune itself points out, the cutaway has three functions: it provides support for the front foot, and it presents a modest amount of material for scribing/sanding in the event of an uneven floor beneath the front feet. The third function underlies the asymmetry: the cutaway must not hinder the operation of the rear foot.

75.

I accept Mr McLellan's evidence concerning the cutaway feature. In my judgment, it was derived from the Classic range, and not copied from the Chichester range.

Stiles extending to the floor and a lower rail framing a recessed adjustable kickboard

76.

Stiles extending to the floor are very common in kitchen furniture. Mr Smallbone explained at [4.3.3] of his first report that as the market grew significantly since the 1990s, there was a noticeable reintroduction of a more unfitted, free-standing look for kitchens. This brought with it a resurgence of kitchens featuring stiles to the floor. There are examples in evidence of vertical stiles to the floor with a lower rail in various different kitchens which pre-date the Chichester range. I accept Mr Smallbone's evidence on this issue.

77.

The addition of a recessed kickboard is unremarkable. Other than for units with a high bottom rail, the choice is limited to a skirting board or a kickboard, as Mr Grey accepted. The shape is determined by the space that needs to be filled.

78.

Vertical stiles extending to the floor with a lower rail were a feature of the DeVOL Classic range, as shown in G2/23/150 - 162. Mr McLellan explained at [62] of his first statement that commonly, when using the Classic range, DeVOL gave customers the option of having skirting along the fronts of the cupboards, a completely open area underneath the cabinets or a recessed kick strip attached behind the fascia. Mr O'Leary explained at [25] of his first statement that the original Classic designs had straight front legs before they were changed to angled legs. Mr O'Leary and Mr McLellan decided to offer similar options with the Shaker range. The design of the recessed kick strip was refined to make it easier to adjust as it was important to ensure that the installation of the cabinets could be carried out by the customer's own kitchen fitter.

79.

I accept the evidence of Mr McLellan and Mr O'Leary. In my judgment, this feature in the Shaker range was not copied from the Chichester range. It was based upon the Classic range.

Fixed front legs and adjustable rear legs/feet

80.

This feature formed a very important part of the Claimant's case. Mr Sims-Hilditch explained in his first statement at [46] - [48] that Neptune realised that most massproduced kitchens had four internal invisible and individually adjustable legs behind a running skirting board fitted across a range of units. However, Neptune's customers liked a freestanding look, with visible legs. Neptune appreciated that the reason why most cabinets do not normally have fixed legs was because of the difficulty of fitting due to unevenness of floors. Neptune therefore devised a solution wherein the two front legs

were fixed, whilst the invisible back legs were metal and adjustable by means of fine internal threads. He explained that no cabinet, to his knowledge, had

two fixed legs on the front and two adjustable legs at the back prior to the launch of the Chichester range.

81.

Mr McLellan dealt with the derivation of the fixed front legs and adjustable rear feet in the Shaker range at [57] of his first statement. He explained that the adjustable feet used on the Shaker range base cabinets are of the same design as the adjustable feet used in the Classic range base cabinets, and he produced photographs to show that this was the case. The adjustable rear feet in the Classic range appear to be indistinguishable from those used in the Shaker range. Mr O'Leary stated at [56] of his first witness statement that the DeVOL Classic range had a combination of adjustable rear feet, fixed front feet and a cutaway by the time that Mr McLellan joined DeVOL permanently in July 2007.

82.

The shape of the fixed front legs and adjustable rear feet is very different in the Chichester and Shaker Designs. The rear feet are of completely different shapes (Annex pages 2 and 3); the front legs are of different shapes; and the combination of those elements is different. Their derivation from the Classic range, as opposed to the Chichester range, is, in my view, apparent from inspection of the articles and photographs in this case.

83.

Neptune suggested that it relies upon the configuration of the adjustable rear feet and front legs, as distinct from their shape. I do not consider that it is open to Neptune to rely upon configuration without shape, given that it has pleaded that it relies on the shape and configuration of "the rear rotatably adjustable foot and the front feet, themselves comprised of both the said stiles and the parts of the bottom of the side panel that have not been cut away".

84.

Even if the point was open to Neptune, any configuration claim in respect of this combination would be so generalised as to amount to a method or principle of construction. It would amount to a claim to the mere idea of using adjustable rear legs with fixed front legs. The configurations of the Chichester and Shaker products are different. In the Shaker range legs are positioned next to the side wall, and not spaced away from it; they are fixed to the side wall, not the base; and therefore, they are in a different location relative to the front of the unit.

85.

I should add that Neptune criticised Mr Smallbone for focussing on aesthetic considerations to the exclusion of functional features, which it suggested meant that he excluded the configuration element from his consideration. Whilst it is true that Mr Smallbone regarded functional features which the customer would not usually look at as of limited interest, nonetheless he specifically addressed the configuration element of the claim at, for example, [5.1.16] of his first report. In any event, similarities and differences in configuration do not require expert evidence - they are apparent on inspection of the articles.

Neptune's allegations in relation to the Classic range

86.

In his second witness statement, Mr Sims-Hilditch said that he had recently visited two of DeVOL showrooms in London. At [7] he said:

“The Classic range at the Defendant's showroom was only visible in its fully-installed status. As a result, it was not possible for me to see whether the rear legs of the floor cabinets were adjustable or not. However, I was able to inspect the base panels of these cabinets and see that there were no co-operating apertures present. Although it is possible that there were nonetheless adjustable feet present, it would be surprising if the Defendant had chosen to retain that feature while abandoning the essential and almost cost-free aperture. For this reason, it seems likely that the Classic kitchen units installed in the Defendant's showroom do not possess adjustable rear feet.”

This evidence raised a very serious allegation of dishonesty. It was being suggested that, contrary to the evidence of Mr O'Leary and Mr McLellan, the Classic range did not have, and does not have, adjustable rear feet.

87.

In response, in his second statement, Mr McLellan produced photographs of presentday Classic cabinets which showed that they do have adjustable rear feet. He also referred at [14(c)] to a number of photographs in DeVOL's disclosure which showed adjustable rear feet on historic Classic pieces provided to customers. He explained that the adjustable rear feet in the Shaker range are generic components which were sourced from a company known as Hafele UK Ltd, well before its relationship with Neptune. He produced an invoice dated 4 October 2007 which showed an order of Hafele components for the adjustable rear feet which were used in the Classic range.

88.

•In the light of Mr McLellan's second statement, the allegation that the Classic range did not have adjustable rear feet was abandoned by Neptune. However, Neptune's closing speech alleged, for the first time, that the adjustable rear feet in the Classic range were copied from the Chichester range. Neptune submitted that adjustable rear feet were used in the Chichester range which was “at large” in January 2007, and such feet were first used in the Classic range in June 2007. It was suggested that it was for DeVOL to prove the genesis of that aspect of the Classic range design. It was suggested that the burden was on DeVOL to adduce evidence from whoever came up with the idea of using adjustable rear feet in the Classic design, and it had not done this.

89.

This allegation was not pleaded, nor was it put to any of DeVOL witnesses, including Mr O'Leary, who worked for DeVOL at the time that the Classic range was designed, and gave evidence about it. In my judgment, it is not open to Neptune to raise a new allegation of copying in respect of the Classic range, without pleading the issue and without putting it to those witnesses who gave evidence about the Classic range.

90.

In *Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd* [2004] EWCA Civ 886; [2005] RPC 6, Jacob LJ said at [65]:

“Where there is an allegation of copying, fairness requires that the claimant should identify the points relied upon well in advance of trial. That should normally be in the pleadings but at least ought to be in the witness statements. As Aldous J observed in *N&P Windows v Cego* [1989] FSR 56 “I would have thought that it was essential in future cases that points of similarity are set down.””

This is important because, if alleged indications of copying are not identified well in advance of the trial, then a Defendant may be ambushed by such allegations in circumstances where, given the opportunity to investigate, there would be a reasonable explanation.

91.

In the present case, Neptune's submission goes considerably further than raising an indication of copying for the first time during the trial. It seeks to advance an allegation of copying about a different range of kitchen furniture to that which is the subject of this Claim. The failure to raise the point in advance of the trial, and to put the point to any witness during the trial, means that there was no opportunity for DeVOL to answer this allegation. I have no doubt that DeVOL and its advisers were taken by surprise by this claim in Neptune's closing, and that to allow it to be introduced at the end of the trial would be unfair.

