Neutral Citation Number: [2020] EWHC 2092 (Ch)

Case No: HC-2015-002828

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

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

Date: Thursday, 30 July 2020
Addendum Date: Friday, 4 September 2020

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

(1) FRANK SCHRIJVER UK LIMITED
(2) GERARDUS BERNARDUS FRANCISCUS MARIA SCHRIJVER (known as FRANK SCHRIJVER)

Claimants

- and -

(1) SMART DRY INTL LIMITED
(2) SCHRIJVER VOCHTBESTRIJDING BV
(3) CORNELIS HENDRIKUS THEODORUS JOHANNES SCHRIJVER (known as IWAN SCHRIJVER)

Defendants

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The Second Claimant (Mr Frank Schrijver) appeared for the **Claimants**
Mr Chris Aikens (instructed by **Swan Turton LLP**) appeared for the **First and Third Defendants**
The Second Defendant had not been served and did not appear

Hearing dates: 6-9 July 2020

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Approved Judgment

(Revised with Addendum)

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

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HIS HONOUR JUDGE HODGE QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties or their representatives by email and release to BAILII. The date and time for hand-down is deemed to be 4.00 pm on 30 July 2020.

This revised judgment (with Addendum) was handed down remotely by circulation to the parties or their representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2.00 pm on 4 September 2020.

JUDGE HODGE QC:

1. This judgment is naturally of considerable interest and concern to the parties to this litigation but it raises no issue of law and will be of no interest to anyone not involved in this case.

2. This judgment is divided into seven sections as follows: (I) Introduction and overview (II) Background (III) Procedural history and trial (IV) Witness evidence (V) Alleged breaches (VI) Quantum (VII) Conclusion and disposal.

I: Introduction and overview

3. This is my substantive judgment on the trial of the seven remaining issues raised by the claimants following an application notice issued by them on 23 November 2018 alleging breaches by the defendants of the terms of a Confidential Settlement Agreement (the **CSA**) entered into by the parties to this litigation (and others) on 3 November 2016 following the compromise of these (and other) proceedings which were stayed on 4 November 2016 by a consent order (in Tomlin form) made on that date by Master Clark. Originally the claimants had alleged nine breaches of the CSA but the claimants' allegations of breaches of the CSA numbered (3) and (8) in their points of claim were ordered to be struck out by paragraph 3 of an order made by Deputy Master Henderson on 30 July 2019. Paragraph 1 of that Order joined the second claimant, Mr Frank Schrijver, as an additional claimant. Paragraph 6 of a further order made by Deputy Master Henderson on 8 October 2019 directed that this hearing should determine the substance of the claimants' application in respect of the remaining seven alleged breaches of the CSA. Although the second defendant company (which is incorporated in the Netherlands) was a party to the CSA, it has never been served with either the original proceedings or the present application and it has not been represented before me. No specific allegations of breach of the CSA have been directed to it, and it can effectively be ignored. The second claimant, Mr Frank Shrijver, represents himself and the first claimant company. The first and third defendants (together referred to in this judgment as '**the defendants**') are represented by Mr Chris Aikens (of counsel), instructed by Swan Turton LLP.

4. The underlying proceedings, apparently issued on 7 July 2015, originally concerned claims by the first claimant company, Frank Schrijver UK Limited (**FSUK**), for trade mark infringement and passing-off relating to the use of the name 'Schrijver' in relation to a damp control system and associated installation services. There were also other proceedings between the parties to these proceedings (and other parties) in various intellectual property offices and in the Dutch courts. The key individuals involved in this dispute are members of the same family: the second claimant, Mr Frank Schrijver (**Frank**) and the third defendant, his younger brother, Mr Iwan Schrijver (**Iwan**). Their father, Mr Henk Schrijver, had founded the original Schrijver damp control business in Holland in the 1970s.

5. It is the claimants' case that the matters which had given rise to the underlying claim had created confusion on the part of members of the public, leading them to think that Iwan's competing damp control system and business were associated with Frank's entirely separate business, thereby causing damage to the latter's established reputation in the Schrijver product and brand and to its goodwill. The CSA had been intended to put a stop to this. The claimants' case is that the defendants have failed to

comply with the terms of the CSA in several material respects, causing damage to the claimants' brand, reputation, business and goodwill leading to a loss of turnover, and consequent loss of profits, resulting in total losses (as quantified by the claimants' accountant) in excess of £7 million. It is said by the claimants that these losses have led to the need for Frank to represent the claimants himself, having previously retained Simmons & Simmons and then Allen & Overy. The claimants seek substantial compensation and damages for the loss of leads, for lost turnover, for damage to the claimants' name, their Schrijver brand, their reputation and goodwill, for trade mark infringement and passing-off, for personal stress and other losses, including the substantial legal costs incurred in the compromised litigation up to the point of the successful mediation, together with stress-related punitive damages and interest and costs.

6. In a passionate and emotional 30-minute opening, Frank portrayed himself as "*a little fly the defendants had to swat away*". He emphasised that this case was about his reputation and brand confusion. At first after the entry into the CSA, it had appeared that the defendants had been adhering to it; but, in reality, they had merely 'paused', and had not 'stopped', their activities of advertising and installing Schrijver branded products in their damp control systems within the UK. Frank was adamant that he would not perjure himself or conspire with others to do so or to pervert the course of justice; and he was well aware of the dire consequences of doing so. He acknowledged that he was "*incredibly passionate about my business. I am incredibly angry*."

7. In contrast to the vehemence of the claimants' case, the defendants say that the claimants' allegation of breaches of the CSA are all without merit and that the present application is, and always has been, vexatious. To the extent that there have been any breaches of the CSA, such breaches are said to be trifling, they were remedied within the 28-day period provided for in the CSA, and they have caused no discernible loss to either of the claimants. The defendants point out that the claimants have not been represented since the application for enforcement of the terms of the CSA was issued. The claimants' conduct in bringing this action is said to have involved: contacting the defendants' customers; posing as an interested customer and filming one of the defendants' installation engineers; setting up fake inspection appointments with the defendants; and trespassing on the property of one of the defendants' customers and removing bricks from his front wall without his permission. Throughout, the claimants are said to have shown a consistent disregard for court procedures and rules which cannot be explained away simply by the fact that they are not professionally represented. They are said to have issued a large number of applications, resulting in no fewer than seven interim hearings. Often it has been necessary to adjourn applications to a further hearing because the claimants have issued the application late, failed to file the appropriate evidence in support of their application, or because their submissions have been so long, rambling and unfocused that it has not been possible to determine the application in the time available. The defendants also complain that the claimants have tended to allege further breaches of the CSA without first seeking to amend their points of claim.

8. In his ten-minute oral opening, Mr Aikens emphasised that this was no longer a claim in trade mark infringement or for passing-off but for the enforcement of the terms of the CSA. The issue was whether the defendants had breached the terms of the CSA in

the manner alleged by the claimants. Pre-settlement matters should be ignored. If breaches of the CSA were established, the normal contractual measure of damages applied: the claimants should be put in the same position as if the CSA had been properly performed. Punitive or exemplary damages were said not to be available in a claim founded upon breaches of contract; the claimants were only entitled to damages to compensate them for the breaches of the CSA that they could establish. Pre-settlement legal costs were irrecoverable because they were prohibited by the terms of clause 20.1 of the CSA.

II: Background

9. I can take the background to this application largely from the terms of Mr Aikens's helpful written trial skeleton.

10. FSUK was incorporated on 1 November 1999 and since then it has carried on the business of providing damp control services within the UK under its present name. It is the proprietor of a number of UK registered trademarks for, or containing, the word 'SCHRIJVER'. Frank is the sole director and shareholder of FSUK. He is the son of Henk Schrijver, who invented and patented the original Schrijver damp control technology in the Netherlands in the 1970s and 1980s. The system involves the installation of ventilation 'bricks' or 'elements' into the walls of properties which promote the flow of air through the walls and thereby remove damp and moisture. Following substantial success in the Netherlands, Henk strongly encouraged his children to set up businesses installing the Schrijver system in other European countries, which led to Frank setting up FSUK and establishing its business in the UK.

11. The first defendant company was incorporated by Iwan on 5 September 2013 under its original name of Schrijver Damp Proofing UK Limited. Between its incorporation and the end of 2016, it provided damp control services in the UK, in particular by installing the Schrijver system. The first defendant changed its name to its present name of Smartdry Intl Limited on 25 November 2016 after the CSA was entered into. It no longer provides damp control services to customers in the UK. These are provided by the first defendant's affiliate company, Smartdry Ltd. It is common ground that Smartdry Ltd is bound by the terms of the CSA and that the claimants' allegations against the first defendant company also cover the acts of Smartdry Ltd. Iwan is the sole director of both companies. For convenience, these two companies are together referred to as **Smartdry**.

12. FSUK originally issued its substantive claim in these proceedings in July 2015. There were also other proceedings between the parties to these proceedings (and other parties) in various intellectual property offices and in the Dutch courts. Following a successful mediation in Amsterdam on 2 November 2016, the parties to these proceedings, and all other parties concerned, entered into the CSA. These proceedings were then stayed by the consent order dated 4 November 2016. Paragraph 2 of that order gave each party permission to apply to the court to enforce the terms of the CSA without the need to bring a new claim. By paragraph 3, each party was to bear its own costs. The CSA itself is at 2/324-343. Its key provisions for the purposes of this trial are as follows:

13. Recital (O) records that the parties have agreed to settle the disputes listed in the preceding recital and all other claims that they may have against any of the other parties on the terms and conditions set out in the CSA. Clause 3 specifically provides for a stay of these English proceedings on the terms of the consent order attached to the CSA. In clause 7.1(A) the parties agree that the UK is to be the exclusive territory of the claimants (referred to in the CSA as 'the Frank Schrijver Entities') in which to provide damp control and related goods and services under the 'SCHRIJVER Marks' and the 'S-Logo'. By clause 7.3, the defendants (referred to in the CSA as 'the Iwan Schrijver Entities') acknowledge that they are responsible for the damp control systems that they have installed in the UK in the past.

14. Clause 8.3 contains the core obligations upon the defendants and the Henk Schrijver Entities. The two which are alleged by the claimants to have been breached are 8.3(A) and (G) as follows:

> "8.3 The Henk Schrijver Entities and the Iwan Schrijver Entities, jointly and severally, undertake that they shall not:
>
> (A) use or apply to register any S-Logo or any SCHRIJVER Mark in the United Kingdom, in relation to any goods or services;
>
> …
>
> (G) maintain any website that uses the word SCHRIJVER (on the site or in the domain name) that is directed at consumers in the United Kingdom. A website will be directed at consumers in the United Kingdom including if it:
>
> (1) is in Welsh;
>
> (2) quotes prices in Pounds;
>
> (3) offers products shipped to or services delivered to any person in the United Kingdom;
>
> (4) includes a United Kingdom phone number; or
>
> (5) links to a website which is directed to consumers in the United Kingdom."

15. Clause 8.4 contains some exceptions (or carve-outs) from the obligations in clause 8.3. It provides as follows:

> "8.4 Notwithstanding the provisions of Clause 8.3, the Parties agree that:
>
> (A) Iwan Schrijver and [the first defendant] shall be permitted until 31 December 2016 to rebrand their damp control business in the United Kingdom, such that there is no use of any SCHRIJVER Mark or any S-Logo by Iwan Schrijver or [the first defendant] (or their Affiliates) in the United Kingdom, or in materials directed towards consumers in the United Kingdom, including on the Internet;

(B) [The first defendant] shall be permitted to make references to the word SCHRIJVER in its advertising materials used in the United Kingdom or directed towards consumers in the United Kingdom (including, for the avoidance of doubt, on the Internet, so long as those uses don't substantially influence search results), namely:

(1) 2 references to Henk Schrijver as the inventor of the damp control technology sold by [the first defendant]; and

(2) 3 references to Iwan Schrijver, as general manager (or similar) of [the first defendant].

For the avoidance of doubt, the rebranding exercise referred to in Clause 8.4(A) shall include at least the tasks set out in Schedule 2 to this Confidential Settlement Agreement."

16. The tasks in Schedule 2 that are relevant to the pleaded allegations of breach are as follows:

"(1) changing the name of SDPUK such that does not include the word SCHRIJVER;

(2) destroying all hard copy materials in their possession, power or control (other than customer records), including office and advertising/promotional materials, that include either the word SCHRIJVER or the S-Logo, including, all letterhead, business cards, pro-forma documents, flyers, posters, catalogues etc;

(3) ceasing to use the SCHRIJVER Marks and/or the S-Logo in digital (including Internet), newspaper, magazine, television and/or radio advertising;

(4) removing and destroying any livery from vehicles or other plant, tools or equipment in their possession, power or control which includes the word SCHRIJVER or the S-Logo;

…

(7) removing all references to SCHRIJVER, including all references to SCHRIJVER SYSTEEM and SCHRIJVER SYSTEM from all advertising and promotional materials used on the Internet, save as otherwise permitted by Clause 8.4 of the Confidential Settlement Agreement;

(8) permanently ensuring that the websites at www.schrijversystem.com, www.schrijversystem.com and www.schrijverdampproofing.com (and any other international or generic top level domain names that Include the word SCHRIJVER on its own or together with any descriptive word in English) as well as any English language websites are set up so that Internet users accessing either of those websites are first presented with a landing page which is split equally in two, with one half asking 'Are you In the UK or the Republic of Ireland?' and providing a click button which then automatically and quickly redirects the user to a domain name to be notified by Frank Schrijver from time to time. The Iwan Schrijver Entities shall not attempt to contact customers so redirected;

…

(12) ceasing to bid on any of the SCHRIJVER Marks as keywords;

…

(14) ceasing to use SCHRIJVER and the S-Logo in customer testimonials …"

17. Clause 11 (headed 'Confidentiality') provides that:

> "11.1 No Party may issue a press release or otherwise affirmatively attempt to publicise the terms or existence of this Confidential Settlement Agreement. If any third party should ask a Party about this Confidential Settlement Agreement or the disputes referred to herein, it will state that: (a) the relevant dispute existed; and (b) it was resolved amicably as a full and final settlement.
>
> 11.2 Subject to the remainder of this Clause, the Parties agree not to disclose the terms and conditions of this Confidential Settlement Agreement except: (a) in confidence as may be required by law; (b) during the course of litigation so long as the disclosure of such terms and conditions are restricted in the same manner as is the confidential information of the litigating Party; (c) in confidence to the professional legal and financial counsel representing the Party; (d) in confidence to any person or entity covered by the releases, licences, or covenants granted herein; (e) in confidence to the Party's insurers or third-party claims administrators; or (f) as agreed in writing by the Parties.
>
> 11.3 A relevant Party shall notify the other Parties immediately upon discovery of any unauthorised access or disclosure of the terms and conditions of this Agreement and cooperate with the others as reasonably requested by the other Parties to help regain possession or obtain suppression of the terms and conditions of this Confidential Settlement Agreement.
>
> 11.4 In any event, a Party shall only be entitled to disclose any of the terms and conditions of this Agreement in accordance with Clause 11.2(a) (including but not limited to the publication in publicly filed accounts of any and all sums related to this Agreement) where the disclosure is in accordance with this Confidential Settlement Agreement and that the disclosure is of the minimum portion of the terms and conditions of this Agreement as is strictly necessary to meet the relevant legal standard."

