

OPINION UNDER SECTION 74A

Patent	GB 2497560 B
Proprietor(s)	Peter David Westlake
Exclusive Licensee	
Requester	Dummett Copp LLP
Observer(s)	
Date Opinion issued	27 April 2017

The request

1. The comptroller has been requested by Dummett Copp LLP (“the requester”) to issue an opinion as to whether GB 2497560 B (“the patent”) is infringed by the guard panel (“the Brick Guard”) described in Annex 1 accompanying the request.
2. The request includes annexes 1-3. Annex 1 is a description of the Brick Guard; Annex 2 is a copy of the examination report dated 21 August 2013 issued during prosecution of the UK patent application; and Annex 3 is a copy of the patent.

Observations

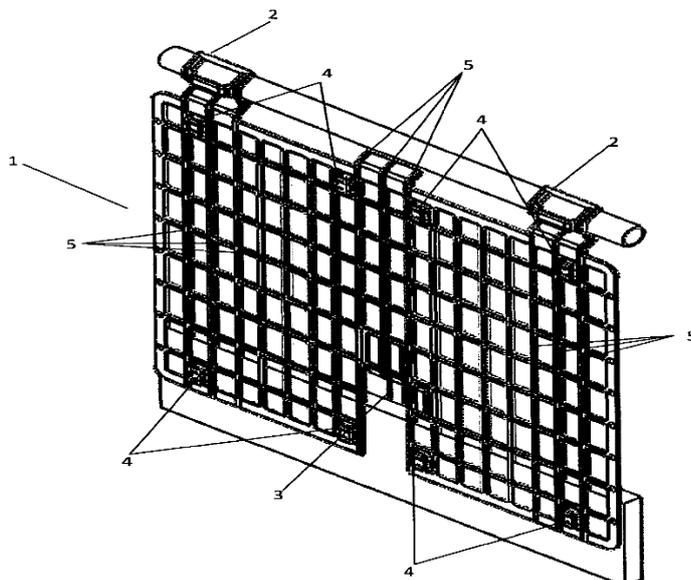
3. No observations were received.

The Patent

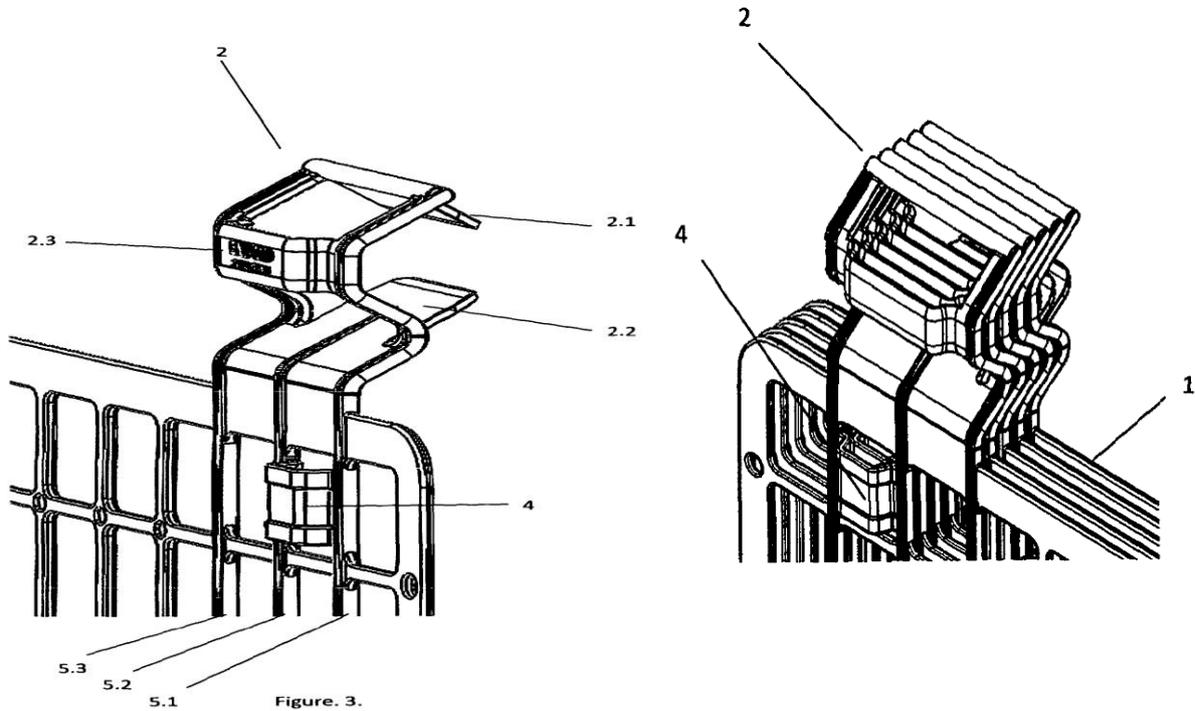
4. The patent, GB 2497560 B, is titled “A guard panel – being a piece of safety equipment”. It has a filing date of 14th December 2011, was published on 19th June 2013 and granted on 19th February 2014. The patent remains in force.
5. The patent relates to safety equipment primarily for use with structures providing temporary or permanent platforms, work areas, storage areas or walkways, such as, elevated scaffolding platforms. In the case of elevated scaffold platforms, whether temporary or permanent, the working at height regulations insist that measures are taken to prevent people or objects from falling from these areas by providing suitable and adequate protection.
6. Elevated structures and platforms are generally formed by a framework of scaffolding components erected to support a closely boarded platform with safety

