

OPINION UNDER SECTION 74A

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|---------------------|------------------------------|
| Patent | GB 2503963 |
| Proprietor(s) | Fashion at Work (UK) Limited |
| Exclusive Licensee | |
| Requester | MWUK Limited |
| Observer(s) | Fashion at Work (UK) Limited |
| Date Opinion issued | 22 December 2015 |

The request

1. The comptroller has received a request from MWUK Limited (the requester) to issue a validity opinion under section 74A(1)(b) in respect of patent GB 2503963B (the Patent) in the name of Fashion at Work (UK) Limited (the proprietor). The request questions the validity of claims 1 and 2 of the Patent on the basis of lack of novelty, and claim 15 on the basis of lack of inventive step.
2. The Patent has a filing date of 4 December 2012. It was granted on 13 May 2014 and remains in force.

Observations

3. Observations in response to the request were received from the proprietor and observations in reply were subsequently received from the requester.

Invention

4. The invention relates to clothing for hospital patients in which some of the seams are formed as releasable seams. By releasing the clothing along these seams particular areas of a patient's body can be accessed without having to remove the entire clothing or otherwise expose a larger area of the patient's body than is necessary for the medical procedure being carried out. In this way the patient's modesty and dignity can be maintained. The clothing may be in the form of a shirt or trousers as illustrated in figures 3 and 4 of the Patent (reproduced as figure 1 below) in which figure 3 is a front view and figure 4 is a rear view.

