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Case No: HP-2021-000042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
PATENTS COURT

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

Date: 19 December 2023

Before :

HIS HONOUR JUDGE HACON
(Sitting as a High Court Judge)

Between :

SAFESTAND LIMITED **Claimant**
- and -
(1) WESTON HOMES PLC
(2) WESTON (LOGISTICS) LIMITED
(3) WESTON GROUP LIMITED **Defendants**

Andrew Lykiardopoulos KC and Henry Edwards (instructed by DLA Piper UK LLP) for
the Claimant

Jeremy Reed KC and Nick Zweck (instructed by Birketts LLP) for the Defendants

Hearing dates: 8, 12-14 and 19 June 2023

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This judgment was handed down remotely at 10.30am on 19 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**Judge Hacon :****Introduction**

1. Builders' trestles are scaffold-like structures. In series they support a platform on which workers can stand to gain access to a point of work in the construction or maintenance of buildings.
2. The claimant ("Safestand") pleads infringement of three patents and three re-registered designs ("RRDs"), all concerned with builders' trestles.
3. The patents are:
 - (1) UK Patent No. 2 378 978 ("UK 978"),
 - (2) European Patent No. EP 1 660 738 B1 ("EP 738") and
 - (3) UK Patent No. 2 420 822 ("UK 822").
4. The RRDs, former Community Registered Designs, all have the title "Trestles for building industry". They are:
 - (1) No. 9000229349001 ("RRD 0001"),
 - (2) No. 90003121450004 ("RRD 0004") and
 - (3) No. 90003121450005 ("RRD 0005").
5. The defendants (collectively "Weston") deny infringement and counterclaim, seeking revocation of EP 738 and UK 822, both on the ground of lack of inventive step. In relation to the RRDs Weston counterclaim that each of them is invalid because the design registered lacks unity and/or clarity and because it lacks individual character over cited prior art.
6. Safestand has an application to amend UK 978. Weston does not resist it and the application has become unconditional. Weston has pleaded a counterclaim seeking revocation of UK 978 but this was withdrawn following the unconditional application to amend.
7. Safestand has a conditional application to amend EP 738.
8. After evidence was heard Weston conceded infringement of UK 822.
9. Andrew Lykiardopoulos KC and Henry Edwards appeared for Safestand, Jeremy Reed KC and Nick Zweck for Weston.

Weston's application to amend the Grounds of Invalidity

10. On the morning of the first day of the trial Weston filed an application notice seeking permission to re-re-amend their Grounds of Invalidity. They had discovered an article from Construction News dated 3 June 2004 containing a passage which, Weston said,

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led to a strong inference that there had been prior use by Safestand of the inventions claimed in EP 738 and UK 822, so both patents are invalid for lack of novelty. Draft Re-Re-Amended Grounds of Invalidity were provided.

11. Weston gave Safestand notice of their intention to make the application and why on the first morning of the trial. Safestand resisted the application.

The law

12. The parties were agreed that the authority of most relevance is the judgment of Carr J, as she then was, in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm). The claimant in that case sought to make what were conceded to be very substantial amendments to her case on the alleged misconduct on the part of the defendant in the sale of the claimant's shares. The application was made three weeks before the trial was due to start. The trial was vacated anyway because it was common ground that the defendant would not have enough time before the trial to respond to the amended Particulars of Claim if amendment were permitted and the claimant had said that if her application to amend were disallowed, she would abandon her claim. The application for permission to amend was dismissed.
13. Carr J said:

“[36] An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus, the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.

[37] Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

[38] Drawing these authorities together, the relevant principles can be stated simply as follows:

- a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

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b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.”

14. In *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268, the Chancellor of the High Court, with whom Sharp and Hamblen LJ agreed, said:

“[41] The principles relating to the grant of permission to amend are set out in *Swain-Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it.

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These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.”