92.

This unfairness is not answered by reference to the burden of proof. DeVOL was not required to call evidence to prove that features of the Classic range were not copied from the Chichester range, in circumstances where Neptune had never made such an allegation. Once DeVOL had identified the Classic range as the source of the design of the Shaker Range, it was up to Neptune to allege that the Classic range (or some part of it) was a copy of the Chichester Range. It did not do so.

93.

Even if the point were open to Neptune, I would have dismissed it on the basis that Neptune had not advanced any or sufficient evidence to support it. In particular, there was no evidence that DeVOL had had access to the Chichester range in June 2007.

Conclusion

94. I accept the evidence of Mr McLellan and Mr O'Leary. In my judgment, this feature in the Shaker range was not copied from the Chichester range. It was based upon the Classic range.

The stiles extending horizontally beyond the body of the cabinet to form 'ears'

95.

DeVOL alleges that this feature is excluded from design protection pursuant to the "must fit" provision in [section 213\(3\)\(b\)\(i\)](#). It submitted that the dimensions of the ears reflect the size of the end panels used. The ear fits over the edge of the end panel so that neither the edge of the end panel, nor the edge of the ear, show at the end of a run. Accordingly, the ear must extend from the cabinet by the same amount as the thickness of the end panel.

96.

I do not agree that the ears are excluded from design protection. DeVOL's argument is that the ears enable the unit to be connected to an end panel. In my judgment, an end unit that is exposed to view includes an end panel. An end panel is fitted to hide the unfinished side of the cabinet. There is no separate 'article' which is connecting to the unit. The ears and end panel become integral parts of an end unit. In those circumstances, the must fit exclusion does not apply; *Baby Dan AS v Brevi SRL and Another* [1999] FSR 377 at [382].

97.

As to derivation of the ears in the Shaker range, Mr McLellan explained that DeVOL had included such 'ears' in designs for the Classic range from as early as March 2007 and he referred to a CAD drawing prepared for a DeVOL customer at page 19 of Annex B to the Re-Re-Amended Defence and

Counterclaim. The end panels used 12mm ears, as are used in the Shaker range. This use of ears in the Classic range was unsurprising, given that this feature was well-known in kitchen design by that date, as explained by Mr Smallbone at [4.4.8] - [4.4.12] of his first report. Neptune point out, correctly, that the Classic range did not include the combination of stiles to the floor with co-extensive ears.

98.

Mr Grey considered that the combination of stiles to the floor with ears that also extended to the floor was ingenious. However, he accepted that since the stiles extend to the floor, and a function of the ears is to cover the end panel from top to bottom, it is apparent that the ears should go to the floor as well. He suggested that the clever aspect was that the combination was all made of one piece of wood and that "the machine that makes this is programmed to do all this at the same time." This is a method or principle of construction, in my judgment. Alternatively, at this level of detail, differences between the Chichester and Shaker stiles would be apparent.

99.

As with the adjustable rear feet, Neptune alleged for the first time in closing that DeVOL had not discharged the burden of showing that the ears in the Classic range were not copied from the ears in the Chichester range. I reject this, for the same reasons that I have set out in respect of the adjustable rear feet. It also alleged that the Shaker range was promoted by reference to a staggering feature, whereby the ears were used to enable one unit to sit in front of another, which was said to be unique to the Chichester range. This does not change the shape or configuration of the ears and I do not consider that it indicates that the shape and configuration of the ears was copied from the Chichester range.

100.

I accept the evidence of Mr McLellan. In my judgment, this feature in the Shaker range was not copied from the Chichester range. It was based upon the Classic range.

A cabinet door featuring a single sunken panel set in-frame with visible butt hinges

101.

Mr Smallbone explained in his first report that a single sunken (recessed) panel is a "classic feature, included in Shaker designs, and a time-served design classic of kitchen design in the UK and USA". Smallbone of Devizes designed its first kitchen incorporating this feature in 1982/3. It quickly became its most popular design and this has continued to this day. Mr Smallbone considered that in-frame designs have been commonplace in kitchens since at least 1978. He considered that the use of two butt hinges to affix the door and frame is entirely standard within the industry. Both Smallbone and Mark Wilkinson Furniture used butt hinges, as did many other kitchen companies before 2006.

102.

In the light of this evidence, which I accept, it is unsurprising that these features were used in the Classic range. Mr McLellan explained in his first statement that the Classic range used panelled doors. The width of the 'frame' of the door panels, which formed the recessed panel in the door on the Classic was 70mm. This was replicated in the doors of the Shaker range.

103.

He said that visible butt hinges are a very traditional feature included on period Georgian and Shaker furniture and the Classic range had always included this detail. DeVOL uses the same butt hinges in

the Shaker range that were used on the Classic range which are shorter than the butt hinges used on the Chichester (50mm rather than 65mm).

104.

I accept the evidence of Mr McLellan. In my judgment, this feature in the Shaker range was not copied from the Chichester range. It was based upon the Classic range.

The shape of the four interior cabinet columns with a saw tooth profile and trapezoidal inserts

105.

Neither Mr Smallbone nor Mr Grey, a well-known kitchen designer who gave evidence on behalf of Neptune, had seen saw tooth shelving used in new kitchen furniture. The Chichester range featuring saw tooth shelving was installed in DeVOL's premises in July 2008, almost a year before DeVOL began designing the Shaker range, and Mr McLellan and Mr O'Leary were fully aware of this feature.

106.

During his cross-examination, Mr McLellan denied that the presence of saw tooth shelving in the Chichester range influenced his decision to adopt such shelving in the Shaker range. He explained that he was very familiar with the use of saw tooth shelving in antique furniture and that he and Mr O'Leary thought that it would be a good solution for the Shaker range, as it would avoid the need for visible shaft supports. I accept that Mr McLellan knew about the use of saw tooth shelving in antique furniture. As Mr Smallbone confirmed, notched columns with a saw tooth profile is a very well-established method of fixing shelves in furniture which has been known for hundreds of years.

107.

However, I do not accept that use of saw tooth shelving in the Chichester range played no part in its adoption in the Shaker range. Insofar as Mr McLellan suggested that this was the case, I do not accept his evidence. In my view, the idea of using such shelving in the Shaker range came from the Chichester range. I believe that Mr McLellan had convinced himself that he had not derived the idea of using saw tooth shelving from the Chichester range as this was such a well-known method. I consider that he and Mr O'Leary were both honest witnesses who did their best to explain to the Court the design history of the Shaker range. I do not accept Neptune's submission that, having found some degree of derivation from the Chichester range, I should reject the totality of Mr McLellan's evidence about the derivation of the Shaker design.

108.

I have concluded that the idea of using such shelving in the Shaker range came from the Chichester range. The question to be considered is whether its physical manifestation has been copied. In my judgment, it has not. I have found that notched columns with a saw tooth profile is a very well-known method of fixing shelves in furniture which has been used for hundreds of years. The physical manifestation of this method is different in the Chichester and Shaker kitchens. The shelf supports are quite different, and the shape of the shelves including their dimensions and the rectangular cut-outs at each end is different.

109.

The idea of using such a method cannot be protected by unregistered design. A definition of this design feature which encompasses both the Chichester and Shaker would amount to a method or principle of construction.

Design 5 - similarities and differences between the Chichester and Shaker cabinets

110.

Apart from the key features, there is a general overall similarity between the Chichester and Shaker cabinets. This is to be expected in kitchen units of this type. There are certain high-level similarities in respect of the key features. However, the key features have been defined by Neptune at a level of generality which obscures the differences between the designs. A few dimensions have been selected by Neptune which are the same or similar, and many other dimensions, which are different, have been ignored.

111.

In particular, the cutaways are strikingly different in shape; the shape of the front/leg rear adjustable foot combination is strikingly different, and its configuration is also different; the width of the stiles in the Chichester range (47mm) is different from the width of the stiles in the Shaker range (35mm); the shape of the door and its frame is different (725mm x 503mm compared with 736mm x 525mm); the shape of the

shelves including their dimensions and the rectangular cut-outs at each end is different; the shape of the saw tooth supports is different; the height from the floor of the bottom rail is different (125mm v 115mm); and the size of the butt hinges is different.