18. Clause 12.3 provides that:

> "12.3 If a Party becomes aware of a breach of any of the terms of this Agreement, it shall notify the other Parties under Clause 22 and give a period of 28 days in which to remedy the breach but shall retain its

right to seek any remedy to which it is entitled in respect of that breach."

19. Other provisions of the CSA that it is necessary to mention are as follows:

    (1) Clause 14 confirmed that nothing in the CSA should be construed as constituting an admission of any liability or wrongdoing whatsoever by any party (or any of its group companies or affiliates).

    (2) By clause 17, the CSA is governed by English law and the courts of England and Wales have non-exclusive jurisdiction over any dispute arising out of or relating to or associated with the CSA.

    (3) By clause 20.1, except as otherwise provided in the CSA, the parties agreed to bear their own fees, costs and expenses relating to the CSA including the negotiation, execution and carrying into effect of the CSA and to the proceedings referred to therein.

20. It should be noted that nothing in the CSA prohibits the defendants from using any existing bricks in the installation of damp control systems within the UK provided they do not bear the words Schrijver, Shrijver System, or Shrijver Systeem or the S-Logo.

21. It is the defendants' evidence and case that their move to the Smartdry brand and away from 'Schrijver' had already started by the time the CSA was entered into. Smartdry Ltd had been incorporated in October 2015 and was already carrying out its damp control business in the UK under the Smartdry name when the defence and counterclaim were served in November of that year. Further, as Iwan explains in paragraph 23 of his second witness statement, from mid-2016, the defendants no longer produced old Schrijver System bricks with the words 'Schrijver System' embossed on them. The mouth of the divider was then also changed and it became possible to remove the divider from the brick (which is inserted at the point of manufacture). Subsequent to entering into the CSA, the defendants also modified the mould for the divider (or back plate) so that the letter engraving (which included the word 'Schrijver') was removed. At paragraph 26 of his trial skeleton, Mr Aikens refers to the documentation which is said to support this case. At paragraphs 6 to 10 of his second witness statement Iwan describes the specific steps that the defendants took after the CSA was entered into in order to comply with the rebranding obligations; and the most important of these are summarised at paragraph 27 of Mr Aikens's trial skeleton. At paragraph 7 of his second witness statement, Iwan explains that all Schrijver brochures and old Smartdry brochures were destroyed and removed from circulation. All old bricks and dividers were taken out of circulation and destroyed, together with all boxes bearing the Schrijver name. All old elements bearing the Schrijver name were exported to Holland or subjected to a process whereby all writing on the brick, including the Schrijver name, was ground off by Iwan and the installers using, first, a plane and then an electric grinder. To the best of Iwan's knowledge and belief none of the defendants' stock of Schrijver branded bricks escaped their "*purge of Schrijver branded products*". From the beginning of 2017, Smartdry have conducted their damp control business under the name 'SmartDry' and they have ceased using the name 'Schrijver'. As Iwan explains, from that time, and in light of the rebrand, the defendants have had no reason whatsoever to

continue to use any Schrijver branded products in the Smartdry business; on the contrary, they have had every reason not to do so. It is the claimants' case that the defendants did not rebrand their business fully and completely and that they have continued to trade on the claimants' name, reputation and brand goodwill.

22. The parties carried on with their respective separate businesses, apparently with no complaints, until Thursday 7 June 2018 when FSUK first wrote to the Dutch lawyer representing Henk Schrijver and his companies stating that it had been identified that Smartdry were bidding on their brand 'Frank Schrijver UK Ltd' via Google Adwords, in clear breach of the CSA, and requesting them to cease doing so immediately to prevent the need for legal action. Smartdry immediately responded in writing on Monday 11 June 2018 stating: "*We would like to extend our gratitude for your notice of the issue regarding Smartdry bidding on the brand 'Frank Schrijver UK Ltd' via Google Adwords. Please be assured that this issue has been resolved immediately upon receiving notice in our offices. As our aim is always to be unequivocally compliant with the agreed terms of the Settlement Agreement in place, this notice has come as a surprise to us. It is apparent that our current online marketing company has made a mistake, as they have knowledge of the Agreement terms, and as such, should not have bid on a 'Frank Schrijver UK Ltd' campaign. We are unsure what has occurred and are currently investigating what has led to this phenomena; regardless, the issue has already been rectified.*" A second letter followed on 15 June 2018 setting out further details of what had happened.

23. On 13 September 2018, Mr Oliver Pope, Smartdry's surveyor, carried out a damp assessment of the home of Mrs Linda Jones-Bottoms at 1 Church Walk, Bletchingley, Redhill. Mrs Jones-Bottoms was accompanied by Frank's personal partner, Mr Paul Chisholm, who was masquerading as her son, David (which is Paul's middle name). The claimants allege that during this visit Mr Pope produced a terracotta-coloured damp control brick bearing the name 'Schrijver' and handed over a brochure which breached the terms of the CSA.

24. On 27 September 2018, two of Smartdry's engineers were carrying out an installation at the property of a customer called Mr Steven Martin in Spalding, Lincolnshire. During the installation, Mr Chisholm (who had travelled to the property in the car with Frank) twice spoke to one of the engineers, called Matt. On the first occasion Mr Chisholm was handed a Smartdry brochure which he took back to the car and showed to Frank. Mr Chisholm then returned to the property with a Smartdry brochure and Matt wrote his name on the front cover. Having claimed to have spoken to his mother, who was said to have damp problems at her property and to be interested in the Smartdry system, Mr Chisholm asked for a sample brick and was handed an "*old*" black sample brick by Matt which Mr Chisholm also took back to Frank who was sitting in the car. Mr Chisholm covertly took two videos of his contact with the installation engineers, which were relied on by the claimants as late evidence in the case. Later that day, after the engineers had left, Frank himself went to Mr Martin's property and removed two white bricks that had been installed in the outside wall of the front of Mr Martin's house and he took them away with him. Frank had not been given permission to do so by anyone. All three of these bricks (one black and two white) are said to be the bricks that were presented at court at a hearing before Deputy Master Henderson on 30 July 2019, and they were photographed on that day.

25. On 3 October 2018, FSUK's then solicitors, Allen & Overy, wrote to Iwan (in Spain) and to Smartdry setting out particulars of a number of alleged breaches of the CSA and requiring remedial action, failing which their client would be applying to the court to enforce the Tomlin order. In relation to Mr Martin, the letter sought payment of the sum of £1,400 into FSUK's account, representing "*the sum our client is entitled to in respect of the profit it would have obtained by installing its damp control system in Mr Martin's property*". The letter is at 2/575-9 and it enclosed (amongst other documents) a copy Smartdry brochure bearing Matt's name on the cover and said to be the brochure that had been handed to Mr Chisholm outside the property on 27 September 2018 (at 2/586-599) and photographs of the terracotta-coloured "*bricks*" (in the plural) said to have been produced at Mrs Jones-Bottoms's property on 13 September 2018 (at 2/601-607) and of one of the white bricks said to have been taken from Mr Martin's property on 27 September 2018 (at 2/610). The defendants' solicitors, Swan Turton LLP, wrote a detailed response to Allen & Overy's letter on 30 October 2018 (at 2/610-614). This provoked a reply from Frank on 13 November 2018 (at 2/615) stating: "*It would seem that you are in total denial that you took my brand after we reached settlement in November 2016 and continued using it. Due to your non-compliance of the Confidential Settlement Agreement dated 03 November 2016, I will now be writing to the Court to enforce the Tomlin Order.*"

26. FSUK issued its application alleging breaches of the CSA on 23 November 2018. According to the defendants, it was not formally served on them until 6 March 2019 (despite FSUK having been directed by the court to do so by email dated 23 November 2018 and also despite the defendants' solicitors having directly asked the claimants to serve the documents). A first case management hearing was held before Deputy Master Lloyd on 20 March 2019, before which FSUK had served nine witness statements purporting to support its allegations. At the hearing, the Deputy Master gave directions for the service of statements of case, including properly particularised points of claim.

27. The points of claim were served on 26 April 2019 and are at 1/6-22. In summary, the breaches alleged are as follows (using the same numbering as in the points of claim even though the alleged breaches numbered three and eight have both been struck out):

(1) Bidding on 'Schrijver' via Google Adwords in the UK, allegedly in breach of clause 8.4(A) and Schedule 2 para (12) of and to the CSA.

(2) Failure to maintain the website at www.schrijversystem.com, allegedly in breach of clause 8.3(G) and Schedule 2 para (8) of and to the CSA.

(3) [Struck out].

(4) Impermissible references to 'Schrijver' in the Smartdry marketing brochure, allegedly in breach of clauses 7.1(A), 8.3(A) and 8.4(B) of the CSA.

(5) Use of 'Schrijver' on bricks said to have been shown to Smartdry's customers, allegedly in breach of clauses 7.1(A), 8.3(A) and 8.4(A) and Schedule 2 para (4) of and to the CSA.

(6) Use of 'Schrijver' on bricks said to have been installed in the walls of Smartdry's customer's property, also allegedly in breach of clauses 7.1(A), 8.3(A) and 8.4(A) and Schedule 2 para (4) of and to the CSA.

(7) Failure to take responsibility for the defective installation of a damp control system at the property of Mrs Ann McKenna, allegedly in breach of clause 7.3 of the CSA.

(8) [Struck out].

(9) Failure to change or remove reviews of Smartdry on the Which? Trusted Traders website, allegedly in breach of clauses 7.1(A) and 8.4(A) and Schedule 2 para (14) of and to the CSA.

28. The relief sought is set out in a table at the end of the points of claim. The claimants seek the following sums:

(1) £3 million against the defendants in respect of '*Compensation for loss of leads, lost turnover, damage to MY NAME, MY SCHRIJVER BRAND, MY REPUTATION as a result of the named breaches by the defending parties.*'

(2) £500,000 against the defendants in respect of '*Punitive damages. Stress related.*'

(3) The same two amounts in respect of the same heads of loss as against the Henk Schrijver Entities (as they are defined in the CSA) which the claimants applied (unsuccessfully) to join as additional defendants to the claim.

(4) £575,000 being "*the Claimants' Legal Fees up to the point of mediation*" (even though the parties had agreed to bear their own costs for that period by clause 20.1 of the CSA).

29. During the course of the trial, the claimants sought to advance an additional complaint that the defendants were obliged by the CSA to destroy completely any bricks bearing the 'Schrijver' brand name. In his oral closing, Mr Aikens submitted that not only was this not a pleaded allegation of breach, but there was in fact no such obligation on the defendants. The obligation was to stop using the Schrijver name and brand (clause 8.3(A)) and to remove and destroy any livery from equipment which included the word 'Schrijver' (Schedule 2 para (4)). This did not extend to destroying any and all bricks bearing the 'Schrijver' name and brand provided these were obliterated. I accept this submission. As noted at paragraph 20 above, nothing in the CSA prohibits the defendants from using any pre-CSA bricks in the installation of damp control systems within the UK provided they do not bear the words 'Schrijver', 'Shrijver System', or 'Shrijver Systeem' or the 'S-Logo'.

30. At times, Frank also criticised the defendants for not having supplied Smartdry's employees and contractors (including their marketing company) with copies of the relevant terms of the CSA. Again, I consider this criticism to be misconceived. Given the highly restrictive terms of the confidentiality provisions contained in clause 11 of the CSA (recited at paragraph 17 above), had they done this, the defendants would have run the risk of a complaint from the claimants that they had breached these provisions. In cross-examination Iwan said that it was very clearly stated in the

CSA that it was a confidential agreement so he was very careful about what he said about its terms. He was afraid that Frank would say that he was in breach of the confidentiality provisions of the CSA. Even though Ms Zarco was his partner, he did not show her the CSA; but he told her all the information she needed to know. The same applied to all the defendants' employees and contractors, including Boutique. In my judgment, it was sufficient for the defendants to alert their employees and contractors to the material terms of the CSA without disclosing written copies of those terms to them. On the evidence, I am satisfied that this was fully, and appropriately, done.

III: Procedural history and trial

31. The procedural history of the underlying claim and of the application to enforce the terms of the CSA is summarised at paragraphs 13 to 18 of the claimants' written skeleton argument for trial and at paragraph 38 of the defendants' written trial skeleton. There have been no fewer than seven procedural hearings before Deputy Masters: on 20 March 2019 before Deputy Master Lloyd, on 30 July, 16 September, and 8 October 2019 before Deputy Master Henderson, and on 2 March, 28 April and 12 May 2020 before Deputy Master Nurse. In addition, written judgments have been handed down by Deputy Master Henderson on 29 November 2019 and 5 February 2020, and by Deputy Master Nurse on 12 May 2020.

32. At a remote pre-trial review hearing held in public via Skype for Business on 2 July 2020 I heard and determined one application by the defendants, and two applications by the claimants, to rely on additional evidence; and I approved a revised agreed trial timetable. Amongst the additional evidence for which I gave permission was a third statement from the claimants' accountant, Mr Dhirajlal F Shah, dated 26 June 2020, with the proviso the defendants should be permitted to submit at the end of the trial that any reduction in the claimants' turnover had nothing whatsoever to do with any of the alleged breaches of the CSA notwithstanding that: (1) that submission might be inconsistent with the evidence of Mr D F Shah, and (2) Mr Shah would not have been cross-examined at trial. For the reasons set out in my extemporary judgment, I refused the claimants' request to call Mr Shah to give evidence at trial in the light of the defendants' confirmation that they did not wish to cross-examine him. In summary, given that he had only recently provided a third witness statement (to add to and, in minor respects, amend figures supplied in his previous statements of 7 March and 25 July 2019) there was no reason to allow him to supplement his evidence in chief and so there would be no purpose to be served in calling Mr Shah as a witness since he was not going to be cross-examined.

