

PATENTS ACT 1977

APPLICANT	DLP Limited
ISSUE	Review of Opinion 14/06 – whether patent GB2394175B is infringed
HEARING OFFICER	Roger Walker

DECISION

- 1 This is a review of an opinion (“the Opinion”) under section 74B of the Patents Act. The Opinion was requested by DLP Limited (“DLP”) and addressed the question whether patent number GB2394175B (“the patent”) is infringed. No observations were submitted on the Opinion request and there is no third party involved in the present review. The Opinion concluded that a shower tray, stated to be made and sold by Scrabo Bathing Care (“the Scrabo tray”), did not infringe the patent under section 60(2) of the Patents Act.
- 2 As proprietor of the patent, DLP has applied for a review under section 74B and rule 77H(5) of the Patents Rules 1995; the latter states:

(5) The application may be made on the following grounds only-

(a)

(b) that, by reason of its interpretation of the specification of the patent, the opinion wrongly concluded that a particular act did not or would not constitute an infringement of the patent.

The purpose of a review under section 74B has been explained in previous reviews^{1,2}. Nevertheless, it is worth making the point here that opinions are not binding for any purpose nor will any part of the present Opinion, which might remain after this review, be binding for any purpose. Further, I am not providing a second opinion; I am reviewing whether the examiner, by reason of his interpretation of the specification of the patent, was in error in reaching his conclusion.

¹ Roger Colston Downs' patent, BL O/025/07, 18 January 2007.

² Ms Penelope Mary Townsend's patent, BL O/078/07, 16 March 2007.

- 3 DLP initially requested a hearing on this matter but subsequently indicated that it was content for the review to be conducted solely on the basis of the papers.

The Patent

- 4 The patent relates to a shower tray and although the Opinion briefly describes the construction of a tray according to the invention, I will need to consider the patent in more detail later in this review.

The Opinion

- 5 The examiner identified *Kirin-Amgen*³ as the current authority on claim construction and he set out three key principles taken from Lord Hoffmann's speech in that case. Turning to the patent, he then decided that he must construe what was meant in claim 1 by the references to "A shower tray comprising a trough along one or more sides of the tray", and "means for clamping flexible floor covering material and/or a flexible edge of a ramp device in the trough(s)". For the former phrase he considered first what would be understood by the reference to "a trough" and then how to construe the word "comprising". For the latter phrase, he construed the "means for clamping" in terms of its function.
- 6 The examiner interpreted the reference to a "trough" as representing a long narrow channel capable of retaining water. On this basis he accepted that, when installed, a trough was formed between a vertical edge of the Scrabo tray, a horizontal lip of the tray and a vertical edge of the floor into which the tray was set.
- 7 He then considered how the word "comprising", as used in the phrase "A shower tray **comprising** a trough along one or more sides of the tray", limited claim 1 of the patent. He noted that the drawings and description clearly and consistently disclose a shower tray with an "integral" trough or a trough "formed from the material of the tray itself" and suggested that this is what the patent proprietor meant by the words of claim 1. He relied, in particular, on a passage on page 13 of the specification, which identifies an advantage associated with having the trough feature "within" the shower tray. Ultimately, the examiner concluded that the claimed shower tray itself must include a trough along one or more of its sides. From this he opined that claim 1 of the patent does not include within its scope an arrangement whereby a trough is formed between the tray and the flooring. Thus, in his opinion the Scrabo tray, when installed according to instructions, did not infringe the patent.
- 8 The examiner then considered for completeness the "means for clamping" and concluded that it is some kind of device which allows the floor covering material or flexible ramp edge to be secured in the channel. In doing so he dismissed a suggestion that the "means for clamping" had to provide a water tight seal. Finally, he took the view that a capping strip of the Scrabo tray, which presses

³ *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] R.P.C. 9

down on floor covering material, would “infringe” the “means for clamping” of claim 1.