Conclusion in relation to Design 5

112. Having regard to all the relevant circumstances, including the similarities and differences and the evidence of derivation, in my judgment the Shaker Door Base Cabinet does not infringe the design right asserted by Neptune in the Chichester Door Base Cabinet

Design 7 - the curved end cabinets (Annex page 4)

113.

Design 7, in my view, represents Neptune's best case. Mr Smallbone and Mr Grey agreed that curved cabinets were offered by Chalon and Mark Wilkinson, but there was no example of a curved cabinet in a modular kitchen, apart from the Chichester and Shaker ranges, because the curved shape is difficult and expensive to make. I should add that during cross-examination Mr Grey generally agreed with Mr Smallbone's evidence. Curved cabinets were not offered in any of the catalogues for the Classic range. DeVOL produced a drawing of a curved cabinet which was supplied to one customer, but its shape was different to the cabinets in issue, in that it had a relatively gentle curve and two doors.

114.

The dimensions of the Chichester and Shaker curved end cabinets are similar, and the fronts of the cabinets bear a distinct resemblance to each other. The similarities can be seen when one of the cabinets is placed on top of the other, as Mr Cuddigan showed Mr McLellan during his cross-examination. However, the sides and bases of the cabinets are different.

115.

As with the saw tooth shelving, I do not accept that the presence of curved end cabinets in the Chichester range played no part in their adoption in the Shaker range. Insofar as Mr McLellan suggested that this was the case, I do not accept his evidence. In my view, the idea of using single-door curved end cabinets in the Shaker range came from the Chichester range. This gives rise to two issues: first, whether more than the idea of curved end cabinets was taken by DeVOL from the Chichester range; and secondly, whether the curved end cabinets in the Shaker range are made substantially to the design relied on in the Chichester range.

116.

The general shape of the Shaker curved end cabinets is determined by the stile size and the choice of width (as well as the standard depth of 560mm). As to the stile size, Mr McLellan explained at [40] of his first witness statement that the frames around the doors of the Classic range had historically been 70mm wide x 27mm deep. Mr O'Leary and Mr McLellan decided that this proportion should be carried across into the uprights of the Shaker range. The uprights of the Shaker range were designed to be 35mm wide x 27mm deep so that when butted together they gave the same appearance as the Classic range (as the width of the two uprights taken together was 70mm).

117.

As to the width of the curved base cabinets, Mr McLellan explained at [55] of his first statement that curved base cabinets need to be suitable for use in opposite pairs to form the end of an island or peninsular run. In the Classic range, kitchen islands were commonly 900mm in width. Factoring in a 30mm worktop overhang at each end of the island, a 420mm width could have been chosen for the Shaker curved end cabinets

to give 900mm islands, but as DeVOL's preference was to use round numbers, the curved base cabinet in the Shaker range was designed to be 400mm in width as a pair of cabinets, plus a 30mm overhang which created an 860mm worktop.

118.

During his cross-examination, Mr McLellan maintained this position and explained that the door radius was a "true radius" meaning that it was a quarter circle rather than a quarter ellipse. In the Shaker curved cabinet, the true radius is $400\text{mm} - 35\text{mm} = 365\text{mm}$. DeVOL points out that in the Neptune cabinet, the true radius is $400\text{mm} - 46\text{mm} = 354\text{mm}$. So, the apparent similarity, it is said, is misleading.

119.

I have to decide whether this is an ex post facto justification, provided in order to conceal copying. I have borne in mind that these were not the only design choices open to Mr McLellan, and, as I have said, the curved end cabinets are similar, particularly in their front view. If this was an ex post facto justification, then Mr McLellan was lying on oath. He could not have believed that any of this was the case, if, in fact, he had copied the dimensions and other details of the Chichester curved cabinet. Having heard his evidence, I do not consider that he was lying about this. In my view, he was an honest witness who was very familiar with curved cabinets. He had convinced himself that the Shaker curved cabinets owed nothing to the Chichester curved cabinets because no more than the idea of using such cabinets in a modular kitchen had been taken. I accept his account of the design process of these articles.

120.

As to the similarities and differences between the curved end cabinets: the overall dimensions are very similar. However, I have accepted Mr McLellan's account of the reasons for the choice of height (890mm) depth (560mm) and width (400mm); the cutaway is a strikingly different shape, as are the rear adjustable feet; the width of the stiles is different (47mm v 35mm); the 12mm ears are present in some DeVOL units and in others, 9mm is used. This was derived by DeVOL from the Classic range; the width of the door frame is different (58mm x 56mm v 68mm x 68mm); the shape of the front left panel has a quarter-circular cut out at its base which is different; the size of the butt hinges is different and the batten support behind the curved element on the bottom surface is absent in the Shaker.

121.

In my judgment, the idea of having curved end cabinets in the Shaker range was derived by DeVOL from its knowledge of the Chichester range. However, the physical manifestation was not copied. When considering all of the similarities and differences, I conclude that the Shaker curved end cabinets are not made substantially to the design of the Chichester curved end cabinets.

Designs 9 and 12 - the wall cupboards (Annex pages 5 and 6, respectively)

122.

Mr Smallbone's opinion was that generally, the visual appearance of the Chichester one door wall cupboard (Design 9) is overwhelmingly similar to other wall cabinets on the market pre-2006. The primary visual features are the single sunken panel door and its surrounding frame, affixed via use of butt hinges. He referred to examples of various wall cabinets featuring a single-door set "in-frame" with a single sunken panel and butt hinges which pre-date 2006. I accept his evidence. As to dimensions, he considered that they are within the standard range for such cupboards.

123.

Similarly, in relation to the two-door wall cupboard (Design 12) Mr Smallbone considered that the visual appearance of this cabinet is overwhelmingly similar to other wall cabinets on the market pre-2007 (the year of first marketing). The primary visual features are the double-glazed panel doors and surrounding frame with a central

stile, affixed via use of butt hinges. He gave examples of very similar wall cupboards which pre-date 2007. As to dimensions, he considered that they are within the standard range for such cupboards. I accept his evidence on this issue.

124.

Mr McLellan explained in his first statement that the starting point for the wall cupboards for the Shaker range was the 900mm and 600mm wide wall cupboards in the Classic range. However, as the Shaker range of wall cupboards were offered with a 50mm cornice, that was factored into the overall width which yielded a width of 800mm (for the two-door cupboard) and 500mm (for the single-door cupboard). It was then necessary to reduce the width of the single-door cupboard further to 435mm so that it could accommodate the same size door as the two-door cupboard. This minimised the number of different components in the Shaker range, and worked well aesthetically.

125.

The height of the Shaker range wall cupboards was taken from the Classic range, which was 800mm including the cornice. Before alteration of the top rail width, the Shaker wall cupboards were 750mm high excluding the 50mm cornice. This was subsequently altered to 765mm. The 320mm depth of the Shaker range wall cupboards was taken from the Classic range. I accept his evidence, and I do not consider that any of these dimensions were copied from the Chichester range.

126.

As to similarities, Neptune relies on a height of 800mm, a width of 450mm, and a depth of 320mm, all of which are, in my view, standard. The Shaker range cupboard is 765mm high, 435mm wide and 320mm deep, the latter dimension being the same as the Classic cupboards.

127.

The other key features relied upon by Neptune are the saw tooth shelf supports, the use of ears, and the use of a sunken panel door. I have considered all of these features above, and my conclusions are the same as for Design 5.

128.

There are also numerous differences between the Chichester and Shaker wall cupboards. This can be seen from the various dimensional differences shown in the tables on pages 5 and 6 of the Annex. The wall cupboards all use saw tooth shelving, but the shape of the shelves, including their dimensions and the rectangular cut-outs at each end which allow the shelves to fit flush around the supports at the front and back of the cupboard, are very different. The batten along the top and bottom edge behind the front surfaces is different. In relation to Design 9, the Shaker wall cupboard includes an alcove above the bottom of the unit visible from the rear which is absent in the Neptune design. In relation to Design 12, further differences include the presence of two circular holes in the upper surface to allow lights to be fitted in the top of the cabinet, with brackets on either side of each hole, and the shape of the rear panel replicates the shape of single tongue and groove boards.

129.

Having regard to all the relevant circumstances, including the similarities and differences and the evidence of derivation, in my judgment the Shaker wall cupboards do not infringe the design right asserted by Neptune in the Chichester wall cupboards.