rails (guardrails) to all open edges. While this basic configuration prevents people and large objects falling through or out from the boarded platforms open edges, further measures such as brick guards are required to prevent smaller objects from falling.

7. Conventional guard panels usually consist of a metal wire mesh panel, normally having a pair of permanently attached metal rods with a predominately U-shaped hook on one end which protrudes from their top edge for hanging the brick guards from the guard rail. The metal wire guards have the disadvantage that in general they tend to have short working lives, before the welds of the mesh, or more frequently the welds securing the rods from which attachment hooks are formed get damaged or break away, rendering the guard unusable or non-compliant with requirements.
8. Another stated constant and frustrating problem is the attachment hooks on some metal wire mesh guards become easily entangled when the guards are stacked for storage or transportation. This is a consequence of the attachment hooks being of a shape and diameter able to pass through the apertures of the other wire mesh screens of other guards in the stack.
9. The patent aims to overcome the problems with the prior art by providing a guard panel made from High-density polyethylene (HDPE) rather than metal. HDPE has sufficient mechanical properties so that when the guard panel is correctly positioned about a guard rail and toe board if it is subjected to the impact of falling materials or debris it will resiliently deflect the same materials or debris back onto the working platform.
10. Further the guard panel of the patent has permanently fixed retaining members formed from a combination of geometric angles and dimensions that enable them to stack neatly within each other providing stability without entanglement.
11. Figure 4 of the patent is reproduced below. The guard panel comprises a semi-rigid mesh panel 1, with two permanently fixed clip structures 2, one remotely spaced toe board retaining panel 3, eight curved spacing structures 4 and nine I beam shaped strengthening structures 5. The guard panel is injection moulded in a single piece.



12. Figure 3 of the patent below shows one of the clip structures 2 having an opening between the upper and lower cooperating retaining members 2.1, 2.2 which receives a guard rail in use. The second figure shows how the clip structures of different guard panels co-operate with one another to enable them to be stacked for storage or transportation.



13. The patent has fourteen claims – one independent claim, eleven claims dependent thereon and two omnibus claims. Independent claim 1 reads as follows:

1. A guard panel being a piece of safety equipment for use with structures providing temporary or permanent platforms, work areas, storage areas or walkways provided with horizontal guardrails; comprising a semi-rigid mesh panel produced from a high density polyethylene incorporating at least two permanently fixed clip structures along a top edge thereof for suspending the guard panel from a guardrail wherein each clip structure consists of solid and aperture sections including a pair of cooperating retaining members one of which in use partially encircles the lower half of the guardrail and the other of which partially encircles the upper half of the guardrail, so as to snap fit onto the guardrail through an opening between upper and lower retaining members and whereby the solid sections stack inside the aperture sections of an adjacent guard panel.

Omnibus claims 13 and 14 read as follows:

13. A guard panel substantially as herein before described with reference to and as shown in the accompanying drawings.

14. A guard panel substantially as described herein with reference to the accompanying drawings.

Infringement – the law

14. Section 60 Patents Act 1977 governs what constitutes infringement of a patent; Section 60(1) reads:

Subject to the provision of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say -

(a) where the invention is a product, he makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise;

(b) where the invention is a process, he uses the process or he offers it for use in the United Kingdom when he knows, or it is obvious to a reasonable person in the circumstances, that its use there without the consent of the proprietor would be an infringement of the patent;

(c) where the invention is a process, he disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.