Discussion

15. Having heard submissions on the first day of the trial, I told the parties that Weston’s application was dismissed and that reasons would be given in this judgment. They follow.
16. I begin with Weston’s prospect of succeeding in its proposed case for the anticipation of EP 738 and UK 822 due to prior use. The article, dated 3 June 2004, spoke of impending regulations which were to impose new safety requirements to protect individuals working at height. It stated that some contractors had already started to change their working practices and to seek new products. The article continued with a reference to a Wembley firm which by common consent was Safestand:

“... a Wembley firm has launched an alternative to the ‘bandstand’ trestle system for brickwork contractors. The Safestand system features telescoping steel rails which are fitted to standard scaffold boards to create a 4.5m guardrailed access platform.

The system has been tested to loads of 3.25 tonnes and does not need scaffold erection skills, said a spokesman. He said ‘It is impossible to use incorrectly and includes a securing bracket so you can’t flip boards over if you step on the end.’”
17. The letter from Weston’s solicitors dated 8 June 2023 to Safestand’s solicitors, in which Weston’s intention to seek to amend its case was first raised, contains quite a long list of requests for further information seeking to nail down whether the launch referred to in the Construction News article constituted a sufficient public disclosure to amount to a prior use of the inventions of either EP 738 or UK 822. Self-evidently, it is not possible to reach a firm conclusion either way as matters stand. Safestand pointed out that features of the inventions claimed were missing from the article and argued that the idea of prior uses was pure speculation.
18. In my view Weston would have a real prospect of succeeding in their allegation of prior use. Had the allegation been pleaded in good time it would not have been strikable.
19. Weston sought to circumvent the point made by Carr J in her sub-paragraph (c). They acknowledged that their prior use allegation could not on any view be dealt with in the present trial and proposed that their application to amend be adjourned to the hearing on the order to be made following judgment. At that stage directions should be given on the application, in effect directions for a second trial on prior use.
20. I do not accept that such a way forward would neutralise Carr J’s point (c). I think that underlying the point was the judge’s concern that save in exceptional circumstances parties should not be put to the expense inevitably caused by the late adjournment of a trial. Likewise, only rarely will it be appropriate to incur the waste in court time and the delay to a final judgment that will generally be caused by a late adjournment. A second trial in the present case would still give rise to those disadvantages.

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21. To my mind, a key consideration here is the reason why the information on which Weston's new argument is based, the content of the Construction News article, was not found sooner. This is Carr J's point (f). There was no evidence filed in support of Weston's application. Weston relied solely on what was said in the Application Notice and I will quote the relevant section:
- “ ... the disclosure in the Construction News Article has only just come to light. In the course of preparing for trial, various searches have been done for articles at the request of junior counsel. On the afternoon of 5 June 2023, the Construction News Article was downloaded together with a number of other articles. These were then forwarded to junior counsel on 5 June 2023 for review. The first opportunity junior counsel had to review those articles was this morning. Upon the issue being identified and raised, we wrote immediately to DLA Piper raising the Construction News Article and seeking further information.”
22. This is not very satisfactory. It appears that junior counsel and possibly others in the legal team took the view at some point that searches for relevant articles were needed for Weston to be properly prepared for the trial. No dates are given for when the view was taken or why, when the requests for searches were made or to whom, when they were complied with, or otherwise why the article in question was not supplied much sooner. I asked Weston's leading counsel during argument why there was no explanation for the late emergence of the article. Beyond saying that his junior has sharp eyes and that discovery of the article was a quirk of fate, no real answer was provided.
23. Applying the balance identified in point (a) of Carr J's judgment, the heavy burden identified in point (b) and in the Court of Appeal's judgment in *Nesbit*, plus the matters raised by Carr J in (d), (e) and (g), I think it matters a good deal that there was no satisfactory reason why prior use could not have been pleaded in good time. If it did not matter much, applications to amend Grounds of Invalidity, even on the first day of the trial, would routinely be allowed on the sole basis that something has just come to light. This would be not in accordance with the overriding objective. The application to amend is dismissed.