Originality and Design 12

130.

A further issue arises in relation to Design 12, which applies to certain other designs relied on by Neptune (for example Design 10, which was not one of the designs selected by the parties for this trial). Design 12, as pleaded in the Re-Amended Particulars of Claim, has a straight top to the glazing. The DeVOL cabinet also has a straight top to the glazing. Mr Sims-Hilditch accepted during his cross-examination

that Design 12 was a modification to an earlier Chichester design which had arched, as opposed to straight, tops to the glazing but was otherwise the same design. At the start of the trial, a photograph of the arched top cabinet was inserted by amendment, creating a further difference between the designs.

131.

Neptune submitted that it was unnecessary to rely upon earlier versions of the design, as they do not deprive later versions of originality. It relied upon the Judgment of the Court of Appeal in *L.A. Gear v Hitech Sports Plc* [1992] FSR 121, where in granting Summary Judgment in a copyright claim, Nourse LJ said at [136]:

“If, in the course of producing a finished drawing, the author produces one or more preliminary versions, the finished product does not cease to be his original work simply because he adapts it with minor variations, or even if he simply copies it, from an earlier version. Each drawing having been made by him, each is his original work. It would be an extraordinary state of affairs if the law were otherwise. Indeed, it might have far-reaching consequences on other artistic and literary works, for example on the manuscripts of books and plays.”

132.

DeVOL submits that, whatever may be the position in copyright law, where a design is produced by making changes to an existing design, the question arises whether a new design right subsists in the new design, or only in those parts of the design that have been changed; *Ultraframe v Eurocell* [2005] R.P.C. 7 at [129] - [131]; *Raft v Freestyle* [2016] EWHC 1711 (IPEC) in which changes to an existing

design which were “minor and localised” did not give rise to “a new originality” in the design as a whole.

133.

I accept DeVOL's submission on this issue. UK unregistered design right, in contrast to copyright, has a relatively short duration. Protection lasts for a maximum of 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever occurred first. If articles made to the design are put on sale within the first 5 years from the end of that calendar year, then the design right lasts for only 10 years from the end of the calendar year of first sale. During the last 5 years of the term of design right licences of right are available. It is important to prevent ‘evergreening’ of such design rights, where small changes are allowed to prolong the duration of the right beyond that fixed by the legislation. Where changes are relatively minor, no new design right will arise in the design as a whole.

134.

Applying this analysis to Design 12, the modification from arched tops to straight tops in the glazing did not give rise to any new design right in the design as a whole. It was necessary for Neptune to rely upon the earlier design with arched tops, and the date of commencement of protection was the year in which articles made in accordance with the earlier design were first put on sale.

Design 2 – the wine rack (Annex pages 7 and 8)

135.

Mr Smallbone explained in his first report at [4.2.7] that small, narrow units are particularly useful for filling in gaps which may be left over after the main cabinets have been chosen, in order to make maximum use of the space, without having to

resort to a wasted space covered by a filler panel. Traditionally the most common narrow units used for this purpose were tray racks and wine racks.

136.

Mr McLellan gave a similar explanation for the use of the wine rack in the Shaker range at [56] of his first statement. He said that it is important to have narrow cabinets in a modular range of furniture so that the furniture fits the space without the need for bespoke cabinets. A wine rack and tray slot are two of the few types of cabinets that can be made very narrow, since doors become impractical below 300mm in width. They are therefore useful in a modular range to fill gaps in runs. The 180mm width of the Shaker wine racks was determined by the size of a Champagne bottle. The same bottle width was used when Mr O’Leary and Mr McLellan designed the Classic wine racks, which were similar in appearance to the Shaker wine racks, although they were not freestanding units.

137.

During his cross-examination, Mr McLellan could not identify any freestanding wine rack with stiles to the floor which had previously been used in kitchen ranges, as distinct from integrated wine racks as used in the Classic range. There was no need for a free-standing wine rack in the Classic range, because it was largely integrated. It was put to him that he took the idea of a free-standing wine rack from the Chichester range. He did not accept this:

“Again, you looked at the Chichester range. You thought this is helpful, it helps us with making our modular range look like free-standing bespoke furniture, and so you incorporated it as a product in the Shaker range?”

The reality of designing a modular range of furniture is that there are various standard cupboards that you have (unclear), such as sinks, dishwashers and all the rest of it. When you are planning an awkward space at the end, you need to introduce a small cupboard of some sort. There are very few options with regard to small cupboards. When we were asked to do a wine rack for a Classic kitchen, it would have been along different lines. To my knowledge, there were only really two options that we can think of at the time that would allow you to design a cabinet that would fill a gap below 200 mm. Knowing that a wine rack was a potentially useful piece of furniture, it made sense.”

138.

I accept his evidence on this issue and I consider that a free-standing wine rack was an obvious and logical development from the Classic wine rack, from where it was derived.

139.

Having set out in detail my conclusions in relation to the key features of Design 5, I shall identify briefly the similarities and differences between the wine racks, and provide my overall assessment: there is an overall similarity between the Chichester and Shaker wine racks, but there is also an overall similarity between the Classic and Shaker wine racks. The height of 890mm is the same. However, I do not consider that this feature was copied, for the reasons which I have set out in relation to Design 5. The width of 190mm, which is relied on by Neptune as a key feature, is not reproduced, as the Shaker wine rack has a width of 180mm which was determined by the choice of the stile and rail widths. The depth of 560mm is the same, but I do not consider that it was copied, for the reasons set out in relation to Design 5. The shape

of the cutaways is strikingly different. The shape of the stiles is different, as explained in relation to Design 5. The ears are similar but were not copied, as explained in relation to Design 5; the shape of the front legs and adjustable rear foot combination is strikingly different and their configurations are different. The height from the floor of the bottom rail is different: 125mm compared to 115mm; and the width of the bottom rail is different. The width of each shelf is different: 15mm as compared with 18mm. The depth of the bottle holding body of the cabinet is different: 361mm compared with 336mm. The Shaker wine rack has bottle holders on the shelves, which are absent from the Chichester wine rack. In the Shaker wine rack there are supporting battens both in front of and behind the kickstand on the side walls; these are absent in the Chichester. The width of the side walls is different: 18mm as compared with 12mm.

140.

Having regard to all the relevant circumstances, including the evidence of derivation, in my judgment the Shaker wine rack does not infringe the design right asserted by Neptune in the Chichester wine rack.

Design 6 - the drawer cabinets (Annex pages 8 and 9)

141.

Mr Smallbone stated that 50cm one door base cabinets, as shown in Design 6, are extremely common in kitchen design. He referred to a number of examples of such cabinets which predated 2007 and described the cabinet shown in Design 6 as “entirely standard in the pantheon of kitchen design” and a “thoroughly mundane one door cabinet”. I accept his evidence. The Chichester cabinet is distinguished from the prior designs by the combination of fixed front legs and adjustable rear feet, a curved cutaway and saw tooth shelving.

142.

Mr McLellan explained that Design 6, in common with other drawer units, was created by modifying units in the Classic range. The drawer fronts were carried over from the Classic range and were designed to be identical. Both the Classic and the Shaker feature “in-frame” drawers.

143.

Mr McLellan was not cross-examined about Design 6 and I accept his evidence. My conclusions in relation to Design 6 are the same as in relation to Design 5, and it is unnecessary to repeat them. Dimensional similarities and differences are evident from the tables at pages 8 and 9 of the Annex. Fixed front legs and adjustable rear feet, a cutaway and saw tooth shelving are present in both cabinets but their physical manifestations are different. The shape of the stiles is different. The ears are similar, but derived by DeVOL from the Classic range. The shapes of the cutaways are strikingly different.

144.

These are very simple articles, and relatively small differences matter. In design terms, the differences identified above are significant. Having regard to all the relevant circumstances, including the evidence of derivation, in my judgment the Shaker drawer cabinet does not infringe the design right asserted by Neptune in the Chichester drawer cabinet.

The Community Registered Design Claim (Annex pages 10 and 11)

145.