15. Section 60(2) of the Patents Act 1977 states:

Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.

16. The first step in determining if there is any infringement under section 60(1) is to consider whether the Brick Guard falls within the scope of the claims of the patent.
17. The request has made no indication that indirect infringement under 60(2) is to be considered.

Claim construction

Independent claim 1

18. Before considering the documents put forward in the request I will need to construe the claims of the patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claims, interpret it in the light of the description and drawings as instructed by Section 125(1) and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.

19. Section 125(1) of the Act states that:

For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.

20. And the Protocol on the Interpretation of Article 69 of the EPC (which corresponds to section 125(1)) states that:

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.

21. I can see no issue with the construction of claim 1 apart from the feature of the mesh panel being made from HDPE and whether the skilled reader would consider the claim to be restricted to the use of HDPE only.

22. The requester has not provided any argument relating to the construction of the claims. However the requester's argument that the brick guard does not infringe claim 1 hinges on whether the scope of protection provided by claim 1 is limited to the mesh panel being made only from HDPE. Therefore guard panels made from any other materials fall outside the scope of claim 1.

23. In considering the scope of protection provided by claim 1 I would observe that the patent on pages 6 and 8 describes the mesh panel as being formed from "high-density polyethylene, or similar plastic type material". Claim 1 as granted however refers merely to the guard panel being produced from a HDPE.

24. Whilst the patent does not disclose an embodiment including the use of any other possible materials other than HDPE in making the guard panel, the patent does describe prior art documents EP 1072736 and US 2010294591 as disclosing brick guards made from polypropylene. I can find nothing in the patent that suggests polypropylene would be an unsuitable material for use in a brick guard and in fact the problem with the two prior art brick guards described is that they do not have integrally formed hooks rather than deficiencies with the material used. Furthermore I can find no explanation in the patent of any advantages of HDPE over other plastics materials in producing the guard panel. In light of the prior art discussed in the patent I consider polypropylene to be a "similar plastic material" suitable for use in making the guard panel.

25. In *Improver Corporation v Remington Consumer Products Ltd* [1990] FSR 181, Hoffmann J formulated three questions which the court should ask itself when considering whether a variant falls inside the scope of a claim. These have subsequently become known as the 'Improver' questions, and in *Wheatley v Drillsafe Ltd* [2001] RPC 7 were re-named by the Court of Appeal, the 'Protocol questions'. These questions are:

(i) Does the variant have a material effect upon the way the invention works? If yes, the variant falls outside the claim. If no:-

(ii) Would this fact (i.e. that the variant has no material effect) have been obvious to the skilled person at the date of publication of the patent? If no, the variant falls outside the claim. If yes:-

(iii) Would the reader skilled in the art nevertheless have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention? If yes, the variant is outside the claim. If no, then the variant falls within the scope of the claim.

26. In this case I would answer the three questions as follows:

(i) the change to a similar plastic type material such as polypropylene would have no material effect on the way the invention works;

(ii) it would have been obvious to an expert that the similar plastic type material such as polypropylene would work in the same way (considering the prior art disclosed and discussed above);

(iii) The invention requires that the guard panel has permanently fixed retaining members formed from a combination of geometric angles and dimensions that enable them to stack neatly within each other providing stability without entanglement. It must also be made from a material of sufficient strength to function as a guard panel. Guard panels made from plastic materials other than HDPE would meet these requirements. Considering this and in light of the passages on pages 6 and 8 and the prior art disclosing polypropylene as a suitable material for use in a guard panel, the skilled reader would not consider the patentee to have intended that strict compliance with the use of HDPE was an essential requirement of the invention.

27. In my opinion the skilled reader would conclude, with reasonable confidence, that the patentee did not intend claim 1 to exclude other suitable plastics materials. Therefore in my opinion the scope of protection provided by claim 1 should not be taken as being limited to HDPE alone but rather to HDPE or similar plastic type material.

Omnibus claims 13 and 14

28. Claims 13 and 14 of the patent are "omnibus" type claims. Guidance on how such claims are construed is provided by The Manual of Patent Practice at paragraphs 14.124, 14.125 and 14.125.1, which are reproduced below:

"14.124 Claims to the preferred embodiments of the invention which end with some such words as "substantially as described and shown (or illustrated) in

the accompanying drawings" are allowable as claims limited to the embodiments described and depicted in the drawings. Such claims fall within the type known as "omnibus" claims which also include claims referring to examples (eg in chemical cases) or to tables...