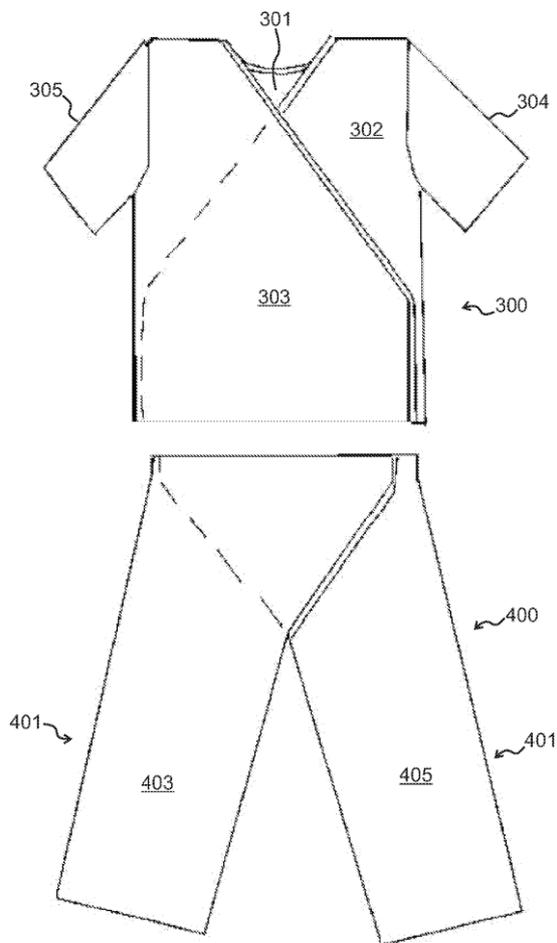


Fig.3

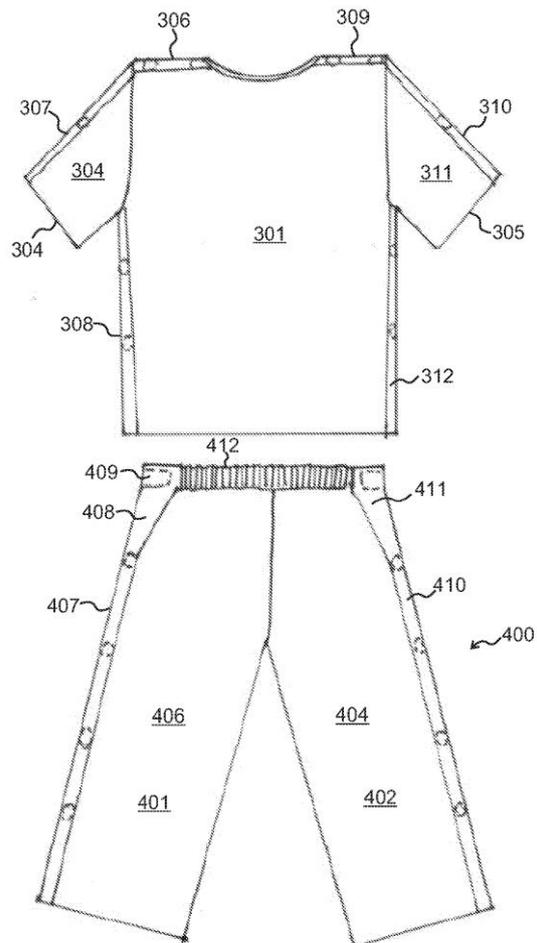


Fig.4

Figure 1 - Figures 3 and 4 of the Patent showing front and rear views respectively of the patient garments of the invention

5. The removable seams are indicated in figure 4 by numerals 306, 307, 308, 309, 310 and 312 for the shirt and numerals 407 and 410 for the trousers.

Prior art

6. The prior art relied upon by the requester is a hospital patient gown known as the Plymouth Gown and identified by the code HP768 (the HP768 gown). In particular, the requester has provided a marketing leaflet¹ (the HP768 leaflet) describing the product, which was published in 1997. They also rely on prior use of the HP768 gown and have provided affidavits establishing the sale of the gown to University Hospitals Birmingham NHS Trust during 2008. An internal document² (the HP768 style summary) outlining the details and specification of the gown was also provided.

¹ Exhibits GM1 and SAN1.

² Exhibit SC1.

7. The overview of the HP768 gown from the HP768 style summary is reproduced as figure 2 below. Releasable seams, formed of cooperating male and female stud fasteners, can be seen at the top of the shoulders. A conventional front fastening and a drawstring waist are also shown.

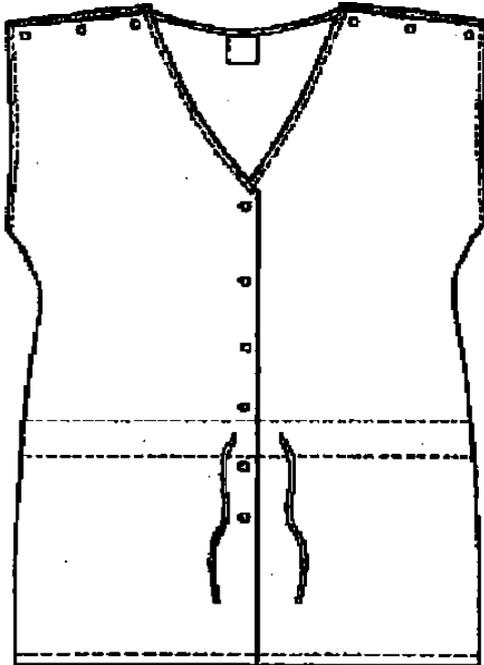


Figure 2 - Front view of HP768 gown

8. The proprietor has not disputed that the garment was made available to the public in the form illustrated and described in the request.

Claim Construction

9. Before deciding the question of novelty it is necessary to properly construe the claim following the well known House of Lords authority on claim construction in *Kirin-Amgen*³. This requires that I construe the claims purposively, interpreting them in the light of the description and drawings, to decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.
10. Claim 1 of the patent is set out below. For ease of reference I have added the letters a to f.
1. A garment for health care use, said garment comprising
 - a) at least one rear panel;
 - b) at least two front panels; and
 - c) a plurality of releasable seams, positioned along peripheral regions of said at least one rear panel and said at least two front panels for releasably connecting said at least two front panels to said at least one

³ *Kirin-Amgen v Hoechst Marion Roussel and others* [2005] RPC 9.

rear panel; wherein

- d) each of the at least two front panels is permanently connected to the at least one rear panel at at least one position;
- e) at least a portion of one of the front panels overlaps the other; and
- f) said rear and front panels each comprise a plurality of flaps or regions which can be folded over when in use as worn by a wearer to expose different areas of said wearer's body.