The merits of this claim are straightforward to determine, and neither side devoted much time to it. There was no dispute as to the legal principles to be applied. The correct approach was summarised by Arnold J in the Magmatic case (supra) at [33] - [52]. Mr Cuddigan points out, and I agree, that although the finding of infringement in this case was reversed on appeal, this passage in the judgment was not affected. It is common ground that when assessing overall impression from the perspective of the informed user, minor importance should be given to similarities which are common to the design corpus, and major importance to similarities which are a departure from the design corpus.

146.

The Registered Design is registered in the field of kitchen furniture. The representations of the design include a photograph of a kitchen drawer unit. The first page of representations in the Registered Design, and images of the alleged infringement, are shown in the Annex. The images also show the equivalent Chichester article, but the relevant comparison is with the representations in the Registered Design. I shall compare the Shaker article and the representations shown in the Registered Design from the perspective of the informed user, who would either be a well-informed customer or a kitchen installer.

147.

The general appearance of the drawer unit shown in the Registered Design is of a standard article which creates the same overall impression as other prior art drawer units referred to in the Grounds of Invalidity. The front view shows an in-frame drawer unit with an upper drawer which is narrower than the two lower drawers. Mr Grey emphasised that there was design freedom in the arrangement of three drawer units, whereas Mr Smallbone pointed to restrictions on design freedom at sections 4 and 5.12 of his first report. In my view, whilst other choices were possible, for example in the depth and proportions of the drawers, the general appearance of the three-drawer unit in the Registered Design is conventional. Insofar as it departs from the design corpus, it is in respect of detailed aspects of shape.

148.

This, in my view, reflects the opinion of both experts. In his second report, Mr Grey identified only two features in the Registered Design which he considered to be of importance, one of which was the rear extensions. Mr Grey considered that they were not present to allow the unit to sit against a wall because there would be a space behind these protrusions to allow for services to pass. He considered that they were present to add strength to the construction. For that purpose, he explained that they need only be long enough to provide a channel to hold the rear panel. He suggested that the protrusions on the Registered Design are considerably longer than is necessary. He considered this was a noticeable and unusual feature, in particular because it was the result of an arbitrary choice that is not driven by aesthetics or function.

149.

However, as Mr Smallbone pointed out in his reply report, rendering the cabinet secure is not the only function of the rear protrusions. They also perform the function of providing a recess behind the cabinet when the cabinet needs to be situated close to the rear wall, for example in smaller or unusually-shaped kitchens. A fitter is able to scribe just these rear protrusions to the wall without needing to penetrate into the internal cavity of the cabinet. The void behind the cabinet formed between the two rear protrusions forms a useful service space which can accommodate pipes and cables. I accept Mr Smallbone's evidence on this issue. Such rear protrusions were a very common feature of fitted kitchen cabinets, and having regard to this function, were not longer than necessary. They would have not been regarded as out of the ordinary by the informed user.

150.

The other feature of importance identified by Mr Grey was not entirely clear from the description in his report, but he explained in cross-examination that he was referring to "the interesting cutaway shape". I agree with Mr Grey that this shape was unusual,

and, in my judgment this feature gives individual character to the Registered Design, and saves it from the validity attack which is the subject of DeVOL's counterclaim.

151.

However, as with other articles in the Shaker range, the shape of the cutaway in the drawer unit is different to that shown in the representations in the Registered Design. The cutaway shown in the Registered Design is an elegant curve, whereas the Shaker cutaway is made with a single straight saw cut. The alleged infringement is quite different in respect of this essential feature which distinguishes the Registered Design from the design corpus.

152.

There are other differences which are matters of detail. However, in my view the scope of the monopoly conferred by the Registered Design is narrow and matters of detail are important. The beading around the drawers which is shown in the Registered Design is absent from the plain face of the DeVOL Shaker Unit. The relative proportions of the drawers are different. In the Registered Design, the upper drawer is shallower than the two lower drawers, whereas in the DeVOL product, any difference is less noticeable. In the Registered Design, the drawers are flush to the front face, whereas in the DeVOL product the drawers sit proud with a bevelled edge. The stiles in the DeVOL product are narrower than the stiles in the Registered Design. The legs in the DeVOL product appear shorter relative to the body than in the Registered Design so it is lower to the ground.

153.

In my judgment, the Shaker drawer unit creates a different overall impression to the Registered Design and does not infringe.

Conclusion

154. None of the Shaker range units considered at this trial infringes any of the unregistered design right asserted by Neptune in its Chichester range kitchen units.

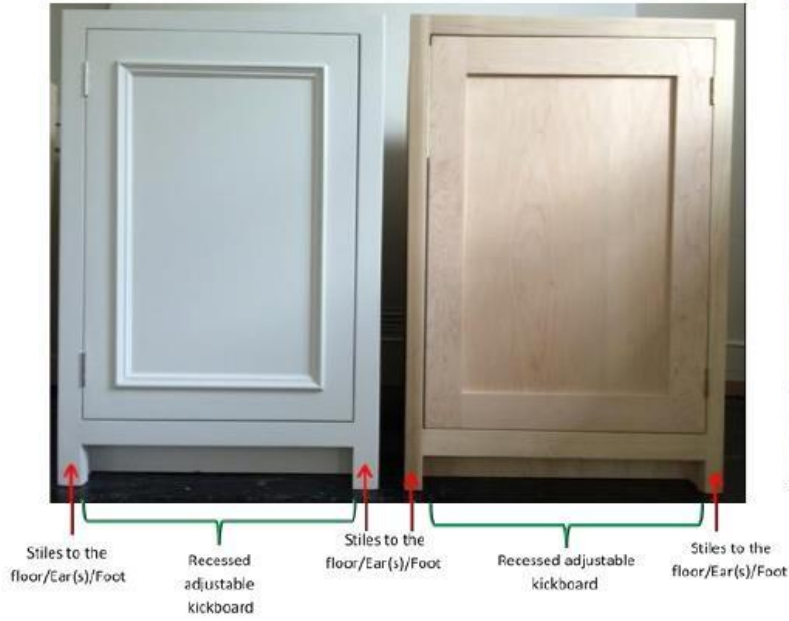
The Community Registered Design relied upon by Neptune is valid but not infringed. Therefore, I shall dismiss the Claim and Counterclaim.