33. The trial was held in public and took place remotely by Skype for Business. It commenced at 2.00 pm on Monday 6 July and concluded at about 12.30 on Thursday 9 July, when I reserved judgment. After the first day, the court sat at 10.00 am; and although there were a number of short five to ten minute breaks during each court session, the luncheon adjournments on Days 2 and 3 were shortened to about 30 to 35 minutes. There were four trial electronic bundles: Bundle 1 (248 pages) comprising pleadings, application notices, orders, judgments and witness statements; Bundle 2 (788 pages) comprising attachments to pleadings and witness statements; Bundle 3 (87 pages) comprising clear copies and applications and evidence for the pre-trial

review hearing on 2 July; and Bundle 4 (136 pages) comprising inter-partes correspondence.

34. On the afternoon of Monday 6 July I heard Frank's oral opening for about 30 minutes and a brief oral response from Mr Aikens lasting for about 10 minutes. After a short break, Frank was sworn and he was then cross-examined (from his home) for about an hour and a half. His cross-examination resumed at about 10.00 am the next morning and his evidence continued for a further hour. After a short ten minutes break, I then heard (for just under half an hour) from Ms Lisa Kinghorn, FSUK's General Manager; from Mr Paul David Chisholm, Frank's personal partner (for just over an hour); and from Mrs Ann McKenna, an independent witness (for about half an hour). Ms Kinghorn and Mr Chisholm both gave evidence from Frank's home, whilst Mrs McKenna gave evidence from her daughter's home. After a 35 minute break, I heard from the claimants' final live witness, Mrs Linda Jones-Bottoms, a long-standing friend of Frank, and, later, Mr Chisholm (for about 30 minutes). She also gave evidence from Frank's home. In total, Frank and his witnesses gave evidence over a little less than a day, from about 3.00 pm on Day 1 to about 2.30 pm on Day 2.

35. In addition to these live witnesses, I received written statements from Mr Paul Chambers and Mr Lukasz Hylinski, both employees of FSUK, who had attended the property of Mrs McKenna's daughter at 46 Upper Richmond Road West, London SW14 on 31 January (Mr Chambers) and 1 February 2019 (Mr Chambers and Mr Hylinski) following Mrs McKenna's complaints about the failure of the damp control system which she had caused to be installed at that property by the first defendant company in March 2016. The defendants saw no need to cross-examine either Mr Chambers or Mr Hylinski because their evidence merely established that bricks bearing 'Schrijver' markings had been installed in the walls of Ms McKenna's daughter's property in March 2016, some seven months before the conclusion of the CSA (and so not in breach of any of its terms).

36. Also in evidence for the claimants are the three witness statements from Mr D F Shah, a letter dated 12 March 2019 from Mrs Jean Mann, and a letter dated 9 June 2020, addressed '*To Whom it May Concern*', from Mrs Izabella Paluch. Mr Shah asserts his belief that FSUK's turnover: "*... has declined substantially due to a third party using the Schrijver brand. As a result the company has suffered significant losses.*" Mr Shah produces turnover figures for FSUK for each of the years ended 31 March 2013 through to 2019 and his calculations of loss of turnover and loss of profit and their effect on the value of FSUK. The defendants elected not to cross-examine Mr Shah on the footing that they say that "*... there is no support or basis for this alleged link between the reduction in FSUK's turnover and the cause given*". Mrs Paluch was formerly the General Manager of FSUK but she left it in January 2017 to take up the same role with Carebrick Damp Control UK Limited (**Care Brick**), another company owned and controlled by Frank. She confirms that she: "*... was very aware this was a separate business entity to Frank Schrijver UK Ltd. I confirm I received specific instructions that the two brands (the Carebrick System and the Schrijver System) and the two companies (Carebrick UK Ltd. and Frank Schrijver UK Ltd.) were to be totally separated. 1 can confirm that both companies sell different products which carry different patent numbers and are marketed separately. Both companies employ their own staff.*" Mrs Jean Mann has been Frank's therapist for the last seven years. She states that: "*Lately I have seen a marked increase in Frank Schrijver's anxiety*

about his self-worth and value in life. In my opinion this is a result of the sustained and relentless attack on Frank Schrijver UK Ltd by his own father. As a result, Mr Schrijver's increasing fears and depression have begun to cloud his perspective and has compromised his ability to function effectively in his business life. He has always respected his family and I believe that his growing and increased stress is a direct result of the long term and damaging attacks and persistent undermining by his father." I have noted, and had regard to, all of this additional material.

37. I have also viewed (on a number of occasions both before, during and after the trial) two video recordings made by Mr Chisholm of his two attendances at the property of Mr Steven Martin at Spalding in Lincolnshire when employees of Smartdry were installing a damp control system on Thursday 27 September 2018. The first video lasts 3 minutes 11 seconds and the second 5 minutes 40 seconds. There are transcripts of the video commissioned by the claimants (from Bubbles Translation Services at 3/39-43) and the defendants (from Auscript at 3/81-86). The latter is fuller and includes a monologue by Mr Chisholm, after he had left the property for the second time - which he did not seem to challenge in evidence and which I am satisfied is accurate – in which he states: "*Can have an old one. (Inaudible) It doesn't say Schrijver System on it. I can't go round (inaudible) that doesn't say Schrijver System on it. Grrr. Can't see anything written on that at all. (Inaudible)*" The claimants also place reliance upon an Auscript transcript of a telephone conversation between Ms Kinghorn and Mr Martin the following day (at 2/745-752) and the following exchange in particular:

> "Ms Kinghorn: *... Okay, so Mr Martin, there's a slight issue here that we'd like to bring your attention, and it has been discovered that the company who (inaudible) contract with and installation agreement with, that they in fact installed our systems, Schrijver systems as opposed to the Smart Dry systems. Are you aware of that?*
>
> Mr Martin: *No, not at all. I mean, I was told by the representative obviously that it was a company that was formed, and two brothers and one of them split and Smart Dry was, you know, was the parent company of Schrijver, so it's a bit like the Aldi and Lidl scenario.*"

The 'representative' of Smartdry referred to by Mr Martin is said to have been Mr Oliver Pope.

38. Trial bundle 2 contain a number of photographs of the bricks used in the installation of damp control systems. Those at 2/68-73 are said by the claimants to be photographs of a terracotta-coloured brick handed to Mrs Jones-Bottoms and Mr Chisholm by Mr Pope when carrying out an inspection of the former's property at 1 Church Walk on 13 September 2018. Those at 2/771-788 were taken at court on 30 July 2019 and are said by the claimants to show the black brick handed to Mr Chisholm by Matt, Smartdry's installation engineer, at Mr Martin's property on 27 September 2018, and the two white bricks taken by Frank from the wall of Mr Martin's property later that day whilst the cement was still wet. The provenance of all these bricks is disputed by the defendants, who refer to the contrasting photograph of their remodelled brick at 3/28. Trial bundle 2 also contains photocopies of a number of brochures. That relied upon by the claimants as infringing the terms of the CSA is at 2/45-60. The claimants assert (and the defendants deny) that this was the form of

brochure handed to Mrs Jones-Bottoms and Mr Chisholm at the former's property by Mr Pope on 13 September 2018 (as evidenced by the brochure cover, with Mr Pope's business card stapled to it, at 2/67); and it was also the form of the brochure handed to Mr Chisholm by Matt at Mr Martin's property (as evidenced by the brochure cover on which Matt had written his first name at 2/111). The defendants' case is that, as a result of the CSA, this brochure had been superseded by a new form of brochure in January 2017 (which can be found at 2/620) which complies with the terms of the CSA and that the previous brochures had all been destroyed.

39. After the conclusion of Mrs Jones-Bottoms's evidence, I heard from Iwan who gave evidence, alone, from his home in Barcelona, Spain. Having made a few minor corrections to his second and fourth witness statements, Iwan was cross-examined by his brother, Frank, for about 2 ¼ hours (over twice the time allotted for the purpose in the approved trial timetable), from about 2.45 to about 4.00 pm on Day 2 and from about 10.00 to 11.00 am on Day 3. (I should record that at the hearing on 2 July 2020 Mr Aikens had withdrawn the allegations in the second, third and fourth sentences of paragraph 42 of Iwan's second, and principal, witness statement dated 30 January 2020, resulting in my refusal of the claimants' application to admit in evidence a letter in rebuttal from Mr Michael Rapoport.) I next heard the evidence of Mr Anthony Ball, an installation engineer employed by Smartdry, from his hotel room in Bali for about 20 minutes. After a short five-minute break, I heard from Ms Bianca Zarco, a consultant to Smartdry, and also Iwan's personal partner, giving evidence alone from their room in Barcelona for a little over an hour. Finally, and after a 40 minute break, I heard from Mr Oliver Pope, Smartdry's company surveyor, giving evidence alone from his home in Peterborough, for a little under an hour. In total, I heard from Iwan and the defendants' other witnesses for about a day, from shortly after 2.30 pm on Day 2 to about the same time on Day 3.

40. Even allowing for Frank's position as a litigant in person and the representative of his company, it is appropriate for me to record that his cross-examinations were ill-tempered and unnecessarily aggressive and confrontational. He would frequently interrupt the witnesses rather than allowing them to answer his questions, despite warnings from the bench not to do so; many of his questions were unfairly formulated and unnecessarily complicated; and frequently they consisted of speeches, or comments, and were not questions at all. It is also appropriate to record that at the end of his cross-examination of Ms Zarco, Frank made it clear that he did not hold anything against her personally, acknowledging that she had been trying to do her best to give her honest account of what had happened, whilst emphasising that there were huge discrepancies between their respective versions of events.

41. The defendants also rely upon the written evidence of Mr Glynn Griffiths, a former employee of Smartdry until his retirement in March 2018, which addresses the rebranding exercise that followed the conclusion of the CSA. This is the subject of a Civil Evidence Act hearsay notice dated 6 July 2020 on the basis that: (1) Mr Griffiths is no longer employed by Smartdry, (2) his evidence does not add anything to that of the other witnesses besides corroboration, and (3) the defendants had reasonable concerns about finishing the trial in the time available.

IV: Witness evidence

42. Mr Aikens addressed the various witnesses in his oral closing, dealing first, and at length, with Frank. He submitted that Frank had treated his own cross-examination, and his cross-examination of the defendants' witnesses, as an opportunity to make long, angry speeches in support of the claimants' evidence and case. He had failed to appreciate the dividing line between his role as a witness and his role as an advocate. He had been of no real assistance to the court in helping it to determine the true facts in dispute. It was clear that his view of the world had only a loose connection with reality. He was operating under the delusion that there had been a wholesale diversion of customers from FSUK to Smartdry when there was in fact nothing in the objective evidence to support that. Frank had obviously been affected by his long-running dispute with his own family, and this present application should be viewed as part of that wider dispute; it had become something that Frank could focus upon and actively pursue. Frank had recruited two people close to him, Mr Chisholm and Mrs Jones-Bottoms, to pursue this matter with him and to play their part in trying to trap the defendants into doing something they were not entitled to do under the terms of the CSA. In my judgment, all of these criticisms are justified.

43. Mr Aikens proceeded to identify what he termed four particular unsatisfactory elements of Frank's evidence. On a close analysis, I find that the first of these is not made out; and, whether viewed on their own or collectively, the other three would not have led me to disbelieve Frank's evidence had I otherwise considered him to be a reliable or a credible witness (which I do not). The most serious of Mr Aikens's specific criticisms is that during the course of Mr Chisholm's cross-examination (from Frank's home, and with Frank present) Frank had intervened to seek to get Mr Chisholm to correct an answer that he had been giving to a question. The answer was not particularly material to the case so the intervention was of no great moment, and it was no doubt the result of Frank's passionate enthusiasm for the claimants' case. However, what was more serious was Frank's later attempt falsely to deny that he had been seeking to get Mr Chisholm to change his evidence; he insisted that he had instead been shouting to the window-cleaner to go away. We had all heard Frank's true verbal intervention for ourselves; and, during his cross-examination (albeit after some initial prevarication), Mr Chisholm had accepted that "*Frank had made some suggestions in the background*". I accept Mr Aikens's observation that this was not the conduct of someone who was seeking to assist the court. Mr Aikens was also right to criticise Frank for saying (on the Monday afternoon) that Mr Chisholm had not at first noticed the name 'Schrijver' on the black brick he had been handed by Matt because he had been looking for raised writing (as on the brick allegedly seen at Mrs Jones-Bottoms's house) whereas the writing on the black brick had been indented, and then falsely claiming (the next morning, when it was pointed out to him that the photographs showed that the writing on the black brick allegedly handed to Mr Chisholm by Matt had also been raised) that he had not said that the name 'Schrijver' had been indented into the brick but rather that there had been indentations **in** the brick. In closing, Frank further sought to justify his use of the word 'indented' by explaining that if the wording had been raised on the brick, it must have been indented in the mould.

44. During his oral closing Frank proclaimed: "*Of course I shout and I am angry and I find it difficult to contain my anger because the Frank Schrijver entity has been affected so much. … I am not a machine. I am a person; a businessman.*" At the very end of the hearing, Frank acknowledged that the court might not like him; but he

went on to make the fair observation that this was not a case about likeability but rather about the evidence. He acknowledged that he is a difficult person, who does not communicate calmly and who shouts a lot; but he had not won his awards, or built up a successful business, by being a likeable person. This was not a case to be judged on likeability.

45. I accept these points; and I do not reject Frank's evidence, or case, because he is unlikeable, loud and difficult. The reason I do so is because throughout this case, whether in his role as a witness or as an advocate, Frank has displayed a consistent inability, and a persistent refusal, to analyse or to present the evidence objectively, rationally or dispassionately. In this, his approach has been in marked contrast to the measured, and tolerant, attitude adopted by Iwan and the defendants' witnesses. I acknowledge that Frank did make some appropriate concessions during his cross-examination. By way of example, and in relation to alleged breach (2), Frank accepted that the Allen & Overy letter of 3 October 2018 had been the first notification to the defendants of FSUK's new web-site address, and he accepted part (but not all) of the blame for the failure to update the redirection mechanism on the defendants' web-site. For the most part, however, Frank's evidence, and his presentation of the claimants' case, has been driven by a searing, and an unswerving, desire to do the defendants down at all costs, and with no regard for the objective truth. To this end, Frank has recruited two close friends, Mr Chisholm and Mrs Jones-Bottoms, to his cause in the hope of catching the defendants out; and they have both been prepared to lie to Smartdry representatives in an attempt to achieve Frank's end: Mrs Jones-Bottoms lied by pretending to be interested in having Smartdry's damp control system installed at her property. Mr Chisholm similarly lied to Matt about his '*mother's*' interest in having the system installed in her property, having earlier falsely pretended that his name was David and that Mrs Jones-Bottoms was his mother. I am satisfied that having failed to catch the defendants out, both Mr Chisholm and Mrs Jones-Bottoms were prepared to join Frank in lying about the results of their "*investigations*".