11. The main area of contention between the requester and the proprietor lies in the interpretation of feature (c), and in particular the construction of the clause "a plurality of releasable seams positioned along peripheral regions of said ... rear panel and said ... two front panels..."
12. The requester has adopted a broad construction whereby the *plurality* of releasable seams can be found at the peripheral regions of the rear panel and *either* of the front panels. Based on this construction, it is only necessary for the garment to have two releasable seams, one associated with each of the front panels.
13. The proprietor has adopted a narrow construction whereby the *plurality* of releasable seams are found at the peripheral regions of the rear panel and *each* of the front panels. This is clear from the proprietor's comments at paragraph (26) of their observations. It is apparent from such a construction that the garment will have four releasable seams, two associated with each of the two front panels.
14. Either of these interpretations is plausible on a literal construction, but I must make a purposive construction, adopting the mantle of the skilled person and looking at the description and drawings to understand what the patentee meant.
15. The skilled person is considered to be a designer of clothing for use in healthcare.
16. As identified above, if I were to adopt the proprietor's construction of claim 1, the garment would have four releasable seams. This corresponds with the four releasable seams shown for the shirt illustrated in figures 3 and 4 of the patent. However, these figures also show trousers which, at least as illustrated, appear to have only two seams. The passage at paragraphs [0027] to [0032] of the description gives more detail of the construction of the trousers and, in particular, paragraph [0032] specifies that the rear panel is permanently connected at the crotch position and down the inside of the right and left legs. Thus only the two seams down the outside of the legs can be releasable. Furthermore, the only releasable seams specified are the left hand seam (407) in paragraph [0029] and the right hand seam (410) in paragraph [0030] which run down the outside of each leg.
17. It is considered clear from claim 8 (reproduced as appendix 1) that the trousers are intended to be a garment for the purposes of the invention, and that the front and rear panels referred to in claim 1 are the front and rear panels of the trousers as specified in claim 8. Accordingly, in order for the trousers of the invention to fall within the scope of claim 1, as would be understood by the skilled person, feature (c) of claim 1 must be given a broad interpretation. This is consistent with the construction adopted by the requester, such that a plurality of releasable seams are

required to be connected along the peripheral regions of the rear panel and *either* of the front panels.

18. In relation to feature (d) of claim 1 as set out above, it is not clear what limitation is imposed by use of the wording “at at least one position”. That equates with “at one position or at more than one position”. Clearly, if the panels are to be permanently connected they must be connected at one position if not more. The phrase “at at least one position” is considered superfluous and should be ignored.
19. The remaining features of claim 1 are considered to be clear such that they are construed as read.

Analysis

20. As has been correctly pointed out by the proprietor, in order for the claims to lack novelty, the prior art disclosure must clearly and unambiguously disclose all of the features of the claim.
21. The HP768 gown is a garment for health care use comprising a rear panel and two front panels and therefore has features (a) and (b) of claim 1 as set out above.
22. At paragraphs (25) and (27) of their observations, the proprietor appears to be suggesting that the HP768 gown comprises only a single panel with a slit opening rather than a number of separate panels. The reason for this distinction is not clear and I see no basis in the description for adopting a narrow interpretation of the word *panel* which would satisfy this construction. I consider that the skilled person would interpret the HP768 gown as being comprised of two separate front panels each joined to a rear panel by a side seam and fitted with co-operating front fastenings. Furthermore, I agree with the observations in reply on page 1, that paragraph (25) of the observations somewhat contradicts paragraph (24). Paragraph (24) appears to be an admission that the HP768 gown comprises front left and right panels and a rear panel. Similarly, paragraph (28) appears to admit the existence of separate left front, right front and rear panels.
23. Paragraphs (25) to (27) of the observations also refer to the prior art⁴ considered during prosecution of the patent to apparently support their interpretation of the features of the HP768 gown and a narrow interpretation of claim 1.
24. However, I agree with the requester’s comments, on pages 2 and 3 of their observations in reply, that the HP768 gown is distinguished from the prior art such that any consideration of the prior art is not relevant in deciding whether the HP768 gown anticipates claim 1 or not. The prior art documents referred to are also distinguished from the claims in other ways such that they cannot be used to define the features of the HP768 gown or to ascertain the meaning of claim 1.
25. The HP768 gown has two releasable seams at the top of the shoulders positioned along the upper peripheral region of the rear panel and respectively the front left panel and the front right panel, for releasably connecting the two front panels to the rear panel. Accordingly the HP768 gown has feature (c) of claim 1 as I have

⁴ D1 = US 4,964,173; D2 = US 2010/0299803 A1; D3 = US 6,694,521 B1.

construed it.

