

**OPINION UNDER SECTION 74A**

Patent	EP1059899
Proprietor(s)	Dr. Pawel Sawlewicz
Exclusive Licensee	
Requester	Dr. Pawel Sawlewicz
Observer(s)	Handsome I.P. Ltd
Date Opinion issued	24 May 2017

**The request**

1. The comptroller has been requested to issue an opinion as to whether granted patent EP1059899 (“the patent”) is infringed by a product named Gus Comfort (“the product”), a sample of which was provided along with its user instructions.
2. Observations were filed by Handsome I.P. Ltd and observations in reply were filed by Praecedo Law Office on behalf of the proprietor.
3. Although the request and the observations include comments on the validity of the patent, it is clear that the request relates to a question of infringement and I will ignore the comments regarding validity.

**The patent**

4. The application for the patent was filed via a Patent Cooperation Treaty application on 1 March 1999, claiming a priority date of 6 March 1998 from a Polish national application. It was granted by the European Patent Office on 7 July 2004 and it remains in the force in the UK.
5. The patent is entitled “*Auxiliary device for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings*”. According to paragraph 0004 the device “*is made from low friction factor fabric and its characteristic feature is its shape, i.e. of a plane figure with a beneficial catch element in the form of a pocket at its one end; at the opposite end, beneficially, there is a fastening element in the form of a tape, press stud or some other well-known fasteners.*”.
6. Two versions of the device are illustrated and three examples are described.

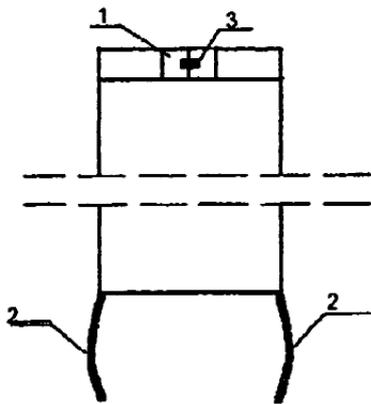


fig. 1

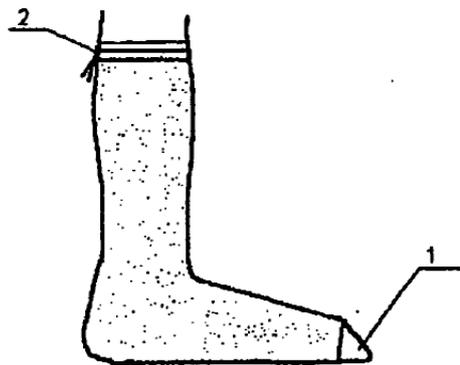


fig. 2

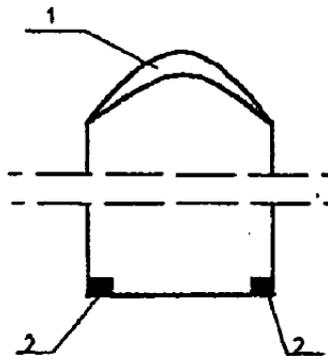


fig. 3

7. In the examples *"The device is made from material which is smooth on its both sides and of low friction factor of its surface."*. In the first example the device is rectangular with a pocket 1 at one end for a user's toes and tape 2 at the other end for fastening around a user's leg. The second example is said to be just like Example I, but with the pocket *"closed with a fastener 3 in the form of Velcro®."*. In the third example the pocket 1 *"is adjusted to the shape of toes"* and there is a fastener 2 at the other end of the device used to join the top edges of the device in use. I take it that figures 1 and 2 correspond to the first two examples and figure 3 corresponds to the third example, although this is not stated explicitly.
8. In use the toes of a user are inserted into the pocket 1 of the device and the device is put around the leg, covering *"the whole of the leg surface smoothly, possibly without any folds or wrinkles"*, with the top part attached to the leg with the tape or fastener 2. A compression stocking is then pulled up on the leg, after which the tape or fastener 2 is undone, the toes are freed from the pocket 1 and the device is removed from under the stocking, *"pulled by its top"*.

## Claim construction

9. 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.