46. Mr Aikens accepted that the vast majority of Ms Kinghorn's evidence was fair and helpfully given, and that she had fairly accepted a number of propositions that he had put to her (such as that there was no other evidence of any bidding on any Schrijver keywords, that the first time that Mr Martin had any knowledge that the name 'Schrijver' allegedly appeared on any of the bricks that had been installed at his property was when Ms Kinghorn had told him that, and that he had not cared what was marked on the bricks). However, at the end of her evidence, and in order to back Frank up, Ms Kinghorn had said that there had been a lot of confusion on the part of customers although: (1) she had not mentioned this in her witness statement and (2) with the sole exception of Mrs McKenna, she was unable to identify any specific examples of confusion; and, in the case of Mrs McKenna, Ms Kinghorn had not told her of the rebranding exercise and had done nothing to clear up her confusion. Subject to this criticism (which I accept), I regard Ms Kinghorn as a witness of truth; but, on analysis, she only provides limited support for, and really does little to advance, the claimants' case. I also note that Ms Kinghorn's witness statement appears to have been drafted for her (at least in part) by Frank: at 1/167 there is a reference to "*myself, as the proprietor of our legally owned brand, Schrijver, Schrijver System, Schrijver Systeem and Frank Schrijver and that passing of [sic] and illicit use of my brands by the company SmartDry, their proprietors,*

representatives and endorsing affiliates" and there are further references to "*my brand*" and "*my brands*" at 1/168. The brands, of course, belonged to Frank and his company.

47. Mr Chisholm was a thoroughly unsatisfactory, and untruthful, witness whose primary concern was to assist his partner Frank rather than the court. He was prepared to say whatever Frank told him to, both before and during the present proceedings. In closing, Mr Aikens identified three particularly unsatisfactory features of Mr Chisholm's evidence, although I am satisfied that there were many more. First, prompted by Frank (who had already sought to make those changes for Mr Chisholm when he, Frank, had first given evidence), Mr Chisholm made two corrections to his witness statement by: (1) substituting a single "*brick*" for the five references to "*bricks*" (in the plural) which he said had been produced by Mr Pope at Mrs Jones-Bottoms's property; and (2) also confirming that the photograph of the black brick he had been handed by Matt had been taken after his return from his second (rather than his first) visit to Mr Martin's property. Given the chronology in the rest of Mr Chisholm's witness statement, I accept that this second (but not the first) of these corrections was the correction of a genuine error. However, rather more serious is the fact that the photograph of the black brick allegedly taken in Frank's car, and which is referred to in paragraph 7 of Mr Chisholm's witness statement, was never produced or relied upon in evidence. Second, Mr Chisholm falsely tried to maintain that he had clearly seen the name 'Schrijver' on the black brick he had been handed by Matt when he had returned to the car for the second time despite the clear statements that he could not see anything written on the brick which were caught in his covert video recording. I am satisfied that Mr Chisholm was lying about seeing the name 'Schrijver' on the brick when he was sitting in Frank's car; and also that he falsely tried to explain away the admissions on the video (which had been omitted from the transcript produced by the claimants) by falsely stating that he had been walking quickly when the video shows that he had clearly slowed down to look at the brick for a second time. Third (and as previously noted) Frank had prompted Mr Chisholm when he was being cross-examined about the dividers on the bricks that Frank had removed from the wall of Mr Martin's property, and Mr Chisholm had then adopted his suggestion. When this was first put to Mr Chisholm he had denied that anyone had spoken to him; but when Mr Aikens reminded him that he was on oath, Mr Chisholm had accepted that: "*Frank had made some suggestions in the background*". This was not the conduct of a witness who was trying his best to assist the court. I accept these criticisms of Mr Chisholm as a witness. However, that is not all. Mr Chisholm's witness statement is a thoroughly unsatisfactory document because it does not seek to tell the **whole** truth. In addition to the five references to '*bricks*' in the plural, it omits any reference to Frank's role in initiating the '*investigation*' that was carried out at Mrs Jones-Bottoms's property and to Mr Chisholm's pretence of being her son, David. Nor does the witness statement disclose that Mr Chisholm had covertly filmed his two meetings with Matt so that this evidence was available to the parties and the court. Mr Chisholm embellished his evidence on a number of occasions during cross-examination in ways which I am satisfied were not truthful. Had they been, they would have been mentioned in his witness statement, and corroborative material would have been produced.

48. At the very end of her re-examination, Mrs Linda Jones-Bottoms acknowledged, to her credit, that Mr Pope had been a very nice man who had phoned to say that he

would be 20 minutes late. Earlier in her re-examination, she had explained that she had lived at the same address as Frank for about five years when she had been ill and had had nowhere else to live. As Mr Aikens submitted, Mrs Jones-Bottoms clearly owed Frank a lot; and it was clear that her primary motivation had been to help Frank rather than to assist the court. Mr Aikens submitted that the principal fault with Mrs Jones-Bottoms's evidence was that it was manifestly implausible in many regards; and he gave three examples. I attach no weight to the references to taking photographs on her mobile phone, rather than an iPad, because she refers to both at the end of her witness statement and she had explained that they were linked devices. Given the remote nature of the hearing, I also attach no weight to the fact that she had brought neither device to the hearing for inspection. However, I do accept that her evidence was unsatisfactory in other respects. Although in her witness statement Mrs Jones-Bottoms had admitted that Frank had asked her whether she "*could participate in an investigatory matter which was starting*", she had initially been reluctant to accept in cross-examination that she was not a genuine customer, stating that she had been seeking "*a second opinion*" and wished to "*compare prices*". Her witness statement twice described Mr Chisholm as her "*friend*" and made no mention of him as Frank's partner or of the charade of pretending to Mr Pope that he was her son. In cross-examination, she implausibly suggested that she could see the words 'Schrijver System' written on the terracotta-coloured brick when she had been sitting on the floor of her living room and the brick was in the middle of her table and that she could see it on the photograph at 2/70. I am satisfied that Mrs Jones-Bottoms was giving evidence to assist Frank rather than the court, and that I cannot accept her as a credible, or a reliable, witness.

49. Mrs McKenna was the claimants' only truly independent witness. Mr Aikens rightly accepted that she had clearly been doing her best to assist the court; and he made no criticism of her evidence. I found her to be an entirely honest and straightforward witness.

50. Turning to the defendants' witnesses, Mr Aikens submitted that during their respective cross-examinations they had been subjected to sustained, and aggressive, shouting from Frank over more than a full court day. They were all to be commended because not one of them had risen to that. Despite having been given every opportunity to ask questions and to put his case, Frank had completely failed to undermine the defendants' written evidence in any material respect. I accept those submissions. I also note that the answers given to Frank's questions were subject to frequent interruptions from him, despite warnings that he should allow the witnesses to complete their answers.

51. Mr Aikens submitted that the contrast in the manner of their evidence between Iwan and his brother Frank was both stark, and revealing, about their respective cases. Iwan had calmly explained what had actually happened as a matter of fact in response to incredibly hostile questioning from his own brother and in the face of repeated interruptions, despite warnings from the bench not to interrupt Iwan's answers. Mr Aikens submitted that Iwan's written evidence had not been undermined in any way, either in the general manner of his evidence or in specific matters. Mr Aikens submitted that Iwan's evidence should be accepted unless it was directly contradicted by independent and reliable materials in the trial bundles (which it was not). There was said to be nothing to support Frank's submission, in opening, that the defendants'

compliance with the CSA had only been temporary and that they had had no intention of complying with the CSA in the longer term or indefinitely. The defendants had had no good business reason, or incentive, not to comply with the terms of the CSA. They stood to lose clients if they had shown them bricks marked with the name 'Schrijver' on them when they were now trading as Smartdry. I accept these submissions.

52. Ms Zarco and Mr Ball were said by Mr Aikens to have been entirely straightforward and honest witnesses, despite Frank's long, sprawling and aggressive questioning of Ms Zarco. They had been doing their best to assist the court, and they had indeed assisted the court to understand what had been going on during the relevant period. Again, I accept those submissions. Mr Ball was an impressive witness who made it clear that he had known that he should not install bricks with the name 'Schrijver' on them, and he was clear that he had not done so. Ms Zarco was also a patently honest and reliable witness whose evidence I entirely accept. She explained that Smartdry employees were told that the company was no longer associated with Schrijver and that they were not to use that name. If the name ever came up in conversations with customers, employees were only to refer to Iwan as the owner of the company and Henk as the inventor of the bricks, and they were to say that Smartdry had no connection with Frank Schrijver. In answer to questions from Frank in cross-examination, Ms Zarco also provided some, albeit entirely hearsay, evidence corroborative of the evidence of Mr Pope. She was criticised by Frank for not having mentioned this in her witness statement; but, since this was hearsay evidence of what she had been told by Mr Pope, I consider the criticism to be misconceived.

53. Mr Aikens submitted that Mr Pope had given his evidence in a clear and straightforward manner and that he had been doing his best to assist the court. He had declined to speculate about matters of which he had no direct knowledge despite being invited to do so on a number of occasions. Mr Aikens emphasised that the claimants had to show that Mr Pope had been lying in his evidence, particularly in relation to the incident at Mrs Jones-Bottoms's house; but the defendants relied on the content of Mr Pope's evidence, and the manner in which he had given it, to negative that conclusion. Again I accept those submissions. I accept Mr Pope's evidence that he had been "*strict*" about not mentioning the name 'Frank Schrijver' or the Schrijver brand. Mr Pope was clear in cross-examination that he did not believe that the photograph of the terracotta-coloured brick at 2/68 was his brick. I find that the terracotta-coloured brick shown on the claimants' photographs was not the brick that was shown by Mr Pope to Mr Chisholm and Mrs Jones-Bottoms at the latter's home; and I also find that Mr Pope did not leave them with the non-CSA compliant brochure of which the claimants complain.

54. Whilst I was preparing this judgment, on 21 July 2020, I received from the court a letter, dated 17 July 2020, from Frank stating that he would like to bring to my attention that it had "*become evident*" that Mr Pope "*was not telling the truth whilst giving oral evidence under oath in relation to the brochure*." The claimants would like to seek my permission to share their evidence with the court "*which supports the fact that Mr Pope was not telling the truth*". I immediately directed the court to respond to the claimants as follows: "*If the claimants wish to apply to adduce further evidence they must issue an application in proper form, supported by appropriate evidence, and paying the appropriate fee and serve a copy on the defendants. They*

should seek the defendants' consent to it being disposed of on paper." I have heard nothing more about any further evidence, despite having checked the case record on CE-File for any application or even any unprocessed filings.

V: Alleged breaches

55. In the light of my conclusions on the evidence in the case, it is convenient to address each of the remaining alleged breaches largely by reference to Mr Aikens's written trial skeleton.

(1) Alleged breach (1): Schrijver Keyword bidding

56. The claimants allege that Smartdry bid via Google Adwords on the keyword 'Schrijver' in the territory of the UK, in breach of clause 8.4 and Schedule 2 paragraph (12) of and to the CSA. The specific sponsored advertisement complained of in the points of claim is the second of the advertisements at 2/32 and appears below a sponsored advertisement for FSUK's own damp control services and immediately to the left of details of FSUK's 'water damage restoration service'. As Mr Aikens acknowledged, this is probably the most important of the alleged beaches from the claimants' perspective since it is online advertising, rather than any name displayed on a brick, that would first attract a prospective customer to Smartdry. It was also the alleged breach that first alerted the claimants to a possible breach of the CSA. This alleged breach is addressed at paragraphs 12 and 13 of Iwan's second witness statement and paragraphs 4 and 5 of Ms Zarco's first witness statement and paragraphs 4 and 5 of her second witness statement. The defendants admit that they were prohibited from bidding on the keyword 'Schrijver' in the UK. They also admit that, without their knowledge, Smartdry's marketing agency, WeAreBoutique (**Boutique**) had bid on this keyword, purportedly acting on behalf of Smartdry. However, the defendants deny that this amounts to a breach of the CSA for three reasons:

57. First, they say that Smartdry's marketing agency had not been acting on Smartdry's express instructions, or with their apparent or ostensible authority, in bidding on any Frank Schrijver keywords. Smartdry had made Boutique aware of the terms of the CSA and therefore the agency knew not to bid on Frank Schrijver keywords in the UK. In support of this part of their defence, the defendants rely upon: (1) Iwan's evidence that he had instructed Boutique to stop all bidding on Schrijver keywords in December 2016 and that they had simply made some sort of mistake in running a 'campaign' which involved bidding on Schrijver as a keyword without the defendants having ever given them any positive instruction or authority to bid on the Schrijver name; and (2) the contemporaneous emails which show that all bidding on 'Schrijver' had in fact been stopped during the rebranding process. On 22 December 2016 (at 3/3), Iwan had asked Boutique to "*make sure that we will not create any google campaign with the word schrijver in it? We decided that we do not want any affiliation with Frank Schrijver in the UK*." Then, having not received any reply to that email, on Wednesday 4 January 2017 Ben Fenman, himself a Smartdry employee, switched off all campaigns relating to Schrijver and Frank Schrijver (as evidenced by his email to Louise Trent of Boutique timed at 3.52 pm on that day at 3/5-6). The claimants place heavy reliance upon Louise Trent's email response timed at 18.44 the same day (at 3/5) referring to '*pausing*' (rather than '*stopping*') the campaign; but the defendants say that the reality is that there is not a shred of

evidence that the instruction to '*pause*' was ever rescinded by any instruction from the defendants to resume the marketing campaign so, for present purpose, there is no material distinction between '*pausing*' and '*stopping*' the '*campaign*' (which, in the present context, means bidding on a specific keyword, or group of keywords, rather than the company's entire marketing strategy). A full explanation of what actually happened appears from an email from Emma Tarleton of Boutique to Smartdry of 17 July 2018 (at 2/769 and also at 3/7) which explains that: "*We started bidding on frank schrijver keywords on the 2lst of February 2018 at this time that ad copy was created and no mention of Frank Schrijver was included within the ad. On the 16th of May the ads were updated across the account to include an ad format where Google would automatically generate the text that was in the ad. It was then that the ads started to mention Frank Schrijver as Google was making them say so. We did not actively decide to have Frank Schrijver within the ad text. On the 8th of June we were informed of the fact that the ad included Frank Schrijver's name and we immediately jumped into the account and paused all keywords we were bidding on around Schrijver. For the whole period we spent £44.22 and generated 55 clicks and one phone call conversion. However, 0 clicks and 0 conversions were generated from ads containing Frank Schrijver's name*."