26. For the avoidance of doubt I consider that the skilled person would interpret the seams above the left and right shoulders as separate seams and not as separate parts of a single seam.
27. The front panels are permanently connected to the rear panel by side seams as described on page 2 of the HP768 style summary such that feature (d) is also considered to be present.
28. Although the front panel overlap is apparently relatively small in the HP768 gown when compared with the overlap in the figures of the patent, it is nevertheless considered to be sufficient to meet the requirement of feature (e).
29. The proprietor contends in their observations (paragraph 28) that the HP768 gown lacks feature (f) on the basis that “the rear panel of the HP768 product does not comprise any such flap or region, and the two front panels of the HP768 product each include a single releasable flap or region”. In the observations in reply the requester has illustrated (see figure 3 below) how the front and rear panels may be folded in different ways to expose different areas of a wearers body.

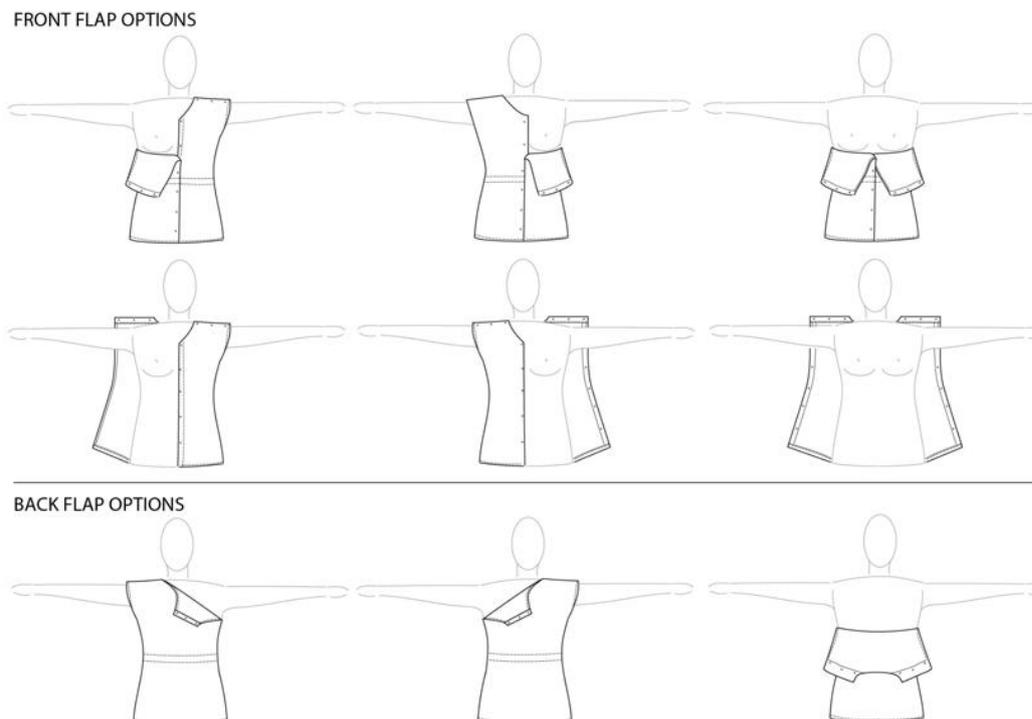


Figure 3 - Examples of how the HP768 gown may be folded

30. I see no reason to apply a restrictive interpretation to the words *flap* or, more particularly, *region*. I consider that the skilled person would understand the word *region* to mean any part of the garment having a significant area. I do not consider that the regions have to be distinguished from the remainder of the garment in any particular way, e.g. by coloured piping or sewing, and there is no suggestion that such is required in the description. Indeed, the word *flap* is only used in the description with reference to the prior art and in the summary of the invention corresponding to claim 1. Similarly, other than the summary of the invention, the

word region is only used in the description with reference to the peripheral regions of the garment and regions of the patient's body. There is nothing in the description which points to a narrow construction. Accordingly, I consider that all the panels of the HP768 gown have multiple regions which can be folded over when in use as worn by a user to expose different areas of the wearer's body, and the gown therefore also has feature (f) of claim 1.