The Grounds for the Review

- 9 In setting out its grounds for a review DLP claims that the examiner reached the wrong conclusion on infringement because he was wrong on his construction of the claim, both in relation to “along one or more sides of the tray” and to “means for clamping flexible floor covering material ... in the trough(s)”.
- 10 There is no dispute over the examiner’s interpretation of what is conveyed by the word “trough” and I believe this is correct.

“Comprising a trough along one or more sides of the tray”

- 11 DLP agrees that the relevant authority on the question of construction is *Kirin-Amgen* but it argues that in applying the law the examiner construed claim 1 of the patent too narrowly. In particular, DLP takes the view that the examiner entirely failed to take into account an unusual feature of the present case. Thus, rather than the usual pattern, according to which the literal meaning of the claim is narrow and the patentee seeks to broaden it by reference to the rest of the specification, here the literal meaning of the words is broad – in the sense that the words do not require the trough to be made from the material of the tray itself. DLP stresses that such a limitation could not possibly be inferred out of “A shower tray comprising a trough along one or more sides of the tray”. Nevertheless, DLP accepts that this does not of itself preclude the possibility that the skilled person, having read the specification as a whole, would interpret the words more narrowly but cautioned that the skilled person would ordinarily assume that the patentee had chosen the words of the claim carefully and intended them to mean what they say.
- 12 DLP also accepts that the drawings show exclusively what the examiner called an “integral trough” but asserts that they are, literally, only illustrative of the claimed invention and do not define the invention. Thus, there is no reason for the skilled person to conclude that the patentee intended the drawings to set out the limits of the invention in place of the usual words of the claim.
- 13 DLP further contends that the examiner placed far too much weight on the word “within”, as used in the statement “*The peripheral trough feature **within** the shower tray allows the installer a wide margin of error.....*” on page 13 lines 10 to 11 of the specification, and in so doing imposed an improper gloss on the clear words of claim 1. DLP implies that the examiner concluded that the skilled person would understand the patentee to have chosen the word “within” with care and precision, yet was casual and imprecise in its choice of the words used in claim 1.
- 14 According to DLP the correct starting point should have been with the clear literal meaning of the words of claim 1, which in its view do not require the trough to be integral, and one word on page 13 (“within”) would not be enough to lead the skilled person to understand that the patentee was using the words of claim 1 to mean something quite different.

- 15 DLP alleges that the examiner was also wrong in law to ignore the purpose of the invention. In its view the examiner had wrongly approached construction as if the law on purposive construction had been abandoned by the House of Lords in *Kirin-Amgen*. DLP also points out that Lord Hoffmann indicated that the Protocol questions would often provide a useful guide to construction. Therefore, a skilled person would construe a claim, where possible, in conformity with his understanding of how an invention works.
- 16 Applying this to the present case, DLP contends that the purpose of the invention is to create an effective water seal between the floor covering and the tray, while keeping installation simple. This is achieved by the presence of a trough along at least one side of the tray, as described in the above mentioned passage on page 13 of the specification. From this DLP asserts that the skilled reader would realise that for the trough to perform the function claimed for it, it would not matter whether the trough is integral or not. In either case the installer would have a wide margin of error in trimming the floor material while achieving an effective water seal and being able to clamp the floor covering.

“Means for clamping flexible floor covering material in the trough(s)”

- 17 DLP observes that the reasoning of the examiner in his Opinion in the context of the clamping means is not clear. However, it has no real argument with the examiner’s construction that the clamping means is *“some kind of device which allows the covering or ramp edge to be secured in the channel”*.
- 18 DLP develops its reason in paragraph 31 of its grounds for review by stating (my emphasis):

*“Although the capping strip in the Scrabo tray undoubtedly secures the flooring into the trough, the Examiner nonetheless felt able to say that it would **not** ‘infringe the ‘means for clamping’ of claim 1 of the patent ...”*

and then concludes that the examiner was wrong not take account of the purpose of the invention and the essential requirement for an effective water seal.