58. Second, even if there were a breach of the CSA, the defendants submit that it was remedied within 28 days of Smartdry having been notified of it by FSUK, in accordance with clause 12.3 of the CSA. This is illustrated by the following chronology of events: FSUK's first letter of complaint to Dutch lawyers (2/566) was dated 7 June 2018. Iwan immediately called the Smartdry office in the UK and instructed the acting manager (who knew nothing of it) to contact the marketing company to ask them to stop whatever process they were engaged in. The marketing agency was contacted and immediately paused all keywords they were bidding on around 'Schrijver'. On Monday 11 June 2018 Iwan wrote to FSUK (at 2/568) explaining what had happened and confirming that the issue had already been rectified (as more fully related at paragraph 22 above); and a fuller explanation was provided on Friday 15 June 2018 (at 2/570) with confirmation that the marketing agency had assured Iwan that they had taken "*the proper action to resolve this issue*". The defendants accept that clause 12.3 of the CSA operates to preserve the innocent party's right to seek any remedy to which it is entitled in respect of the other party's breach even if it has been remedied within 28 days. However, in circumstances where the defendants acted so promptly in response to the complaint, they submit that FSUK should not be entitled to any remedy in this case, even if any significant damage had been suffered.

59. Third, the defendants say that any loss suffered by the claimants during the short period in which Frank Schrijver keywords had been bid upon was de minimis and is incapable of justifying any award of damages. For this, they rely upon the Google Analytics reports at 3/9-19. These give the relevant data for the entirety of the campaign which involved bidding on the keywords 'Frank Schrijver'. In particular, as is clear from those reports: (1) In total there were 512 impressions of the sponsored advertisements generated by the campaign. (2) Those advertisements were clicked on 56 times. (3) The campaign cost Smartdry a total of £47.18. (4) Only one lead was generated. Addressing this evidence (at paragraph 13 of his second and paragraph 7.2 of his third witness statements) Iwan explains that the one lead that was generated did not convert to an order for an installation. Iwan also puts these figures

in context. Over the same period, Smartdry had a total of 272,000 impressions, 11,600 visits to the Smartdry website and 276 conversions resulting from an advertising campaign which had cost £13,700. In his oral closing, Mr Aikens made the further point that Smartdry had clearly not outbid FSUK on the relevant keywords because Smartdry's advertisement appeared below that of FSUK in the online rankings.

60. I accept all of these submissions. They are borne out by evidence (summarised above) which the court accepts as reliable. There was no breach of the CSA because the defendants had ceased actively to bid on any of the Schrijver marks as keywords. They had instructed their marketing agency not to do so; and that instruction was never withdrawn by the defendants. What happened in May and June 2018 was an unfortunate accident to which the defendants had not contributed in any way. That accident was immediately rectified. It has resulted in no financial gain to the defendants and in no established loss to the claimants. Ms Kinghorn accepted in cross-examination that there was no other evidence of any bidding on any Schrijver keywords. This alleged breach has not been made out.

(2) Alleged breach (2): Failure to maintain the web-site at www.schrijversystem.com

61. The allegation under this head is that the defendants breached clause 8.3(G) and schedule 2 para (8) of and to the CSA. These provisions require the defendants to ensure that on this (and other) websites operated by the defendants and the Henk Schrijver Entities, internet users accessing the website are first presented with a landing page which is split in two and asks the user whether they are in the UK or the Republic of Ireland. If they click 'Yes', then the user must be automatically, and quickly, redirected to a domain name to be notified by Frank Schrijver from time to time. The claimants say the defendants breached this obligation by linking to a non-active website at the claimants' domain name schrijversystem.co.uk.

62. The defence to this allegation is that the first time that the claimants had notified the defendants of a domain name to which users should be directed under this paragraph was in Allen & Overy's letter to the defendants of 3 October 2018 (at 2/575), in which FSUK notified them that the redirection should be to www.damp.co.uk. Frank accepted that this was the case in cross-examination. Up until the receipt of that letter, and in the absence of any notification having been received from the claimants, users were being redirected to www.schrijverdampcontrol.co.uk, a domain name known by the defendants to be owned by the claimants. Having been notified of the new domain address, the defendant promptly updated the redirect link so that users were directed to www.damp.co.uk if they clicked 'Yes' to the geographical base question. In these circumstances, the defendants say that even on the facts pleaded by the claimants, the defendants have at all times complied with their relevant obligations under the CSA. I accept that submission. This alleged breach has not been made out. Nor have the claimants established that they have suffered any actual loss as a result of the use of an incorrect domain name in the redirection link.

(4) Alleged breach (4): The Smartdry marketing brochure

63. The claimants allege that Smartdry has been distributing brochures which refer to the Schrijver System, claiming to customers that Smartdry has been in business for 35 years and was founded by Henk Schrijver. This is said to be outside the permitted

references to 'Schrijver' in the defendants' advertising materials set out in clause 8.4(B) of the CSA (which are: (1) two references to Henk Schrijver as the inventor of the damp control technology sold by Smartdry; and (2) three references to Iwan Schrijver as Smartdry's general manager (or similar)) so the defendants are in breach of clauses 7.1(A) and 8.3(A) of the CSA. The Smartdry brochure which is relied on by the claimants as establishing this breach is at 2/45-60. The defendants admit that: (1) the references to 35 years' experience in that version of the brochure at 2/46, 47, 48 and 59; and (2) the reference to Henk Schrijver as having established Schrijver Systeem Vochtbestrijding b.v. in 1982 at 2/47 are both outside the scope of the references to Schrijver permitted by, and are therefore contrary to, the terms of the CSA. However, as Iwan explains in his witness evidence, this version of the Smartdry brochure had been produced in February 2016 and was withdrawn from circulation in December 2016 following the entry into the CSA. A new version of Smartdry's brochure (which is at 2/620-635) was printed for circulation commencing in January 2017. Unused stocks of the old Smartdry brochure were destroyed at that time. The claimants have not alleged that this later version of the Smartdry brochure contains impermissible references to 'Schrijver' and the claimants are said to make no complaint about it. This version, in turn, was taken out of circulation in the middle of 2018 and old stocks of it were destroyed in October 2018 because Smartdry no longer charged a call-out fee and references in the brochure to such a fee had to be deleted. The Allen & Overy letter of 3 October (at 2/577 and 4/2) does not identify the provenance of the Smartdry brochure which they exhibit as Annex 3. The cover of that version of the brochure (at 2/586 and 4/13) appears to be the one bearing Matt's signature. Certainly the Allen & Overy letter makes no connection to the brochure allegedly obtained from Mr Pope at Mrs Jones-Bottoms's property on 13 September 2018.

64. The defendants' evidence and case is that the brochure of which the claimants complain is the first version of the Smartdry brochure, which had been superseded and destroyed as a result of the entry into the CSA, and that the defendants have not been distributing any non-CSA compliant brochures. I accept this evidence and submission.

65. I find that the brochure of which the claimants complain is indeed the first version of the Smartdry brochure, which had been superseded and destroyed as a result of the entry into the CSA, and that the defendants have not been involved in, or responsible for, distributing any non-CSA compliant brochures. Having gone to the time, the trouble and the cost of producing a new (second) version of the Smartdry brochure, it is inherently unlikely that the defendants would have continued to distribute the older version; and the defendants' evidence (which I find to be reliable and which I accept) is that they did not do so. I find, accepting the evidence of Mr Pope, and rejecting the evidence of Mr Chisholm and Mrs Jones-Bottoms, that Mr Pope did not hand a copy of the first, and non-CSA compliant, version of the marketing brochure to them at 1 Church Walk, Bletchingley on 13 September 2018. I accept Mr Pope's evidence that he did not carry copies of the Smartdry brochure with him when surveying the properties of potential customers, and that these were sent out by the Smartdry office. I find that the brochure to which Mr Pope's business card was at one time stapled was a copy of the first version of the brochure which Frank must have obtained at some point before these were superseded by the second version and then destroyed by the defendants. In the course of his cross-examination Mr Chisholm referred to notes

which he said had been taken from a video of Mr Pope's visit to Mrs Jones-Bottoms's property; but neither these notes, nor the video, had ever been mentioned before, nor have they been produced and placed in evidence by the claimants. I am satisfied that they would have been had they provided any support for the claimants' case.

66. I find that the brochure that Matt handed to Mr Chisholm at the Spalding property on 27 September 2018 was a later, and CSA-compliant, version of the Smartdry brochure. Mr Chisholm then took this back to Frank's car and they together substituted it with an earlier, non-CSA-compliant version of the brochure. Mr Chisholm then took this substituted brochure back to the property, and it was the cover of this version which Matt wrote his name on. This was the reason why Mr Chisholm returned to the property carrying a Smartdry brochure rather than leaving the brochure behind with Frank in the car (or, as he explained on his return to Matt, with his mum at her house "*just round the corner*" where he claimed to have told her about the Smartdry installation: see 3/84). In response to Mr Aikens's observation (in cross-examination of Mr Chisholm) that we do not know whether the brochure which he was shown carrying on the second video was the same as the brochure he had earlier been handed by Matt, Mr Chisholm said that there had only been the one brochure that day, namely the one he had been handed by Matt on his first visit to the property. However, I am afraid that I do not accept Mr Chisholm's evidence on this point.

67. Had this particular breach been established (which it has not) I would have found that any loss that might have been suffered by the claimants as a result of such breach would have been insignificant and incapable of justifying any award of damages (which in any event have not been properly particularised, or established, by the claimants). There is no evidence that the minor differences between the CSA-compliant and the CSA non-compliant versions of the Smartdry brochure ever resulted in any financial gain to the defendants or any loss to the claimants.

Alleged breach (5): Display of Schrijver-branded bricks to Smartdry's customers

68. The claimants allege that the defendants have been showing bricks to potential customers on which the Schrijver name is visible, in breach of clauses 7.1(A), 8.3(A), 8.4(A) and Schedule 2 para (4) of and to the CSA. The only direct evidence offered by the claimants in support of this allegation is that of Mrs Jones-Bottoms and Mr Chisholm as to what took place during the course of Mr Pope's visit to Mrs Jones-Bottom's home on 13 September 2018. Against that must be set the evidence of Mr Pope. Although paragraph 7 of his witness statement begins with somewhat guarded language ("*I cannot confirm that the brick in the photograph produced by Frank Schrijver was the one that I actually produced to Linda Jones-Bottoms …*") Mr Pope proceeds to expand upon this evidence, explaining why "*I very much doubt that this brick could have been produced by me at the survey and consequently I do not believe that Mrs Linda Jones-Bottoms Statement dated 11 March 2019 is accurate on that point*". Although Mr Pope was pressed in cross-examination, he was very clear in his belief that the terracotta-coloured brick shown in the claimants' photographs was not the brick that he had produced on 13 September; and he provided cogent reasons for this, in both his written and his oral evidence. I accept the evidence of Mr Pope on this issue in preference to the entirely unconvincing evidence of Mr Chisholm and Mrs Jones-Bottoms, neither of whom was a satisfactory, or a reliable, witness, unlike Mr Pope, who was.

69. I find that this was a contrived visit specifically conceived and designed by the claimants to catch Mr Pope out although I should record that in cross-examination Mrs Jones-Bottom was initially reluctant to admit (as she eventually did when pressed) that she was not a genuine customer despite her original candour in acknowledging (in paragraph 2 of her witness statement) that "*Mr Schrijver asked me whether I could participate in an investigatory matter which was starting*". This incident involved Mr Chisholm in masquerading as Mrs Jones-Bottoms's son, 'David'. His evidence about this meeting was deeply unsatisfactory. In his witness statement there were no less than five references to Mr Pope having left '*bricks*' in the plural (two in each of paragraphs 2 and 4 and one in paragraph 3) when there was only one brick, and this had to be corrected in chief at the beginning of his oral evidence. Moreover, in the course of cross-examination, Mr Chisholm claimed that Mr Pope had mentioned the name 'Schrijver' to him three times, yet this had not been mentioned in Mr Chisholm's witness statement, which was signed on 11 March 2019, only some six months after the events to which it speaks. Had Mr Pope made any reference to 'Schrijver' during the course of his visit, in the light of the observations made by Mr Chisholm at the end of the second video I have no doubt that it would have been mentioned by Mr Chisholm, and picked up by the astute and efficient Ms Kinghorn when she interviewed him for the purpose of preparing his witness statement some six months after the meeting with Mr Pope. Mr Pope was adamant that he was '*strict*' about not mentioning the name 'Frank Schrijver' or the 'Schrijver' brand to prospective customers of Smartdry, and that he had not done so; and I accept his evidence on this point. I have already mentioned Mr Chisholm's unsatisfactory evidence about a missing video recording of Mr Pope's visit. I also consider (although I make it clear that this merely provides further support for findings to which I had already come) that had Mr Pope been aware of the name 'Schrijver' featuring on any brick, it is inherently unlikely that he would have shown that brick to any prospective customer of Smartdry, still less that he would have left it with them whilst he embarked on an inspection of Mrs Jones-Bottoms's property. Although it was not mentioned in, or foreshadowed by, any of the claimants' evidence, towards the middle of Mr Frank's cross-examination of Mr Pope (who was, of course, the defendants' last witness) Frank mentioned that he had conducted an earlier '*investigation*' at the home of Lisa Kinghorn where she and her partner, who was also present, had wanted to inspect one of Smartdry's bricks but Mr Pope would not '*let it go'*. If that evidence were correct, then it is most unlikely that Mr Pope would have left a brick with Mrs Jones-Bottoms and Mr Chisholm whilst he was undertaking an inspection of her property rather than retrieving it from them before he left the room.