Weston's products

24. Weston's products are described in their product and process description (“PPD”). The system comes in two variants. Weston's principal product, the KK1500 or Kwik Kage System, has standard height 1498mm frames. It is shown here without the transverse planks or board which would be laid about half way up to form the platform on which builders would stand:

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25. It is marketed in the colours shown. Each trestle is coloured yellow and consists of an “h frame”, to use Safestand’s term after their shape. The blue and grey components are removeable supports for safety barriers. The trestles are used in systems of two or more, together supporting the platform. Weston also market a shorter version, called the KK600, used for work at lower heights. It has the same construction but is shorter with two rather than three horizontal bars in the h frame. For the most part argument was directed to the KK1500 system.
26. This is an illustration of the KK1500 with a platform, an access ladder, a removeable gate at the top of the ladder and removeable safety rails in place:

**The witnesses**

27. The only witness of fact was Shaun Weston, director of the first defendant, who signed the statement of truth in the PPD and was cross-examined. Mr Weston gave clear answers.

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28. The experts were Timothy Lohmann for Safestand and Lewis Santos for Weston.
29. Mr Lohmann is Director of Strategic Engineering at Keltbray, a specialist in construction engineering. At the earlier of the priority dates of the patents alleged to be invalid, in July 2002 (the later is in June 2004), Mr Lohmann was working for the engineering and construction company Laing O'Rourke. From 2003 to 2005 he was a senior engineer and project manager at Techrete (UK) Limited, a manufacturer of precast concrete cladding. Later Mr Lohmann built up a small engineering business which he co-founded before moving to Keltbray.
30. Dr Santos is a product design consultant. In 2003 to 2004 Dr Santos was director and employee of Product Solutions Catalysis Limited, a company which he had founded in 2001. Product Solutions develops new products either on behalf of clients or on its own account. These have included a low-level platform for use in construction, an aluminium scaffold system and a guardrail for aluminium towers.
31. My impression was that both Mr Lohmann and Dr Santos for the most part did their best to assist the court. Both made concessions in cross-examination. Up to a point this indicated that they were capable of honest changes in their evidence when each felt obliged to do so. But there were quite a lot of changes which may suggest that their respective reports were not prepared with full care as to their accuracy.
32. The experts became embroiled in detailed arguments about experiments conducted by the parties which were directed in part to what the skilled person would understand by the term "trestle", a matter relevant to infringement. Mr Lohmann sometimes struggled with calculations done and admitted that he had made errors in his theoretical modelling. On the other hand, a central proposition being put to him was that the experiments had shown that a hypothetical trestle was too "wobbly" to be a trestle. Criticism that he did not give clear answers about this I think often stemmed from the difficulty anyone might have experienced in trying to give exact answers in relation to such an imprecise criterion.
33. There are three matters to mention regarding Dr Santos' evidence. The first is about his understanding of the concept of common general knowledge, the second about his understanding of obviousness in patent law. I discuss these in context below.
34. The third concerns experiments done by Weston on their KK600 system. They were not included in the Notice of Experiments, although data was obtained which was not disclosed by Weston. In his reply report Dr Santos criticised Mr Lohmann for attempting calculations about the KK600 without any data. The criticism was odd because Dr Santos knew that such data existed and did not say so. It subsequently came to light because Mr Lohmann noticed KK600 samples at the site where the experiments were done. Safestand queried this with Weston and following a contested disclosure application the KK600 data was disclosed.
35. Weston's submission in argument was that when experiments are carried out in the course of litigation the expert supervising them is entitled to select the results which he or she believes are relevant and to ignore the others. He or she is not under any duty to mention that tests were carried out giving rise to those other omitted results. It is equivalent, Weston argued, to selecting disclosure which is relevant and not providing disclosure which in the expert's view has no relevance.

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36. The KK600 data was relevant to the issues between the parties and apparently wrongly withheld, although by the time of the trial it was largely water under the bridge.
37. The shorter point is that the lack of candour on the part of Dr Santos when he implied that there was no KK600 data, although he knew such data existed, did not enhance his credibility.

The skilled person

38. It was common ground that the skilled person is a person interested in the design or manufacture of scaffolds, working platforms and products affording low-level access at a construction site. Weston went further, saying that he or she is a product designer involved in such design or manufacture. Such a designer is no doubt a person who most characteristically would be likely to have a practical interest in the subject matter of the inventions claimed in the patents, but I do not believe that anything significant hangs on the distinction.
39. The reason for Weston's preference for a designer was that this was Dr Santos's job at the relevant time. Mr Lohmann was a project manager, the "technical lead" (Mr Lohmann's term) in respect of the projects in which he was involved. Dr Santos's had the easier task of putting himself into the position of the hypothetical skilled person but I did not have the impression that Mr Lohmann was unable to conduct that task. As ever, the reasons given by the experts for their views was more important than their proximity to a real-life embodiment of the skilled person.