- 19 It is worth noting here that DLP seems to have misunderstood the examiner’s actual conclusion as presented in his Opinion. From my reading of paragraph 25 of the Opinion, it is clear that the examiner thought the capping strip of the Scrabo tray would “infringe” the “means for clamping” of claim 1. However, in so far as the examiner rejected the notion, now relied on by DLP, that the clamping means is essentially required to provide a water seal, I will also review his interpretation of this aspect of claim 1 of the patent.

Assessment

- 20 In the Opinion the examiner acknowledged the need to approach the interpretation of claim 1 purposively and through the eyes of the person skilled in the art reading the specification. As Lord Hoffmann remarked in *Kirin-Amgen*, construction of a patent is not directly concerned with what the author meant to say. Rather construction is objective in the sense that it is concerned with what the skilled addressee would understand the author to be using the words to

mean.

- 21 DLP quoted in its grounds for a review a passage from *Kirin-Amgen* and I believe it is helpful to quote this passage here but in its fuller context (DLP's emphasis) :

*“‘Purposive construction’ does not mean that one is extending or going beyond the definition of the technical matter for which the patentee seeks protection in the claims. **The question is always what the person skilled in the art would have understood the patentee to be using the language of the claim to mean. And for this purpose, the language he has chosen is usually of critical importance. The conventions of word meaning and syntax enable us to express our meanings with great accuracy and subtlety and the skilled man will ordinarily assume that the patentee has chosen his language accordingly.** As a number of judges have pointed out, the specification is a unilateral document in words of the patentee’s own choosing. Furthermore, the words will usually have been chosen upon skilled advice. The specification is not a document *inter rusticos* for which broad allowances must be made. On the other hand, it must be recognised that the patentee is trying to describe something which, at any rate in his opinion, is new; which has not existed before and of which there may be no generally accepted definition. There will be occasions upon which it will be obvious to the skilled man that the patentee must in some respect have departed from conventional use of language or included in his description of the invention some element which he did not mean to be essential. But one would not expect that to happen very often.”*

- 22 In *Kirin-Amgen* Lord Hoffmann also remarked that what the author would have been understood to mean by the words used is highly sensitive to the context of, and background to, the particular utterance. I will therefore consider the context of, and background to, the invention claimed in claim 1 of the patent before I attempt to construe the language of the claim.

- 23 As is conventional the specification of the patent begins by indicating the field of the invention; in this case it is shower trays and more particularly, but not exclusively, low level shower trays. The specification continues by describing three known types of installation which allow wheel chair access to the shower area but each of which requires a dedicated design of shower tray to suit the differing installation requirements. Thus, manufacturers and installers need to stock a number of different types of shower tray. It is then stated that achieving water-tightness of the flooring is one of the most difficult requirements with these known installations and a couple of examples are given of how this has been addressed in the past. The objective of the present invention is then stated on page 3 at lines 10 to 13 as follows (my emphasis):

*“The present invention seeks to provide a shower tray device which provides the access and positioning benefits of a wet floor former water seal whilst **simultaneously allowing** low level shower tray and surface shower tray installation **options.**”*

- 24 There then follows a statement of invention, which corresponds to claim 1, and a description of examples of the invention as illustrated in the Figures. Figures 1 to

5 show an example of the shower tray before installation, Figures 6 to 11 illustrate the installation of the shower tray in a recess in the floor and Figures 12a and 12b show the same shower tray installed on the surface of a showering area. As described and illustrated the shower tray is shaped along two of its sides to provide troughs in which a retaining bar is secured to clamp floor covering or a flexible edge of a ramp between the retaining bar and inner surfaces of the troughs. This then is the context within which I must construe claim 1 of the patent.