70. It is convenient at this point to deal with a further, unpleaded allegation which is directed to the defendants by the claimants. In support of the unpleaded allegation that Mr Pope had mentioned the name 'Schrijver', and had described Smartdry as its parent company, Frank relied, both in cross-examination and in submissions, on part of a transcript of a recorded telephone conversation between Ms Kinghorn and Mr Steven Martin (whilst he was at work: see his last answer at 2/748) on 28 September 2018, the day after the incident at his property, which begins at 2/745, and, in particular, upon the following exchange at 2/746-7:

> "MS KINGORN: *... Okay, so Mr Martin, there's a slight issue here that we'd like to bring your attention, and it has been discovered that the company who (inaudible) contract with and installation agreement with,*

> *that they in fact installed our systems, Schrijver systems as opposed to the Smart Dry systems. Are you aware of that?*
>
> MR MARTIN: *No, not at all. I mean, I was told by the representative obviously that it was a company that was formed, and two brothers and one of them split and Smart Dry was, you know, was the parent company of Schrijver, so it's a bit like the Aldi and Lidl scenario.*"

71. When this was put to him in cross-examination, Mr Pope's response was that he would never have said that Smartdry was the parent company of FSUK; nor would he ever have talked about Frank's companies. I have heard no evidence about this conversation from Mr Martin himself. I do not criticise either party for failing to calling him as a witness: as Ms Kinghorn explains in her witness statement (at 1/167), he was " ... *an innocent bystander, a third party, unfortunately caught up in a previously longstanding legal dispute that we regarded as settled*" between the parties to the present litigation. But I must not speculate as to what Mr Martin's evidence might have been had he been called as a witness and cross-examined. When this passage from the transcript was put to Ms Zarco, she said that she had asked Mr Pope about this and he had told her that he had not said that Smartdry was the parent company of Schrijver. Ms Zarco suggested that Mr Martin had probably been in a state of shock or confusion after being told that a damp control system had been installed in his property which should not have been. That is one possible explanation that is consistent with Mr Pope's evidence. However, another possible explanation is that it was Mr Martin who first mentioned the name 'Schrijver' to Mr Pope who then had to think about how to explain the relationship between the two companies. In this connection, it has to be borne in mind that Mr Martin had previously contacted FSUK (on 9 September) about the damp issues affecting his property before later contacting Smartdry: see Ms Kinghorn's witness statement at 1/166. A later passage in the transcript (at 2/750-1) reads:

> "MS KINGHORN: ... *It's an illegal installation. It's counterfeit. It's fraudulent. It is not the Smart Dry system that you thought it was. It's not the Smart Dry system that you thought it was unfortunately, Mr Martin.*
>
> MR MARTIN: *Yeah, well they told me it was - because I queried Schrijver when I was speaking to the rep and obviously, he said it was, like I say, that they were exactly the same. Two brothers, Frank had gone his way. His boss was the other brother and you know, they had the rights to install in the UK.*"

72. Unfortunately this passage was never put to Mr Pope and the court therefore does not have his comments upon it. Had this passage been put to him, it might have jogged Mr Pope's memory. On the evidence before the court, I find that Mr Pope did not spontaneously suggest any connection or affiliation between FSUK or Frank Schrijver and Smartdry to Mr Martin. In the face of a specific query about any connection between them from Mr Martin, I accept that Mr Pope may have mentioned that the two companies were run by two brothers who had '*split*' and gone their own separate ways. If there had been such a specific query, Mr Pope would have been put on the spot as to how to respond. But what is clear, from Mr Martin's reference to '*the Aldi and Lidl scenario*', is that Mr Pope had made it clear to Mr Martin that the two entities were in competition with each other (a point made by Iwan when the first of the two passages from the transcript was put to him in cross-examination). I do not

find that this unpleaded allegation amounted to any breach of the terms of the CSA. Had it done so, then I note that Allen & Overy's letter of 3 October 2018 had quantified FSUK's loss at £1,400, representing "*the sum our client is entitled to in respect of the profit it would have obtained by installing its damp control system in Mr Martin's property*".

73. Had alleged breach (5) been established (which it has not) I would have accepted Mr Aikens's invitation to find that the word 'Schrijver' on the brick had in fact been sufficiently obliterated from it so as not to be visible to any reasonably attentive customer. I would have found that neither Mrs Jones-Bottoms nor Mr Chisholm fell into that category because they were deliberately looking to catch Mr Pope out if he made any reference to 'Schrijver' or displayed any materials bearing that word (or any semblance of it).

74. Had this particular alleged breach been established, again I would have found that any loss that might have been suffered by the claimants as a result of such breach would have been insignificant and incapable of justifying any award of damages (which in any event have not been particularised, or established, by the claimants). There is no evidence that the appearance on any brick displayed by Mr Pope to any Smartdry customer of a small part of the largely obliterated word 'Schrijver' has ever resulted in any financial gain to the defendants or any loss to the claimants.

Alleged breach (6): Installation of Schrijver branded bricks

75. The claimants' case under this head of their claim is that the defendants knowingly installed bricks and other elements branded with 'Schrijver Systeem' or 'Schrijver System' in customers' properties across the UK, in breach of clauses 7.1(A), 8.3(A) and 8.4(A) and Schedule 2, para (4) of and to the CSA. In particular, the claimants allege that Smartdry installed such bricks at the property of one of Smartdry's customers, Mr Steven Martin, at Spalding in Lincolnshire, on 27 September 2018. The defendants deny this general allegation. Pursuant to their obligations under the CSA, the defendants say that they have caused the obliteration of the word 'Schrijver' on all stocks of bricks that they have retained and that the word 'Schrijver' no longer appears on any of Smartdry's new stock of bricks. The specific allegation relating to the installation at Mr Martin's property is denied for the same reasons.

76. Iwan addresses the general allegation at paragraphs 7 to 9 of his second witness statement; and this evidence receives some support from the hearsay evidence of Mr Glynn Griffiths. Iwan explains that Smartdry's brick elements had already been produced without the 'Schrijver' name on them since around July 2016 and that dividers of the elements with the Schrijver name on them had been replaced with blank dividers which were then made removable in December 2016. All old elements bearing the Schrijver name were either exported to Holland or were subjected to a process whereby all writing on the brick, including the Schrijver name, was ground off by Iwan using, first, a plane and then an electric grinder. To the best of Iwan's knowledge and belief, none of the defendants' stock of Schrijver branded bricks escaped their '*purge*' of Schrijver branded products. Iwan says that he had no reason whatsoever to continue to use any Schrijver branded products in his business, and every reason not to do so by that time because he had already rebranded his business under the name '*Smartdry*'. Iwan states that it is important to note that the old bricks (or elements) which had been sold and installed at the homes of Smartdry's old clients

prior to the CSA were produced before the CSA and would definitely have had the Schrijver name on them. Equally importantly, his brother, Harm Schrijver, who was and remains a business partner of Frank, had purchased several thousand of these bricks with the Schrijver mark on them, making it easy for Frank to access Schrijver branded bricks which were identical to the ones Smartdry had installed for their old clients. Iwan further explains that he made it clear to everyone at Smartdry that if they were to ever find any Schrijver marks on company property, they were to inform him immediately so that Iwan could instruct them on how to remove or destroy those Schrijver marks. All new employees were informed on an ongoing basis that the Schrijver System was not a brand that Smartdry endorsed and they were trained only on the Smartdry System and its elements known as 'DryBricks' and 'DewBricks'. New employees were also instructed on an ongoing basis to inform Iwan immediately of any Schrijver marks that might be found. All of this is supported by the contemporaneous documents identified at paragraph 26 of Mr Aikens's written trial skeleton and the photograph of the new form of the Smartdry brick which was in use from August 2016 at 3/28. As Iwan explains (at paragraph 2 of his fourth witness statement) the appearance of the Smartdry bricks remained unchanged from the sample in this photograph dated 11 August 2016 to the present day; and it is entirely different from all three bricks produced to the court by the claimants on 30 July 2019.

77. The claimants' evidence on the specific incident at Mr Martin's property is contained in the witness statements of Frank himself, Mr Chisholm and (although she was not herself present at the property) Ms Kinghorn. The claimants' evidence is that Mr Chisholm was given a black brick by Matt, one of the two Smartdry installation engineers installing damp control system bricks in the walls of the property on 27 September, and that Frank later trespassed on Mr Martin's property and removed two white bricks from the wall of the property whilst the cement was still wet. The three bricks which the claimants say they took during that incident were brought to court for the defendants to inspect on 30 July 2019; and the photographs taken in court on that day are at 2/771-782. The black brick is alleged to have been given to Mr Chisholm by Matt, and the white ones are said to be the ones taken from Mr Martin's wall by Frank. Mr Chisholm also took two videos of this whole incident, which was explored in cross-examination during the trial. In cross-examination, Mr Chisholm accepted that the installation engineer had not referred to 'Schrijver' or to the 'Schrijver System' during either of his two visits to Mr Martin's property.

78. The defendants address the specific allegations relating to Mr Martin's property in detail at paragraphs 25 to 36 of Iwan's second witness statement. His evidence is that, for the reasons set out earlier in this section of the judgment, the bricks could not have been marked with the word 'Schrijver' and they were not so marked. Iwan also specifically addresses the photographs of the bricks brought to court in his fourth witness statement. However, as Iwan points out at paragraph 29 of his second witness statement, even if the bricks had been marked 'Schrijver': (1) Mr Martin would never have seen the word 'Schrijver' on the bricks at all because (as Frank accepted) the face of each brick was buried deep into the wall and he would not have inspected them before installation. (Indeed, Mr Martin was not even present at the property at the time the bricks were installed.) (2) Even if Mr Martin had inspected the bricks prior to their installation, that would have been post-contract and after he had already decided to proceed with a damp control installation supplied by Smartdry. Ms Kinghorn confirmed that Mr Martin had not known that anything was written on the

bricks that had been installed at his property. The defendants also submit that it is fanciful to suggest that the appearance of the word 'Schrijver' on a brick would have caused the claimants any discernible loss in circumstances where the defendants' business is very clearly conducted under the completely different name of 'Smartdry'.

79. But for one piece of hearsay evidence in paragraph 4 of Iwan's fourth witness statement, I accept the defendants' evidence and case and I reject that of the claimants. The one exception is the passage in his fourth witness statement where Iwan says that: "*The SmartDry installer present at the installation vehemently denied to me and to Bianca Zarco that he handed over any bricks to any third party at that time. … Our installer in fact had to take back a brick that Paul Chisholm attempted to steal from the SmartDry van.*" It is clear from the video evidence of Mr Chisholm's second visit to the property that he had tried to take one of the bricks that was being installed in the property and was told "*You can't take that*"; and that he was then offered "*an old one … the older model*" which he was allowed to take away with him. Matt had clearly not recalled, or had not related, the whole account of the incident to Iwan and Ms Zarco. Mr Chisholm did not attempt to steal a brick: he had attempted to take one but he was told that he could not do so and he was then handed an older brick. I have no doubt that Iwan (and Ms Zarco) genuinely believed what they had been told by Matt; but they had not been provided with a full and accurate account of all that had happened. Subject to this one exception, I accept the defendants' evidence; and I reject the claimants' evidence as unreliable. I should add that I do not criticise the defendants for not calling Matt to give evidence: I accept the evidence of Iwan and Ms Zarco (which derives support from the evidence of Mr Ball) that Matt left the defendants' employment some two to three months after the installation was carried out at Mr Martin's property in circumstances where it was understandable that the defendants would not want to approach him to give a witness statement. His departure pre-dated by some months the service of the claimants' particulars of claim.

80. Frank described the visit to Mr Martin's property as a '*spot-check opportunity*'. He accepted that he could not hear any of either of the two conversations between Matt and Mr Chisholm from the car (which, from the distance travelled by Mr Chisholm, I find was parked much further away from Mr Martin's property than the 25 yards asserted by Frank and Mr Chisholm). Of the two transcripts of the video recordings, I am satisfied that the Auscript transcript is the more complete, and the more accurate, version. It is clear, both from the second video and the related Auscript transcript, that Mr Chisholm asked to take one of the bricks being installed at Mr Martin's property and was told that he could not do so but he was then given an '*older model*' instead of an example of the bricks being installed by the Smartdry engineers. After Mr Chisholm left the property for the second time with the black brick the transcript accurately records him as saying:

> "*Can have an old one. (Inaudible) It doesn't say Schrijver System on it. I can't go round (inaudible) that doesn't say Schrijver System on it. Grrr. Can't see anything written on that at all. (Inaudible)*"

It is clear from the video that Mr Chisholm could not see any writing on the brick when he looked at it on his way back to Frank in the car. Mr Chisholm accepted that this was the case in cross-examination, but he said that he had been walking fast down the road and that he could clearly see the name 'Schrijver' when he looked at the

brick when he was seated in the car. I reject this evidence as inconsistent with the evidence of Mr Chisholm's own video recording. It is clear from the last section of the second video that Mr Chisholm had twice looked closely at the brick to try to discover any writing upon it, and that he had slowed down before uttering the words: "*Can't see anything written on that at all.*" He had clearly looked closely at the brick on that second occasion, and he was disappointed that he could not see anything written on it at all. I reject the claimants' evidence that Mr Chisholm had not actually looked at the brick closely before returning to the car. At one point during his cross-examination, Mr Chisholm suggested that had the claimants wanted to catch the defendants out, they would have edited the video by cutting out his concluding monologue. This monologue does not appear in the claimants' version of the transcript, and it is likely that its existence (and significance) were simply not appreciated by the claimants. In order to explain away Mr Chisholm's failure to identify any words on the black brick, Frank claimed that one had to look at it very closely against the light, but that when one did so the word 'Schrijver' was visibly '*indented*' into the brick, rather than raised up as in the brick which had allegedly been produced at Mrs Jones-Bottoms's property. I reject as unreliable the evidence that the word 'Schrijver' was visible on the black brick. Both Frank and Mr Chisholm said in evidence that they had taken photographs of the black brick with a newspaper behind it. No copies of any such photographs have ever been produced. Had they existed, and supported the claimants' case, they would have been relied upon by the claimants in evidence. Further, the words 'Schrijver System' on the black brick photographed at court were raised and not indented into the brick; and the brick has the old rectangular, and not the new, diagonal, corners: see 2/772-4. I reject the evidence of Frank and Mr Chisholm that the 'Schrijver' name appeared on the black brick that was handed to Mr Chisholm by Matt.