14.125 An omnibus claim should not suggest that a drawing, example or table illustrates or exemplifies the invention if it does not, for example if it is present for comparison or as prior art, but there is no objection to referring to the invention "as described with respect to" such drawings, examples or tables, provided the wording of the claim and of the description makes the position clear. However the words "substantially as described" are insufficient by themselves to limit a claim to the embodiment described, and its scope will be construed to be as wide as the statement of invention. In such cases care should be taken to ensure that the invention is set forth in precise terms in the body of the specification, that ambiguity does not arise (see 14.139.1 and 14.139.2) and that the statement of invention is not broader than the main claim (see 14.146). With regard to omnibus claims of co-pending applications describing the same apparatus, see 18.95.

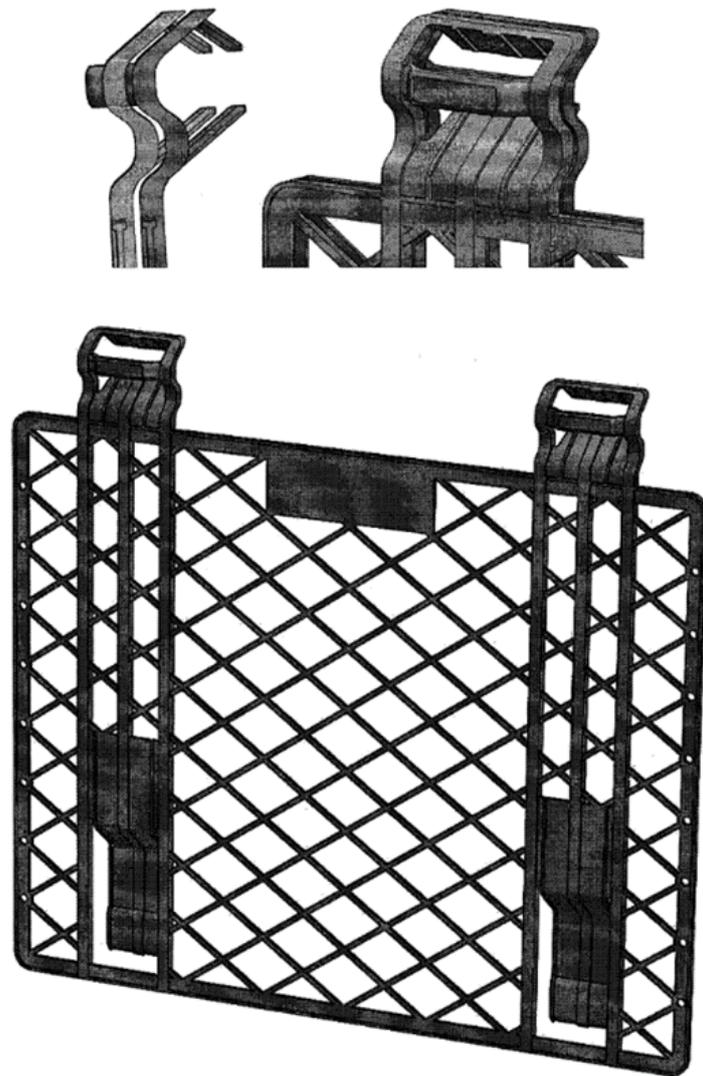
14.125.1 In Raleigh Cycle Co Ltd and Anr. v Miller and Co Ltd, 65 RPC 141, an omnibus claim directed to a generator "constructed, and arranged substantially as described with reference to and as illustrated in the accompanying drawings" was construed as a narrow claim, but was held, by virtue of the qualification "substantially", to have been infringed by a generator not having stepped stator windings, even though the only embodiment specifically disclosed did have such windings. In Jansen Betonwaren B.V. v Ian Robbie Christie (BL O/496/15) the Hearing Officer considered the validity of an omnibus claim to "A building block substantially as described with reference to the drawings." The claim was construed narrowly such that it required the "four main design features" disclosed in the description and all features shown in the sole figure. The claim was nevertheless determined to lack novelty on the basis of prior public use. The Hearing Officer also found an even narrower construction of claim 1 was possible. Under this construction the claim required the building block to be manufactured using "a mix of concrete sand and cement as well as elastomer and thermoplastics". The additional limitation rendered the claim novel over the alleged prior use but resulted in the disclosure being insufficient."