The Annex

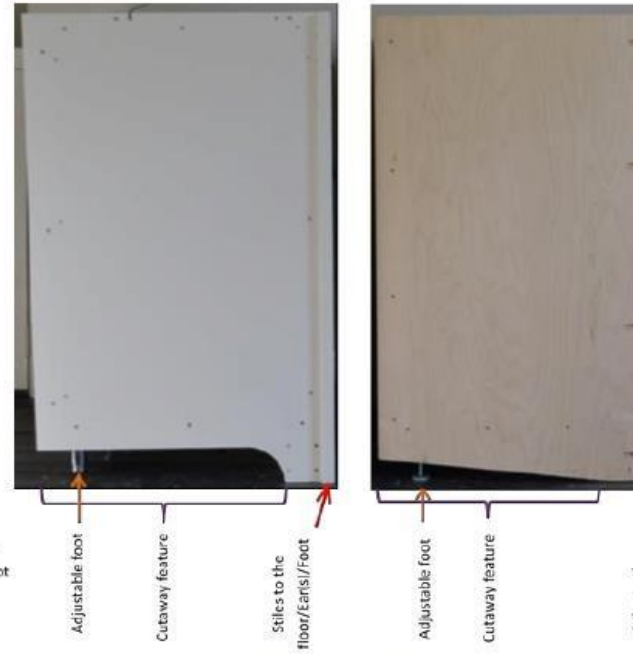
The Classic range



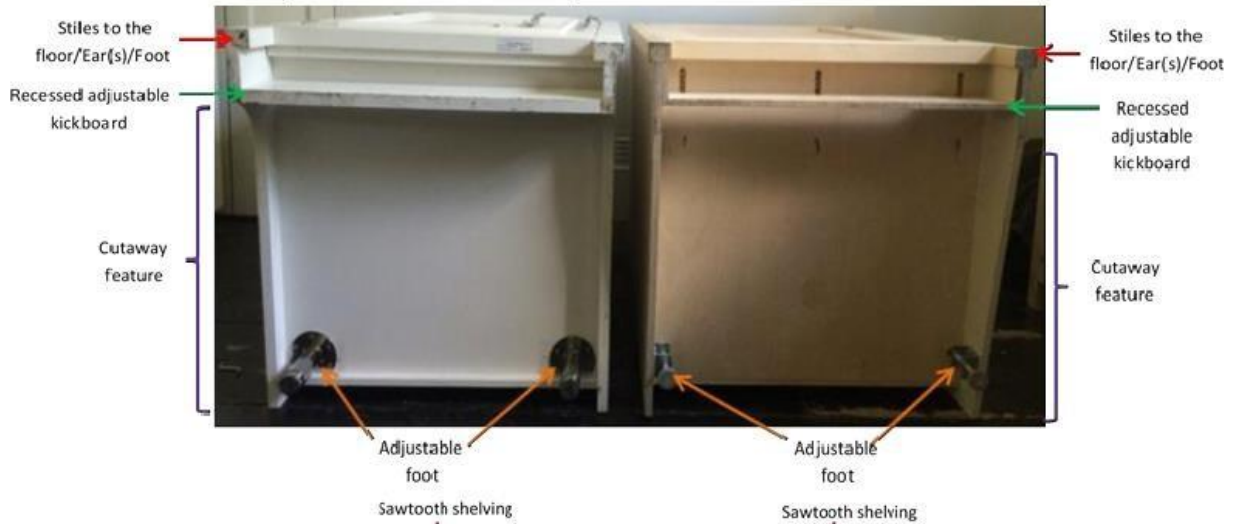
Design 5 – Front View



Design 5 – Side View



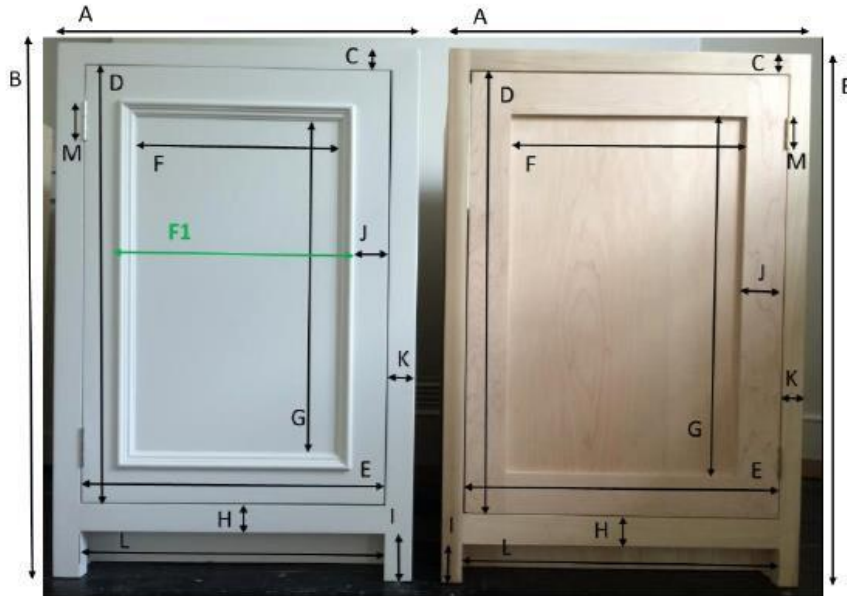
Design 5 – Bottom View



Design 5 – Interior View



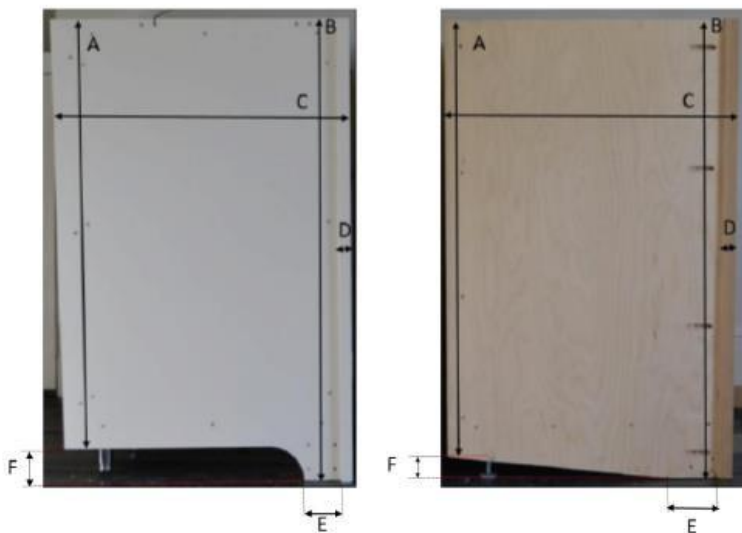
Design 5 – Front View



	Chichester	Shaker
A	600	600
B	890	890
C	36	35
D*	725	736
E*	503	525
F	334	390
F1*	390	
G	557	597
H	45	50
I	80	68
J	57	68
K	47	36
L	506	530
M	64	51

* D/E are the sizes of the door, not the cavity.
 * F1 is the width between the outer edges of the beading on the Chichester cabinet.
 All measurement are in millimetres.

Design 5 – Side View, Facing Right



	Chichester	Shaker
A	820	840
B	890	890
C	560	560
D	24	26
E	71	100
F	70	50

Design 5 – Bottom View



	Chichester	Shaker
A	560	560
B	575	580
C*	488	474

All measurement are in millimetres.

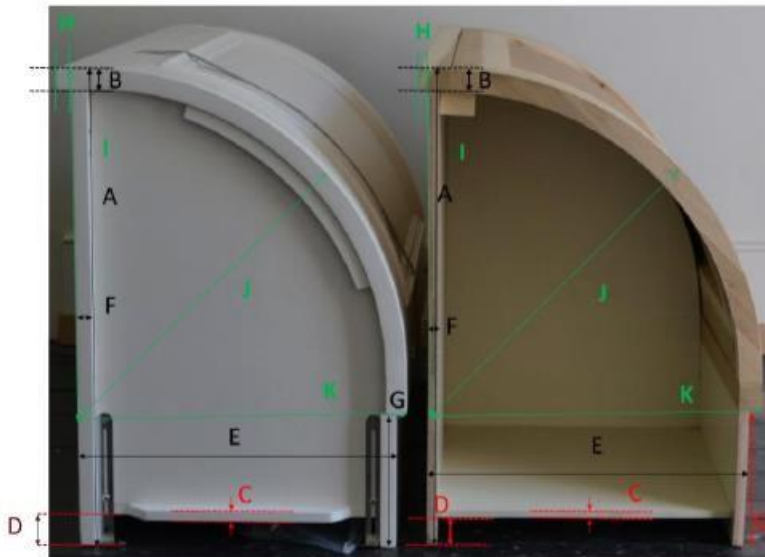
C*: Claimant's measurement of distance from the front feet to the location of the rear feet.

Design 7– Front View Left



	Chichester	Shaker
A	160	160
B	36	35
C	59	68
D	46	35
E	57	68
F	560	600
F1	609	
G	56	68
H	80	65
I	90	160

Design 7– Top View



	Chichester	Shaker
A	560	560
B	25	29
C	22	10
D	30	30
E	370	372
F	18	12
G	160	162
H*	19	10
I	397	398
J	405	406
K	381	387

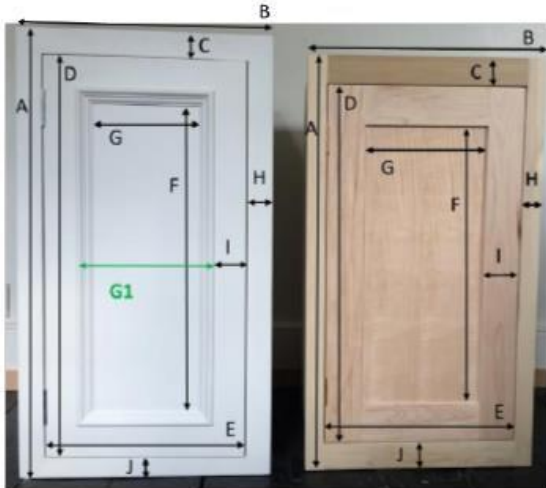
Design 7– Bottom View



	Chichester	Shaker
A	106	101

All measurements are in millimetres.