81. I also reject the evidence of Frank and Mr Chisholm that the two white bricks that Frank unlawfully removed from Mr Martin's property bore the name 'Schrijver' on them. Had they been, I would have expected this to have been recorded in contemporaneous photographic or video evidence taken at Mr Martin's property, or in Frank's car, and that such evidence would have been produced in support of the claimants' case. Frank said in cross-examination that photographs of the bricks had been taken at FSUK's office by Lukasz Hylinski, but these are not mentioned in the latter's witness statement nor were they produced in evidence (as they would have been if they both existed and supported the claimants' case). I find that Frank took the two white bricks from the wall of Mr Martin's property because Frank had failed to find any evidence incriminating the defendants on the black brick. I find that he failed to find any such evidence on the white bricks also. There is absolutely no reason why the defendants would have been installing obsolete Schrijver-branded bricks over a year and a half after the conclusion of the CSA. I find that the bricks produced at court on 30 July 2019 were not the bricks that were obtained during the visit to Mr Martin's property in September 2018. They are an earlier version of the bricks that Smartdry has been using since August 2016, with rectangular rather than diagonal corners. They could have been obtained by Frank before the conclusion of the CSA or from his brother, Harm. In view of this finding, nothing has been lost by my inability to see, and touch, the bricks themselves, as distinct from viewing them remotely as they were displayed to me during the trial by Frank's assistant, Anna.

82. For all of these reasons, I find that the claimants have not established alleged breach (6). Had I found otherwise, I would have found that the claimants had failed to establish any tangible financial loss as a result of this breach. Even if the name 'Schrijver' had appeared on any of the bricks installed or present at the property on 27 September 2018, this is no way influenced Mr Martin's decision to proceed with a Smartdry damp protection system, in preference to one from FSUK, because Mr Martin: (1) had already ordered a Smartdry installation before the Smartdry van arrived to carry it out: see his last answer on 2/748: "*I accepted the quote verbally over the phone and then the system was then installed*"; and (2) Mr Martin was not present at the property during the installation: see the first answer on 2/749: *"... I'm a lorry driver. I wasn't even at the house when the installation occurred yesterday.*"

Alleged breach (7): Failure to take responsibility for pre-CSA installations

83. The claimants allege that Smartdry failed to inform one of its customers, Mrs Ann McKenna, of its re-branding exercise. When she identified problems with mould at her daughter's property on Upper Richmond Road West in London SW14 in January 2019, she says that she tried to contact Smartdry, but without success, and that she had to contact FSUK instead. That, it is alleged, amounted to a breach of clause 7.3 of the CSA, by which the defendants acknowledge that they are responsible for the damp control systems that they had already installed in the UK at the time the CSA was entered into. The defendants admit that they are responsible for the system that was installed at the property of Mrs McKenna's daughter but they deny that they failed to assume such responsibility. Ms Zarco addresses this particular incident at paragraph 15 of her first witness statement. She recalls that Mrs McKenna called the Smartdry offices on 31 January 2019 stating that she was still having damp issues at her property. Ms Zarco asked her, and Mrs McKenna agreed, to send Smartdry an email with photographs of the damp issues she was having so that they could assess the situation and, based on that, Smartdry would set up a meeting. Smartdry's record of this call appears at 2/673 and it corroborates Ms Zarco's evidence. Mrs McKenna never sent Smartdry any email with photographs and she never followed up further with them. In cross-examination, Mrs McKenna said that she could not remember being asked to send any photographs in to Smartdry's offices although she acknowledged that this was possible. She accepted that she had not sent any photographs to Smartdry although she could not remember why not.

84. Smartdry had sent Mrs McKenna a standard form letter informing her of the re-branding exercise on 12 December 2016 at 2/563. It was not suggested in cross-examination that this letter had not been sent and I find that it was. Mrs McKenna says that she never received this letter, possibly because it was sent to 46 Upper Richmond Road (which is in Putney and was the address recorded in Smartdry's records: see 2/673) whereas the correct address is 46 Upper Richmond Road **West**, which Mrs McKenna says is in Mortlake (although I note that the postcode was correctly stated). I accept Mrs McKenna's evidence that she never received this letter, either because it was never delivered or because her daughter (to whose address it was sent) never passed it on to her. However, that is no fault of the Defendants. The telephone number that Mrs McKenna initially rang to complain about her damp problems was an old, and obsolete, number and that is why she went on to contact FSUK, having accessed its web-site. Mrs McKenna was confused; but, as the defendants submit, this was post-CSA confusion which was caused by her failure to

receive, and so act upon, the letter which had been sent out by Smartdry as part of the re-branding exercise. This confusion was then compounded by Ms Kinghorn's failure to explain to Mrs McKenna that FSUK had not carried out her damp control installation, and so was not responsible for rectifying it, and by Frank's subsequent visit to the property. In accordance with clause 7.3 of the CSA, FSUK should simply have referred the matter to Smartdry. The failure of the defendants to carry out any necessary remediation works was attributable to Mrs McKenna's unexplained failure to follow up on her phone call with Ms Zarco, which was not any fault of the defendants. I find that the alleged breach of clause 7.3 has not been established. In any event, there is no evidence (or allegation) of any incident other than that involving Mrs McKenna from which it follows that if this has caused any loss to the claimants at all, such loss is entirely nominal. No specific actual financial loss is alleged or established by the claimants.

Alleged breach (9): Reviews on the Which? Trusted Traders website

85. The final alleged breach is the failure to change or remove reviews of Smartdry on the Which? Trusted Traders website which contain references to 'Schrijver', allegedly in breach of clauses 7.1(A) and 8.4(A) and Schedule 2 para (14) of and to the CSA. The reviews complained of are at 2/212-216. There were five reviews in total which included the word 'Schrijver' and one which contained the misspelt word 'Schrijder'. These reviews dated from between 11 April 2014 and 29 July 2016. There are a further five reviews in evidence which do not use the word 'Schrijver' or any similar word. In support of this allegation, the claimants rely upon an email (at 2/211) sent on 26 November 2018 from Ashleigh Cooper, Client Relationship Executive at Which? Trusted Traders, to Ms Kinghorn and Frank which states: *"… our reviews can be amended/deleted after they are posted within the discretion of our management team. If needed this can technically be done within minutes but depending on the work load of the department this can take a few days to complete.*" This email formed one of the appendices to the points of claim served on 25 April 2019. It is not clear whether it had previously been produced to the defendants.

86. The defendants deny this alleged breach. Their evidence and case is that these reviews were posted before the entry into the CSA, and by customers of Smartdry and not the defendants. The defendants say that they were unable to take these reviews down and that the CSA did not oblige them to terminate their Which? Trusted Traders registration altogether merely because of the existence of pre-CSA customer testimonials on its web-site. They address this allegation at paragraph 39 of Iwan's second witness statement (referring to a letter dated 18 November 2016 and an exchange of emails in December 2016 at 2/674 and 675 respectively) and paragraph 16 of Ms Zarco's first witness statement. The defendants say that their experience does not accord with the practice spoken to by Ms Cooper. When Iwan attempted to change the name 'Schrijver' to 'Smartdry' in the existing customer reviews in December 2016, he was told in an email sent by Which? Trusted Traders on 29 December 2016 (at 2/675) that they were not able to change the name as it would indicate that the business had always been trading as Smartdry. That is consistent with what Ms Zarco was told when she telephoned Which? Trusted Traders on 31 July 2019. This was that "*the only way to remove a review is if a customer requests the review to be removed*". Ms Zarco then asked if she could remove the entire profile and make a new one but she was told that the profile would only be taken

down if Smartdry's membership was cancelled. Cancelling Smartdry's membership was not considered to be a viable option because it would be detrimental to their business, and the Which? Trusted Traders name was posted on their marketing materials. Ms Zarco persevered in attempting to remove the Schrijver reviews and at some point in August 2019 she finally succeeded in getting them removed without closing Smartdry's membership. Ms Zarco was not challenged in cross-examination about the accuracy of paragraph 16 of her first witness statement. It is the defendants' case that they were under no obligation to procure the removal of the references complained of in the reviews written by third parties; and that it was certainly not a breach of the CSA for the defendants to have failed to persuade Which? Trusted Traders to amend the customer reviews when they had told them on two separate occasions that that was not possible.

87. The claimants say that it is not simply a coincidence that the reviews were removed shortly after Ms Zarco had first renewed the defendants' efforts to secure their removal on the day after the hearing before Deputy Master Henderson on 30 July 2019. They also assert that the defendants should have cancelled Smartdry's Which? Trusted Traders' membership if this was the only means to secure the removal of the reviews from their web-site and that it is simply not a sufficient excuse for Smartdry to say that this would not have been in their own commercial best interests. The defendants were required to comply with the terms of the CSA.

88. I accept the defendants' evidence that they did all that they reasonably could to secure the removal of reviews referring to the name 'Schrijver' from the Which? Trusted Traders' web-site. Against that background, I reject the claimants' case that the continued appearance of the name 'Schrijver' in customer testimonials appearing on the Which? Trusted Traders' web-site amounted to a breach of the CSA. Schedule 2 para (14) required the defendants to cease to use the name 'Schrijver' in customer testimonials. The defendants were not themselves actively using that name in customer testimonials. In the face of the information they had been given by Which? Trusted Traders, I do not consider that the defendants were obliged to do any more by way of seeking to secure the removal of reviews referring to the name 'Schrijver' from the Which? Trusted Traders 'web-site. I do not consider that the CSA obliged the defendants to cancel their membership of the Which? Trusted Traders' scheme. This alleged breach of the CSA is not established. I also note that the claimants have not provided any evidence that the defendants acquired any additional customers or business, or that the claimants lost any customers or business, as a result of the appearance of these reviews on the Which? Trusted Traders' web-site.

VI: Quantum

89. In view of my findings on the various alleged breaches of the CSA, I can deal with the issue of quantum shortly. In support of their claim to recover substantial damages the claimants rely on three letters from their accountant, Mr Dhirajlal F Shah. He states that FSUK's turnover has dropped substantially due to a third party using the Schrijver System and that, as a result, the company has suffered significant losses. He produces financial summaries relating to FSUK (at 3/79 and 80) showing net turnover and profit and loss figures for the year ending 31 March in each of the years 2013 to 2019, and he sets out his calculation of the resulting loss in the value of the company. There is no challenge to the actual underlying figures. These show that turnover rose in each of the years 2013 to 2015, it fell in 2016, it rose again in 2017 and it then fell

dramatically in 2018 and further still in 2019. However, there is no evidence, reasoning or analysis to support Mr Shah's assertion, and the claimants' case, that this loss of turnover, and any resulting loss of profits and consequent decrease in the value, of FSUK were in any way caused or contributed to by any of the alleged breaches of the CSA. They may just as well have been caused by Frank's stress-related mental health problems. In this connection, I repeat Ms Mann's assessment that Frank's "*increasing fears and depression have begun to cloud his perspective and has compromised his ability to function effectively in his business life*". In his oral closing Mr Aikens made the point that FSUK's turnover had actually increased very significantly after Smartdry had first started using 'Schrijver' as its main brand in 2013. Although it had fallen in 2015-6 it had increased again in 2016-7 but it had then fallen dramatically in 2017-18 and further still in 2018-19. How, asked Mr Aikens rhetorically, could the claimants sensibly demonstrate that the very limited use of the Schrijver brand alleged after the Smartdry rebrand had caused such a dramatic fall in FSUK's turnover when the much more extensive use of the Schrijver brand before the entry into the CSA had been accompanied by an increase in FSUK's turnover. Mr Aikens also submitted that the only evidence of confusion over the two companies which might have resulted in any discernible loss to FSUK had involved Mrs McKenna; but he pointed out that her confusion had: (1) related to a pre-CSA installation and (2) been compounded by the claimants themselves.

90. Further, it is clear from the second set of figures produced by Mr Shah (at 3/80) that Care Brick, another company 100% owned and controlled by Frank, had a turnover of about £250,000 during each of the years ended 31 March 2018 and 2019. The substantial drop in FSUK's turnover coincided with Care Brick's entry into the market. In her letter, Care Brick's general manager, Mrs Paluch, confirms that she was very aware that this company was a separate business entity to FSUK and that she received specific instructions that the two brands (the Care Brick System and the Schrijver System) and the two companies (Care Brick and FSUK) were to be totally separated. She says that both companies sell different products, which carry different patent numbers and are marketed separately, and that both companies employ their own staff. Although, in cross-examination, Frank would not accept that competition from Care Brick inevitably causes loss to FSUK, he did accept that both companies installed ventilation systems, that he had incorporated Care Brick in order to try to increase market share by offering a separate brand and product which could be offered to customers who decided not to do business with FSUK, and that Care Brick offered a cheaper product than FSUK. In those circumstances, it must be inevitable (and I so find) that Care Brick's business has been undermining FSUK's market share, particularly when it was undercutting FSUK on price, and that at least some of FSUK's loss of turnover has been due to the presence of Care Brick in the same market place as FSUK and Smartdry. Frank did not challenge the proposition that Smartdry's turnover had remained more or less steady over the years at around £300,000 a year, which is scarcely consistent with the wholesale diversion of business to Smartdry which is alleged by the claimants. Frank's explanation for this (which I reject as irrational and paranoid speculation on his part) was that Iwan was too clever to show his attack on the claimants' brand so he kept his turnover figures steady. Mr Aikens described this in closing as an example of Frank losing touch with reality, a charge that Frank rejected in his oral closing, asserting instead that the defendants had taken what was not theirs. On this issue, I find the position to be as advanced by Mr Aikens.

91. I find that the claimants have not established that FSUK's loss of turnover and profitability have been caused by any conduct on the part of Smartdry. For the reasons set out above, I accept the defendants' submission that the reduction in FSUK's turnover has nothing whatsoever to do with any of the breaches of the CSA that the defendants are alleged to have committed.

92. At paragraph 94 of his trial skeleton, Mr Aikens submits that even if the claimants were to succeed in establishing all of the alleged breaches, the loss suffered by them will have been '*vanishingly small*'. He addresses each of the alleged breaches in turn:

(1) The unauthorised keyword bidding by Boutique, Smartdry's digital marketing agency, resulted in a relatively very small number of impressions and click-throughs and no new instructions.

(2) There is no evidence that anyone ever went to the web-site www.schrijversystem.com looking for FSUK and failed to find its actual website such that it has lost business as a result.

(4) The brochure of which the claimants complain was very clearly branded 'Smartdry' so it is very unlikely - and there is no evidence - that anyone ever confused Smartdry and FSUK. It is also very unlikely that anyone would have decided to instruct Smartdry purely as a result of reading the references to 'Schrijver' in the offending brochure. Again, there is no evidence to support any submission that they would have.

(5) Even if all of Smartdry's customers were shown the same brick as was allegedly produced by Mr Pope at Ms Jones-Bottoms's property, the vast majority of them would not have noticed any writing on the brick at all, let alone that the faint engraving (which had been at least partially obliterated) read 'Schrijver'. Again, the idea that this had any negative effect on FSUK's business in circumstances where the defendants had so clearly and successfully rebranded to Smartdry is fanciful.