- 25 The examiner approached the construction of claim 1 by considering the limitation imposed by the word “comprising” and concluded that the trough(s) is integral to the shower tray. I find the examiner’s reasoning, so far as it goes, convincing but his characterisation of the trough as “integral” or “formed from the material of the tray itself” unjustifiably narrow. The use of the word “comprising” in claims is entirely conventional and in my view this would in itself lead a skilled addressee reading the claim to conclude that the trough(s) is a part of the tray as it would be supplied by a stockist, such as a plumbers’ merchant. Indeed, it seems to me that the skilled addressee would lean to the view that the word “comprising” had been carefully chosen to convey just this meaning.
- 26 However, it is necessary for the claim to be read in context and here I turn to the specification. There is nothing in the specification which would lead the skilled addressee to think that the author of the patent meant anything other than the trough should be a part of the shower tray itself. Whilst not specifically mentioned by the examiner in his Opinion, the clincher for me comes from the stated objective of the invention, which seeks to provide the access and position benefits of a wet floor former water seal whilst also allowing the options to install the **same** tray as a low level shower tray and as a surface shower tray. In my view the skilled addressee would recognise that if the tray is to provide the option of being installed both as illustrated in Figures 6 to 11 and as illustrated in Figures 12a and 12b, the trough must be a part of the shower tray itself.
- 27 I do not believe that DLP can rely on the passage on page 13, which identifies an advantage provided by the trough feature within the shower tray, to support its purposive construction since this passage clearly relates to the shower tray with its own trough as previously described in the specification. Thus, in my view the criticism that the examiner has used this passage to impose an improper gloss on the claim is unfounded.
- 28 By arguing that the claim embraces a shower tray whereby the trough may be formed only once the tray has been installed, DLP are seeking in my view to treat the patent specification as a document *inter rusticos* for which broad allowances must be made in the way that Lord Hoffmann did not approve. Moreover, other than asserting that this should be so, DLP has not suggested how such an interpretation might arise and offers nothing to suggest why, having read the description, a skilled person would view the claim in this light.
- 29 I turn now to the construction to be placed on the reference in claim 1 to “means for clamping flexible floor covering material and/or a flexible edge of a ramp device in the trough”, and in particular whether the correct construction is one that requires an effective water seal between the floor covering and the tray. I

agree with DLP that the examiner's reasoning in the context of the clamping means is not very clear.

- 30 In my view the skilled addressee would be conscious that water tightness is an issue with the installation of shower trays. This would be reinforced when reading the specification on pages 2 and 3 where it is acknowledged that in the described examples of the prior art, one of the most difficult requirements of shower installation is to achieve a water-proof seal with the flooring. Thus, I agree with DLP that a purposive construction of claim 1 leads to a conclusion that the clamping means is such that it provides an effective water seal by clamping flexible floor covering material and/or a flexible edge of a ramp device in the trough(s).

Conclusion

- 31 I have carefully reviewed the interpretation of the specification of the patent in the light of the grounds set out by DLP and I have found that the Opinion interprets claim 1 too narrowly by requiring the trough(s) to be "integral" or "formed from the material of the tray itself" and wrongly by not recognising that the clamping means provides a water seal by clamping, for example, floor covering material in the trough(s). Nevertheless, I agree with the interpretation given in the Opinion that the "the shower tray itself includes a trough on one or more of its sides". Moreover, whilst I do not fully accept the examiners interpretation of the specification, I cannot fault the overall conclusion in the Opinion that the patent would not be infringed by the Scrabo tray under section 60(2) of the Act if it were sold in the UK.
- 32 I therefore decide that the Opinion wrongly construes the specification as requiring the trough(s) to be "integral" or "formed from the material of the tray itself" and as not requiring the clamping means to serve the purpose of providing a water seal. Thus, I order these parts of the Opinion to be set aside. However, in so far as I find that on a proper interpretation of the specification of the patent, the patent would not be infringed by the Scrabo tray, I make no order to set aside this part of the Opinion.

Appeal

- 33 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

Roger Walker
Divisional Director acting for the Comptroller