Design 9 – Front View

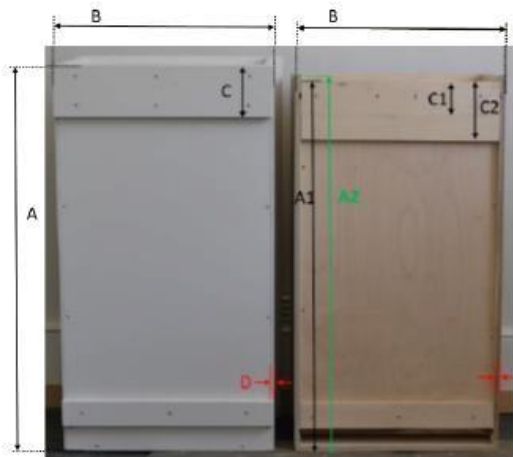


	Chichester	Shaker
A	800	765
B	450	435
C	46	50
D*	713	661
E*	354	361
F	550	520
G	192	
G1	241	227
H	47	35
I	56	68
J	36	50

* D/E are the sizes of the door, not the cavity.

All measurements are in mm.

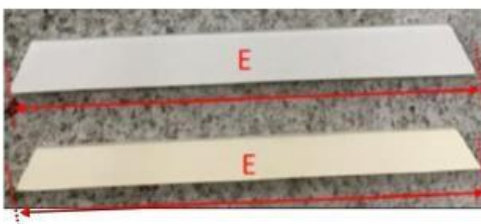
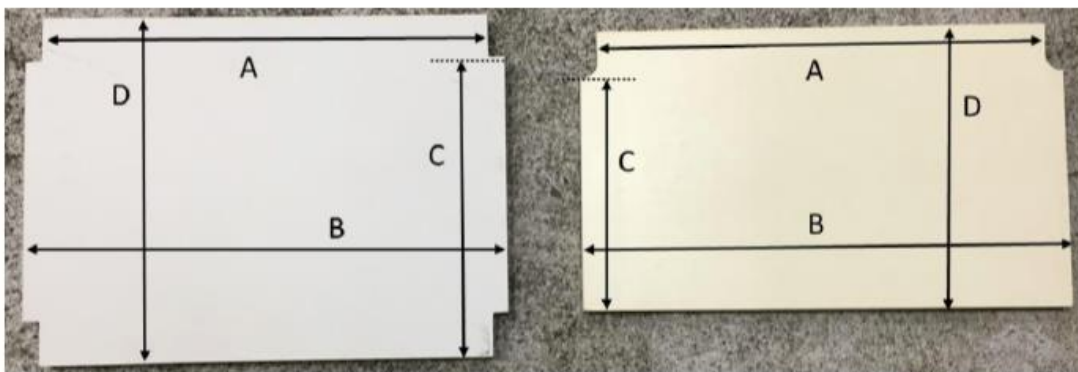
Design 9 – Back View and Close-Up



	Chichester	Shaker	
A	783	A1: 750 A2: 765	
B	427	415	
C	99	C1 66	C2 116
D	5	12	
E	50	50	

All measurements are in mm.
* Height of cabinet including rim

Design 9 – Shelves



Chichester

Shaker

	Chichester	Shaker
A	361	361
B	389	391
C	246	190
D	280	230
E	234 (Height: 26)	232 (Height: 19)

All measurements are in mm.

Design 12 – Front View



	Chichester	Shaker
A	800	765
B	855	800
C	46	50
D*	714	660
E*	354	360
F	571	525
G	211	225
H	35	50
I	60	70

*D/E are the sizes of the door, not the cavity.

All measurements are in mm.

Design 12 – Bottom View



	Chichester	Shaker
A	855	800
B	832	780
C	320	320
D	27	27

All measurements are in mm.

Design 12 – Beading



*A: Distance between face of sunken glass panel and outer edge of beading

	Chichester	Shaker
A	9	-
B	-	8

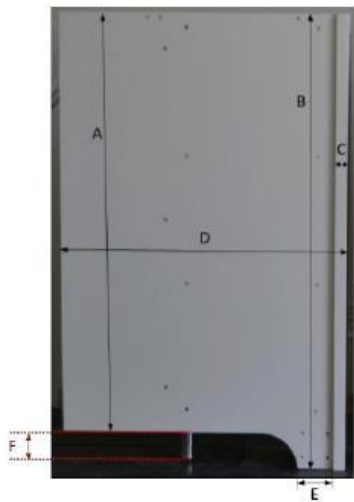
Design 2 – Front View



	Chichester	Shaker
A	890	890
B	190	180
C	107	112
D	36	35
E	18	15
F	46	35
G	46	50
H	80	65
I	98	110

All measurements are in millimetres.

Design 2 – Side View, Facing Right



	Chichester	Shaker
A	820	858
B	890	890
C	25	25
D	560	560
E	71	100
F	70	50

All measurements are in millimetres.

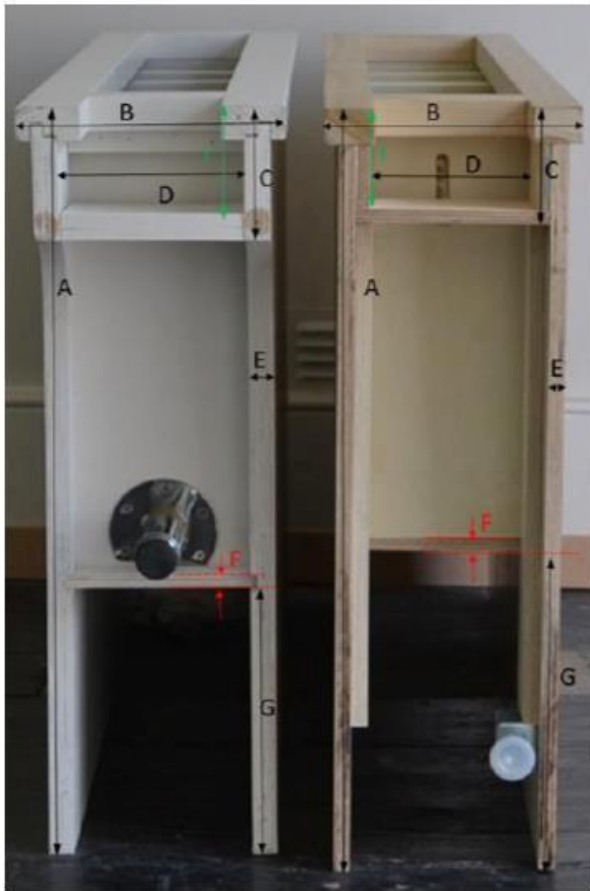
Design 2 – Rear View



	Chichester	Shaker
A	820	858
B	167	160
C	18	12
D	199	224
E	785	762

All measurements are in millimetres.

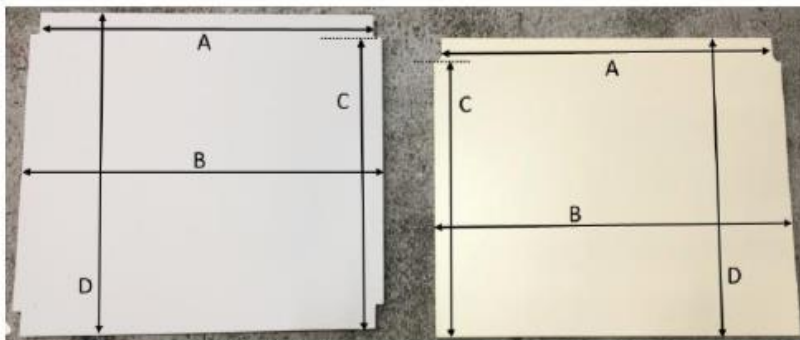
Design 2 – Bottom View



	Chichester	Shaker
A	560	560
B	190	180
C	93	84
D	130	118
E	18	12
F	11	9
G	199	224
H	210	68
I	75	75

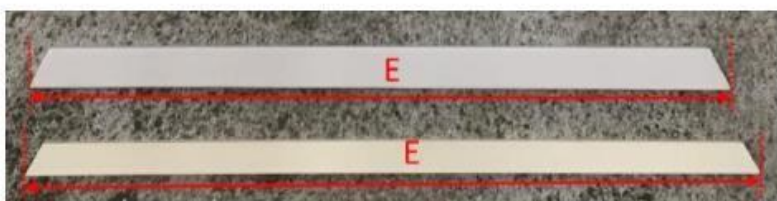
All measurements are in millimetres.