10. 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.*

11. 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.*

12. There is one independent claim, as follows:

*1. An auxiliary device for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings which is made from low friction factor fabric characterised in that it has the shape of a plane figure with a beneficial catch element (1) in the form of a pocket for inserting the toes at its one end; at the opposite end there is a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well-known fasteners.*

13. It seems to me that the meaning of the claim is for the most part clear. I should however mention several parts. The “*catch element (1) in the form of a pocket*” is described as “*beneficial*”, also as “*nützlich*” and “*utile*” in the German and French translations of the claim. Those terms might also be translated as useful or helpful. The same term is used in the description, but is not described further. I am not entirely clear what, if any, limitation is intended by the term as used in claim 1. It

seems to me that the skilled reader would place no particular significance on the term and that it places no limitation on the claim.

14. More significant to my opinion is the requirement that the device should have "*the shape of a plane figure*". The phrase is repeated, more or less, in paragraph 0004 and Example I is said to be rectangular in shape, but I can see nothing else explicit in the description which helps me to interpret this phrase. Figures 1 and 3 appear to show devices lying flat, but I cannot place too much emphasis on this appearance in the absence of any confirmation elsewhere in the specification.
15. The observations take me to a dictionary definition to construe "*plane figure*" and suggest that the limitation is intended to distinguish the invention from the prior art described in paragraph 0002 which "*looks like a sock made from low friction factor fabric*". Based on this the observations assert that "*plane figure*" should be interpreted to mean that the device may be "*laid out flat on a surface with no overlapping regions, folds, wrinkles or creases*", acknowledging that the catch element and fastening element cannot form part of the plane figure in this interpretation. Figures 1 and 3 are also said in the observations to show "*a rectangle of material laid out flat with no overlapping regions*".
16. The observations in reply resist an interpretation based upon a dictionary definition and suggest that "*shape of a plane figure*" in this context should be taken to mean having much smaller thickness than other dimensions. This interpretation is justified in part as it is said to be required for the device to function in the way described.
17. It seems to me that "*the shape of a plane figure*" would be understood by the skilled person to place little limitation upon the claim. As I noted above I can find little in the specification to assist in interpreting the phrase and neither the observations nor the observations in reply take me to anything in the specification that assists me. With some hesitation, I take the phrase to mean a body that could be laid substantially flat. I do not think that this necessarily implies anything about the thickness of the device nor does it preclude the device having overlapping regions.

## **Infringement**

18. 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;*

...

19. According to the request the product had been distributed in the United Kingdom between 2010 and 2016 by Haddenham Healthcare Ltd. In the absence of any observations on the point, I will take it that the product was the subject of one or

more of the acts in section 60(1)(a) and hence would infringe the patent provided it falls within the scope of protection of the patent.

## The product

20. The allegedly infringing article is illustrated below. The photograph is one of four provided with the observations rather than with the request, but appears to be identical in all respects bar the colour to the sample provided with the request.



21. It is clear to me from the instructions provided with the sample that the product is intended “*for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings*”, in the words of claim 1. It is equally clear from the sample that the product is “*made from low friction factor fabric*”. There is a “*catch element ... in the form of a pocket for inserting the toes at its one end*” shown at the left hand end of the photograph above. At the opposite end of the product there is “*a fastening element ... for fastening around the leg in the form of a tape*”. Since none of the statement, observations or observations in reply dispute any of this, I take it that it is common ground that all of these features of claim 1 can be found in the product.
22. This leaves one requirement of claim 1, namely that the device is “*characterised in that it has the shape of a plane figure*”.
23. There is one obvious difference between the product and a sample of the patentee’s product that has been provided, a sample packaged with instructions bearing the patent number and hence I take it intended to embody the invention protected by the patent. The product illustrated above is formed from two layers which overlap in use,

joined at the end of the device with the pocket or catch element. By contrast the sample of the patentee's product is made from a single layer of material.

24. According to the observations this difference is key to the question of infringement. Since those observations construe "*shape of a plane figure*" to mean "*may be laid out flat on a surface with no overlapping regions, folds, wrinkles or creases*", they contend that the product cannot infringe by virtue of its overlapping layers. The observations in reply disagree. In view of my construction of the phrase "*shape of a plane figure*" to mean a body that could be laid substantially flat I do not agree with the observations. It seems to me that the product falls within the scope of the claim as I have construed it and consequently the product infringes the patent.

## **Opinion**

25. In my opinion the Gus Comfort product infringes claim 1 of granted European patent EP1059899.

Karl Whitfield  
Examiner

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## **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.*