29. Omnibus claims are often in the form referred to in paragraph 14.124, i.e. "substantially as described and as shown (or illustrated) in the accompanying drawings" (emphasis added). However, paragraph 14.125 makes it clear that if the reference to the drawings is omitted, then the scope of the omnibus claim must be construed as being as wide as the statement of invention.
30. Omnibus claim 13 is in form referred to in paragraph 14.124 and is in my view clearly the narrow form of omnibus claim.
31. Omnibus claim 14 is worded differently and is in form referred to in paragraph 14.125.1 and considered in Jansen Betonwaren B.V. v Ian Robbie Christie (BL

O/496/15). I also consider omnibus claim 14 to be the narrow form of omnibus claim.

The Brick Guard

32. The figures provided in Annex 1 accompanying the request illustrating the Brick Guard are reproduced below. They show the Brick Guard to be of a very similar design to the guard panel of the patent. The Brick Guard includes a mesh panel, two permanently fixed clip structures along the top edge thereof and two toe board retaining panels. It would also appear to include vertical strengthening structures provided underneath each clip.
33. The clips appear to consist of solid and aperture sections including a pair of cooperating retaining members one of which in use partially encircles the lower half of a guardrail and the other of which partially encircles the upper half of a guardrail, so as to snap fit onto the guardrail through an opening between upper and lower retaining members and whereby the solid sections stack inside the aperture sections of an adjacent guard panel (see top left hand figure below).



34. It is explained in the request that the Brick Guard is made from polypropylene, which

may be a polypropylene copolymer.

Infringement

35. I must now decide whether the Brick Guard falls wholly within the scope of independent claim 1 and omnibus claims 13 and 14 the patent. I will consider dependent claims 2-12 should I find that the Brick Guard infringes independent claim 1.

Infringement of claim 1

36. The Brick Guard includes a guard panel comprising a mesh panel and two clip structures as required by independent claim 1 of the patent. The only difference between the Brick Guard and the guard panel of claim 1 of the patent would appear to lie in the material used for the panel i.e. polypropylene (or a polypropylene copolymer) and HDPE respectively. However as explained I consider the skilled reader would not consider the claim to be limiting the panel as being produced from HDPE only but rather would consider the scope of claim 1 to include HDPE or similar plastic type material. Furthermore due to the disclosure in the patent of prior art guard panels being made from polypropylene, in my opinion the skilled reader would consider polypropylene to be a "similar plastic material" suitable for use in guard panels. Therefore whilst the Brick Guard is made from polypropylene, which may be a polypropylene copolymer and not from HDPE, I consider the Brick Guard to fall within the scope of claim 1 of the patent. Therefore the importation, disposal and/or manufacture thereof in the UK would constitute infringement under section 60(1).

Dependent claims 2-12

37. I will turn now to the dependent claims. On the basis of the material before me I am of the opinion that the Brick Guard does include the features of dependent claims 2-6 and 10-11. Hence those claims would also be infringed by the importation, disposal and/or manufacture thereof in the UK of the Brick Guard.
38. I can see nothing in the material provided to suggest that the Brick Guard has a centrally positioned toe board retaining panel; an evenly distributed series of unapertured curved spacing structures; or a series of three consecutive I-beam shaped structures as required by claims 7-9. In my opinion the Brick Guard does not infringe claims 7-9.
39. Claim 12 defines a range for the height and width dimensions of the guard panel. I have no material before me disclosing the size of the Brick Guard and thus I am not in a position to provide an opinion on whether claim 12 is infringed.

Infringement of omnibus claims 13 and 14

40. As previously discussed omnibus claims 13 and 14 are of the narrow form and as such are limited to the described embodiments with reference to the drawings. I consider there to be significant differences between the embodiment described and illustrated in the figures and the Brick Guard as shown in Annex 1 and reproduced above. For example the described embodiment requires the guard panel to have a

single toe board retaining panel whereas the Brick Guard has two such toe board retaining panels. Furthermore the described embodiment requires the guard panel to have eight spacing structures 4. The Brick Guard doesn't have this feature. Consequently there is in my opinion no infringement of the omnibus claims.

Opinion

41. I conclude that the Brick Guard falls within the scope of claims 1-6 and 10-11 of the patent and therefore the importation into and/or manufacture in the UK of the Brick Guard infringes the patent under Section 60(1).

Marc Collins
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.