Design 6 – Shelves



	Chichester	Shaker
A	511	529
B	538	554
C	453	427
D	490	467
E	444	463

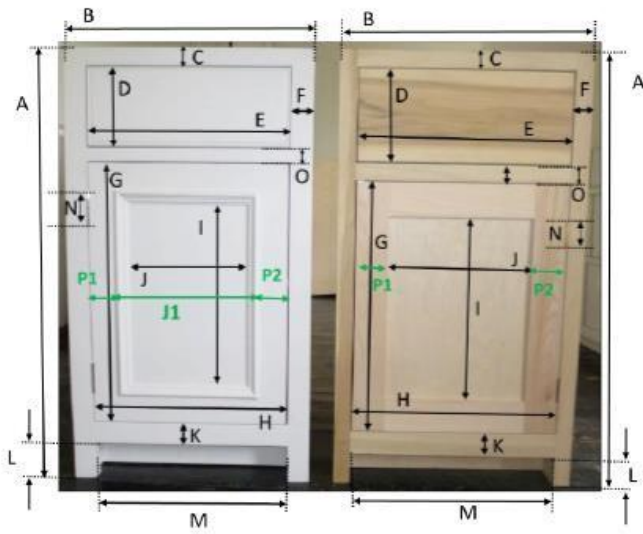
All measurements are in mm.



Chichester

Shaker

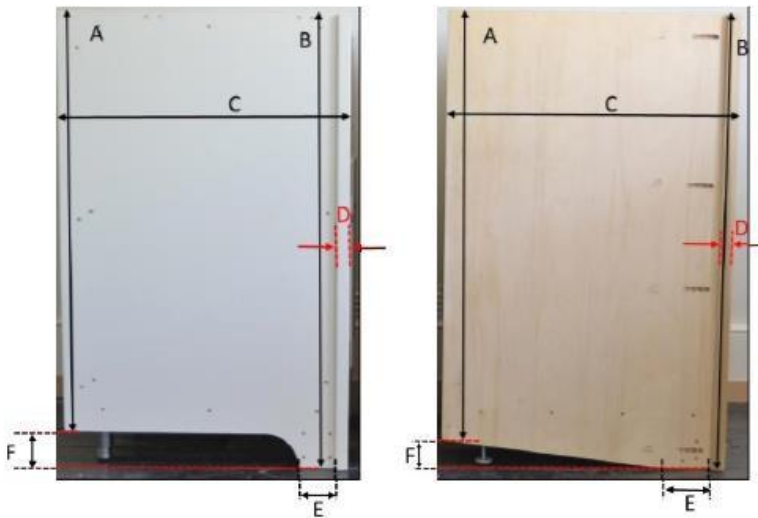
Design 6 – Front View



	Chichester	Shaker
A	890	890
B	500	500
C	89	35
D*	157	184
E*	404	426
F	45	35
G*	535	515
H*	404	426
I	372	377
J	241	
J1	292	291
K	46	50
L	79	65
M	410	430
N	64 (width 5)	52 (width 6)
O	28	35
P1*	55	67
P2*	57	70

* Sizes of the drawer/door, not the cavity.
All measurement are in millimetres.

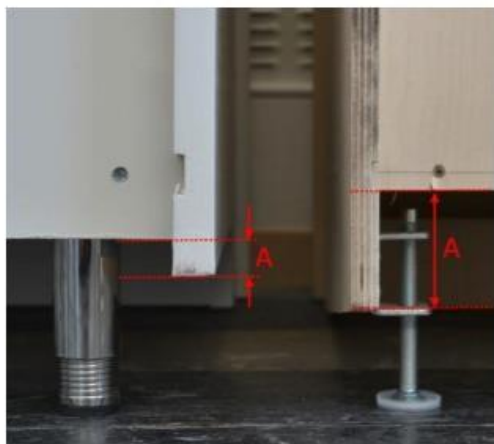
Design 6 – Side View Facing Right



	Chichester	Shaker
A	820	840
B	890	890
C	560	560
D	25	27
E	71	100
F	70	50

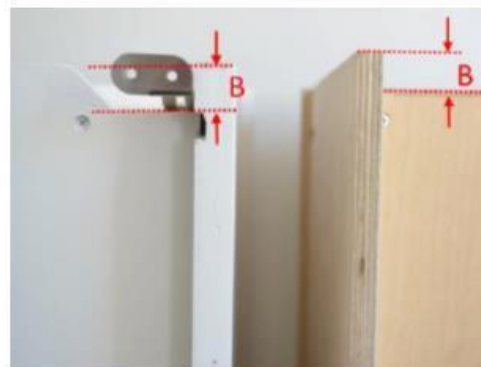
All measurement are in millimetres.

Design 6 – Rear View Close-ups



	Chichester	Shaker
A	15	56
B	22	16

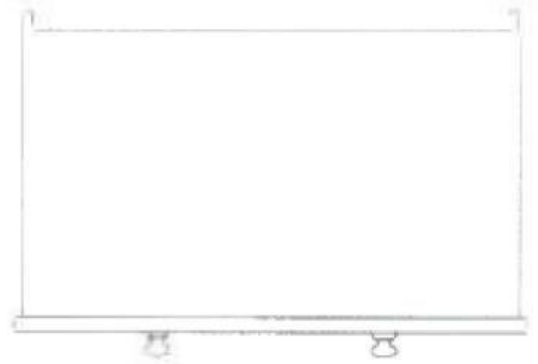
All measurement are in millimetres.



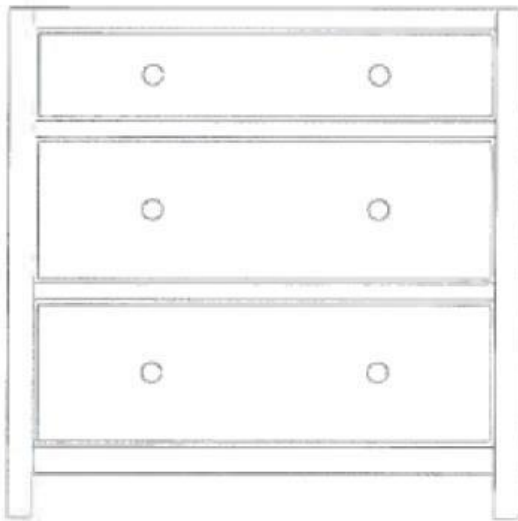
Community Registered Design no. 000793534-0018



0018.1



0018.3



0018.2



0018.4

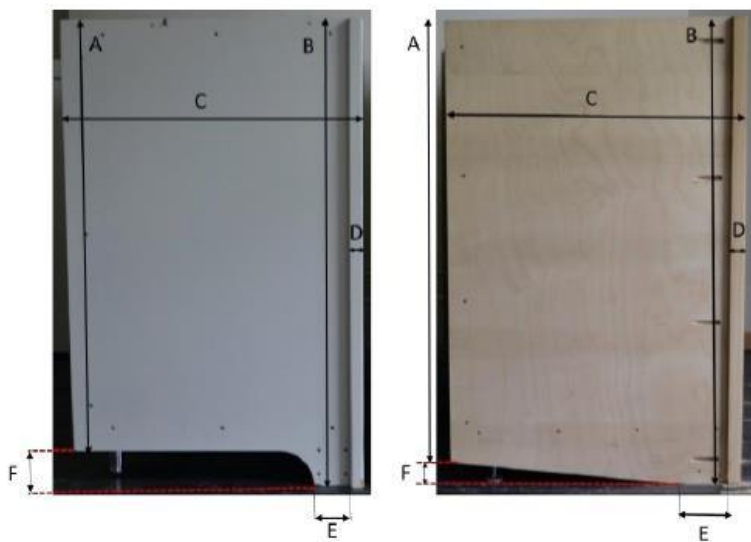
Design 3 – Front View



	Chichester	Shaker
A	890	890
B	900	900
C	35	35
D	28	35
E	28	35
F	45	50
G*	156	185
H*	803	825
I*	253	235
J*	803	830
K	46	35
L	808	830
M	81	65

*Sizes of the drawers not the cavity.
All measurement are in millimetres.

Design 3 – Side View, Facing Right



	Chichester	Shaker
A	820	840
B	890	890
C	560	560
D	25	25
E	71	100
F	70	50

All measurement are in millimetres.