(6) The installation of Schrijver-marked bricks would not have even been noticed by any of Smartdry's customers, let alone have resulted in any negative effect on FSUK's business of any sort.

(7) Apart from Mrs McKenna, there is no evidence, or allegation, of any other failure to take responsibility for a damp control system that Smartdry had installed. It follows that even if the defendants did in fact fail to accept responsibility for that installation, and if that has caused any loss to the claimants, that loss is entirely minimal.

(9) The claimants complain of a total of five Which? Trusted Traders reviews containing the name 'Schrijver' and one which contains the misspelt word 'Schrijder'. There is no evidence that this had any effect on potential customers of either FSUK or Smartdry, let alone caused any significant loss to the claimants.

93. I accept all of these submissions as being supported both by the evidence and by commercial common sense. I find that had the claimants established any, or all, of the alleged breaches of the CSA, they have established no resulting loss or damage.

VII: Conclusion and disposal

94. At paragraph 95 of his trial skeleton Mr Aikens concluded by confessing that it was not known why the claimants had pursued this action. He submitted that it had no merit and that the claims for breach of the CSA should be dismissed. Even if it were found that there had been any breaches, they were said to be of a purely technical nature and they had caused no discernible loss to the claimants. Their business might be suffering, and Frank might genuinely feel that he had been wronged, but any loss was very clearly not capable of being ascribed to any of the alleged breaches of the CSA by the defendants. Again I accept those submissions as being supported both by the evidence and by commercial common sense.

95. For all of the reasons set out above, I find that the claimants have established none of the alleged beaches of the CSA, nor have they established any resulting damage or loss. This claim is therefore dismissed.

96. I invite the parties to submit, through CE-file, written submissions on the form of order, costs, any application for permission to appeal, and any other consequential matters by 4.00 pm on Monday 10 August 2020. Since he is counsel for the successful party, I also direct Mr Aikens, by the same time, to file a draft minute of order. I hope to be able to deal with all such matters on paper and without a hearing. I thank both Mr Frank Schrijver and Mr Aikens and his solicitors for their assistance in this matter.

Addendum

97. At paragraph 96 of my substantive judgment I invited written submissions on the form of order, costs, any application for permission to appeal, and any other consequential matters by 4.00 pm on Monday 10 August 2020. At Mr Aikens's request, I subsequently extended the time for these to 4.00 pm on Wednesday 12 August. Shortly after 12 noon on that day I received Mr Aikens's written submissions, his draft form of order, and supporting documentation. Shortly thereafter, Chancery Judges' Listing forwarded to me an email they had received from Ms Kinghorn on behalf of the claimants at 1.18 that afternoon. At paragraph 54 of the substantive judgment I had recorded that I had heard nothing more about any application by the claimants to adduce further evidence in this case before I handed down my judgment on 30 July 2020 despite the response which I had directed should be sent to the claimants. The claimants' letter referred to this paragraph of my substantive judgment but made it clear that they had not received any response from the court in the terms I had directed. The letter requested the court to allow the claimants 14 days to adduce further evidence by issuing an application supported by the appropriate evidence. I immediately made inquiries of Chancery Judges' Listing as to what had apparently gone wrong. As a result of those inquiries, later that afternoon I directed that a response should be sent to the claimants in the following terms:

> "Your letter of 17 July was forwarded to HHJ Hodge QC by email at 11.00 am on 21 July. HHJ Hodge responded to Chancery Judges Listing at 11.14 am the same day stating: 'Please respond to the Claimants: If the Claimants wish to apply to adduce further evidence they must issue an application in proper form, supported by appropriate evidence, and paying the appropriate fee and serve a copy on the

> Defendants. They should seek the Defendants' consent to it being disposed of on paper.' At 11.15 am he received an acknowledgment: 'Thank you for your directions.'
>
> HHJ Hodge QC assumed that his direction had been followed. He heard nothing more and so he handed down his judgment at 4.00 pm on 30 July, before the end of the Trinity Term sittings. He is surprised that you should have waited until 11 August to point out that you had received no response to your letter of 17 July, particularly in view of the terms of paragraph 54 of his judgment
>
> Having made inquiries of the member of staff concerned, it would appear that she simply forgot to send the Judge's directions to the claimant (for which she apologises).
>
> Having already handed down his judgment, which sets out his findings of fact on the evidence that was before him at the trial, HHJ Hodge QC does not consider that it would be fair to the parties for him to receive any application to adduce any further evidence."

I understand that this response was set out in an email from the court sent on 13 August 2020.

98. In forming my assessment I had in mind that: (1) I had already not only formed, but also expressed, a final judgment about both the reliability and the credibility of Mr Pope as a witness which would also be perceived as informing my assessment of the other witnesses and evidence in the case. (2) As a result, there would inevitably be "real ground for doubt" as to whether I could be perceived as undertaking an impartial and unbiased re-appraisal of Mr Pope's evidence, and its impact on the other evidence in the case. In this regard, I had firmly in mind the recent decision of the Court of Appeal in the case of *Re C (A Child)* [2020] EWCA Civ 987, albeit that that was a case about whether a judge should recuse herself from continuing to hear a case that had not yet proceeded to judgment rather than about whether a judge should receive further evidence post-judgment. (3) The failure of the claimants to take any steps to follow up their initial request to rely upon further evidence despite knowing that I was in the course of preparing my substantive judgment. (4) The defendants' legitimate expectation that they should be entitled to enjoy the benefits of my substantive judgment in their favour. (5) The constituent elements of the overriding objective of dealing with the case justly and at proportionate cost.

99. I note that in his response submissions, Mr Aikens adds that claimants were well aware of the need to make applications in order to rely on further evidence as they had been told to make, and had in fact made, a number of such applications during the course of these proceedings. He submits that they therefore suffered no prejudice by not receiving a response to their email to the court.

100. Having received Mr Aikens's submissions, I allowed the claimants an opportunity to respond, which they did by way of written response dated 20 August. Mr Aikens responded by way of reply submissions on the same day.

101. Mr Aikens has suggested four minor corrections to paragraphs 12, 35, 86 and 89 of my substantive judgment. I am grateful for these suggested corrections which I

accept and I have incorporated them in my revised substantive judgment. They do not in any way affect any of my reasoning or my conclusions.

102. Paragraph 1 of Mr Aikens's draft order records that the claimants' application is dismissed. The defendants submit that the court should go further and also record that the application was totally without merit pursuant to CPR 23.12(a). Such an order is said to be justified by the court's overall finding in paragraph 94 of my judgment. The defendants do not ask the court to make a civil restraint order at this stage, but given the general conduct of the claimants and, in particular, the number of applications made by the claimants in the context of this overall application, it is said to be a realistic prospect that the defendants will need to ask the court to do so at some point in the future. Paragraph 2.1 of PD 3C provides that a limited civil restraint order may be made where a party has made a minimum of two applications which are totally without merit.

103. In response, the claimants say that they made the underlying application because they had identified breaches of the CSA. They genuinely believed that the defendants were deliberately damaging the claimants' business by breaching the CSA. They point out that the defendants had sought to have all nine alleged breaches struck out but they had failed in this attempt because Deputy Master Henderson had identified seven breaches in relation to which they had produced sufficient evidence that the matter ought to proceed to a full hearing.

104. I have already made it clear in my judgment that the underlying application was without merit. The real issue here is whether it was "**totally**" without merit. Deputy Master Henderson allowed seven of the nine alleged breaches to proceed to trial because he considered there to be sufficient evidence to warrant a full investigation of the allegations with oral evidence. I am satisfied that upon a full investigation of the evidence at trial, the defendants have demonstrated that the application was **totally** without merit. Since the court considers that the application was totally without merit, the court's order is required to record that fact.

105. Mr Aikens addresses the appropriate costs order, and the basis of assessment, at paragraphs 5 to 7 of his written submissions. Paragraph 2 of his draft order contains what he submits is the appropriate order for costs. The claimants are the unsuccessful party so, pursuant to the general rule in CPR 44.2(2)(a), they should be ordered to pay the defendants' costs (excluding, for the avoidance of doubt, any costs that are already the subject of an earlier order of the court, but including any costs that have thus far been reserved) since it is the defendants who are the successful parties. As to the basis of assessment, Mr Aikens refers to para 44.3.8 of the 2020 edition of *Civil Procedure* which states that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) are such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs. The defendants submit that this is a paradigm case where costs should be assessed on the indemnity basis. They rely upon the following four factors:

(1) Dishonesty. The court has made a number of specific findings that Frank has lied or he has procured other witnesses to lie: see, in particular, paragraphs 43, 45, 47 and 48 of the judgment.

(2) The claimants' conduct more generally. In paragraph 7 of the judgment, the court found that the claimants had shown a consistent disregard for court procedures and rules. This continued and was amplified during the trial itself: see paragraph 42 of the judgment, in which all of the defendants' criticisms of Frank's conduct during the trial were held to be justified.

(3) The offer to settle. On 6 December 2019, the defendants made a Part 36 offer to settle these proceedings: see pages 4-5 of the accompanying clip of "Without Prejudice Save as to Costs" correspondence. The defendants offered to pay the claimants £15,000 in full and final settlement of the full amount of the claim. That offer was a genuine attempt to settle the proceedings in accordance with CPR 36.17(5)(e). The claimants did not accept that offer, and they have failed to obtain a judgment more advantageous than that offer. The automatic consequence under CPR 36.17(3) is that the defendants should be awarded their costs from the date 21 days after the offer was made, together with interest on those costs. However, the defendants say that the claimants' failure to accept what was always an extremely generous offer also supports assessment of the costs on the indemnity basis throughout.

(4) The amount claimed. The claimants had massively exaggerated the value of the claim (at £7.5 million): see paragraphs 90 and 91 of the judgment. The court also accepted the defendants' overall characterisation (in paragraph 94) that the claim had no merit and that any loss suffered by the claimants' business was very clearly not capable of being ascribed to any of the alleged breaches of the CSA by the defendants.

106. The claimants contest the defendants' submission that the costs should be paid on the indemnity basis. They dispute that the claimants and their witnesses were dishonest; and they assert that it was Mr Pope who lied and was dishonest during the trial. The claimants say that they feel aggrieved by the loss of the opportunity, after trial, to challenge Mr Pope's evidence. They say that the claimants have complied with all adverse costs orders throughout the proceedings. The claimants seek permission to appeal, or they seek to persuade me to investigate whether or not Mr Pope was telling the truth.

107. I accept Mr Aikens's submissions. I am satisfied that costs should follow the event and should be paid by the claimants to the defendants. There is no reason to depart from the general rule. For the reasons given by Mr Aikens, those costs should fall to be assessed on the indemnity basis throughout. This is an application that should never have been brought or persisted with. Both the conduct of the parties, and the other particular circumstances of the case (as outlined at paragraph 105 above), are such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs. The court can only deal with the case on the basis of the evidence that was adduced, and evaluated, at trial. I have already adjudicated upon that evidence. Compliance with previous costs order is irrelevant to the ultimate incidence, or the basis of assessment, of costs.

108. In paragraph 3 of the draft order, the defendants seek a payment on account of the costs ordered to be paid in paragraph 2 in the sum of £100,000. CPR 44.2(8) states that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good

reason not to do so. I find that there is no good reason not to do so in this case. Mr Aikens has referred me to paragraphs 23 and 24 of the judgment of Christopher Clarke LJ in *Excalibur Ventures v Texas Keystone Inc* [2015] EWHC 566 (Comm). Mr Aikens acknowledges that in determining what is a reasonable amount to order in this case, it is first necessary to estimate those costs which will be covered by the order in paragraph 2 of the draft (i.e. those of the action which are not already the subject of an earlier order of the court) before estimating the proportion of those costs that are likely to be allowed on detailed assessment. Mr Aikens sets about this task at paragraphs 12 to 14 of his written submissions. This is said to produce a figure of just under £110,000. Mr Aikens submits that just under £110,000 is a reasonable sum to have incurred in relation to a claim of this nature, which was determined at a trial which occupied a total of three court days, involving the live evidence of nine witnesses, and where the claimants were unrepresented (which on the most practical level meant that the defendants had to prepare all the trial bundles and take on the other administrative responsibilities which would fall on a claimant if represented). The defendants are therefore said to be likely to recover very close to that sum on a detailed assessment, especially taking into account the interest which would have accrued on that sum.

109. The sum sought by way of payment on account (£100,000) is, the defendants accept, a large proportion of the total estimated to have been incurred. However, that proportion is said to be justified in this case for the following reasons:

(1) The sums incurred are eminently reasonable for a claim of this nature.

(2) The defendants' costs fall to be assessed on the indemnity basis.

(3) The sum does not take into account interest on costs.

(4) The claimants' lack of representation, and conduct in this case so far, shows that (a) agreement on the final sum owed is highly unlikely and (b) detailed assessment will inevitably be a difficult, lengthy and costly process for the defendants. They should, in the meantime, be deprived of as little of the costs owed to them as possible.

110. Mr Aikens points out that the claimants were ordered to provide, and paid into court, security in the sum of £112,450. Paragraph 3 of the draft order therefore specifies that £100,000 be released to the defendants from the funds held by the court, with the remainder to be retained until determination of the detailed assessment proceedings or agreement between the parties.

111. The claimants say that they do not understand the defendants' costs summary and so they cannot agree to it. For the reasons they set out in their written response, they say that they would be prepared to submit to an order that 50% to two-thirds of their costs be paid to the defendants on account pending a final assessment of the costs, and subject ultimately to the outcome of any appeal.

112. I am satisfied that in all the circumstances of the present case, a reasonable sum to order to be paid on account of the costs which fall to be assessed on the indemnity basis is £90,000. This should be paid from the funds paid into court by way of security for the defendants' costs.

113. I refuse the claimants permission to appeal. I am satisfied that there is no real prospect of the claimants establishing on appeal that my decision was either wrong or unjust because of a serious procedural or other irregularity in the proceedings before me. There is no other reason (still less any compelling reason) why any appeal should be heard.

114. I approve Mr Aikens's draft order save that: (1) £90,000 should be substituted for £100,000 as the amount of the interim payment on account of costs in paragraph 3 and (2) there should be a final paragraph recording that the claimants have been refused permission to appeal and that an appeal lies to the Court of Appeal with the permission of that court. I would invite Mr Aikens to upload an amended draft order to the CE-File for this case.