31. The proprietor refers in their observations to a statement in *Dr Reddy's Laboratories*⁵ that "it is necessary to distinguish between what the document probably means and whether that meaning is clear and unambiguous". I do not believe there is sufficient detail in the HP768 leaflet for the leaflet alone to provide enabling disclosure sufficient to establish the existence of all the features of the claim. Nevertheless, the uncontested evidence is that the gown was made available to the public before the priority date of the invention. In such a situation the comments of Aldous J in *Lux Traffic Controls*⁶ are considered relevant:

"There is a difference between circumstances where the public have an article in their possession to handle, measure and test and where they can only look at it. What is made available to the public will often differ in those circumstances. In the latter case it could be nothing material; whereas in the former the public would have had the opportunity of a complete examination"

32. I consider that the evidence establishes that members of the public have had the HP768 gown in their possession to the extent that they can determine all its features.
33. The proprietor's observations do not seem to question the existence of relevant features. Instead, they comprise arguments based on a narrow interpretation of a number of the features of claim 1. However, no reasoning has been provided as to why such a narrow interpretation is to be made and a broader construction of the claim in line with the principles of purposive construction is considered appropriate.
34. The lack of novelty is therefore based on the prior use of the gown as evidenced by the requester.
35. I consider that the HP768 gown has all the features of claim 1 such that claim 1 is anticipated. Accordingly claim 1 lacks novelty based on the HP768 gown.

Dependant claims

36. The requester has also asked for an opinion on the novelty of dependant claims 2 and the inventiveness of dependant claim 15. As I consider that claim 1 is anticipated I shall now consider these claims.
37. Claim 2 reads:

2. The garment as claimed in claim 1, wherein a said releasable seam comprises

⁵ *Dr Reddy's Laboratories (UK) Ltd v Eli Lilly and Co Ltd* [2008] EWHC 2345.

⁶ *Lux Traffic Controls Limited v Pike Signals Ltd and Faronwise Ltd* [1993] RPC 107.

a first seam area positioned at a peripheral region of a said panel; and
a second seam area positioned at a peripheral region of another said panel,

wherein said first and second seam areas are attachable to each other and detachable from each other.

38. I agree with the requester's statement and consider that the HP768 gown has a first seam area at the upper periphery of the shoulder region of each front panel, a second seam area at the upper periphery of the shoulder region of the rear panel, the corresponding seam areas being attachable to and detachable from each other via male and female stud fastenings. Claim 2 is therefore also anticipated.

39. Claim 15 reads:

15. A garment according to any of claims 1 to 14, wherein each releasable seam comprises a hook and eye fastening.

40. On a point of construction, the description makes clear that the hook and eye fastening is a Velcro (RTM) type fastening.

41. The use of Velcro as a clothing fastener is considered to be part of the common general knowledge of a healthcare clothing designer, being the person skilled in the art, at the priority date of the invention. It is considered obvious for the skilled person to replace the male and female studs of the releasable seams of the HP768 gown with cooperating Velcro fastenings. Such an arrangement is considered to fall within the scope of claim 15. Accordingly, claim 15 is considered to lack an inventive step based on a combination of the HP768 gown and common general knowledge.

Opinion

42. On the basis of the evidence put forward regarding the prior disclosure to the public of the HP768 gown, and the arguments provided, I am of the opinion that claims 1 and 2 of the Patent lack novelty.

43. I am also of the opinion that claim 15 lacks an inventive step based on a combination of the HP768 gown and the common general knowledge of the skilled person.

Application for review

44. Under section 74B and rule 98, the proprietor may, within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.

Matthew Jefferson
Examiner

NOTE

This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Office.

Appendix 1

Claim 8 - A garment according to claim 1 or 2 for covering a lower part of a wearer's body, wherein:

the at least one rear panel has first and second leg portions;

a first of the at least two front panels is a first leg panel attachable and detachable from said first leg portion; and

a second of the at least two front panels is a second leg panel attachable and detachable from said second rear leg portion.