The common general knowledge

40. Before the trial the parties filed a joint statement of common general knowledge ("CGK") which was quite extensive.

Systems

41. The experts were agreed that some of the products that competed with those from Safestand and Weston in 2002-4 would have been part of the skilled person's CGK. In his first report Dr Santos said that this would have consisted of all the main products marketed in the UK at that time, as well as their technical data sheets and their product manuals. He went on to list 25 such products. Mr Lohmann accepted that four of them, the Kwikstage system marketed by RMD Kwikform, the Cuplock system sold by Lyndon SGB, a system sold by Youngman Stagings and the BoSS Towers system were all part of the CGK, but not the others.
42. In cross-examination Dr Santos was asked how he had satisfied himself that the other 21 products were part of the CGK. His answer was simply that he knew about them. That was not sufficient to establish their status as CGK and it suggested that Dr Santos had not been given an accurate idea of what is meant by CGK in law.
43. In his first report Dr Santos said that Birketts, Weston's solicitors, referred him to *Raychem Corp's Patents*. Dr Santos quoted this from the judgment of Laddie J:

"The common general knowledge is the technical background of the notional man in the art against which the prior art must be considered. This is not limited

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to material he has memorised and has at the front of his mind. It includes all that material in the field he is working in which he knows exists, which he would refer to as a matter of course if he cannot remember it and which he understands is generally regarded as sufficiently reliable to use as a foundation for further work or to help understand the pleaded prior art. This does not mean that everything on the shelf which is capable of being referred to without difficulty is common general knowledge nor does it mean that every word in a common text book is either. In the case of standard textbooks, it is likely that all or most of the main text will be common general knowledge. In many cases common general knowledge will include or be reflected in readily available trade literature which a man in the art would be expected to have at his elbow and regard as basic reliable information.”

44. Dr Santos apparently understood that this passage from *Raychem* supported what he had been told by Birketts:

“[Birketts] also explained to me that the CGK can include information which, even if not retained in the skilled person’s memory they would refer to as a matter of course.”

45. I assume that Dr Santos not unreasonably took this to be a correct summary of the law. The key qualification left out is that the CGK can include information which the skilled person would refer to as a matter of course *to use as a foundation for further work or to help understand the pleaded prior art*. In other words, such further information only becomes part of the CGK if the skilled person is appropriately prompted to consult it, which will usually be in order to elucidate an item of prior art. To take an arbitrary example, if the prior art says that a process must not be conducted at or above the melting point of lead, the skilled person can be taken to look up that temperature. In *Raychem* Laddie J did not mean that every piece of information not held in the skilled person’s mind but which he or she knows to exist is hoovered up into the CGK.

46. Dr Santos gave a citation for the passage from *Raychem* which he quoted. The citation is wrong (the correct citation is [1998] RPC 31, at 40). That would normally be neither here nor there, but the citation he provided: [2009] RPC 23, at [25], is in fact to a paragraph from the judgment of Jacob LJ in *Generics (UK) Ltd v Daiichi Pharmaceuticals Co Ltd* [2009] EWCA Civ 646; [2009] RPC 23. This is that paragraph, which follows immediately after Jacob LJ has quoted the passage from *Raychem* set out by Dr Santos:

“[25] Of course material readily and widely to hand can be and may be part of the common general knowledge of the skilled person – stuff he is taken to know in his head and which he will bring to bear on reading or learning of a particular piece of prior art. But there will be other material readily to hand which he will not carry in his head but which he will know he can find *if he needs to do so* (my emphasis). The whole passage is about material which the skilled man would refer to ‘as a matter of course.’ It by no means follows that the material should be taken to be known to the skilled man if he has no particular reason for referring to it.”

47. I see no point in speculating how this part of Dr Santos’s report came to be edited and finalised. However, I am forced to conclude that Dr Santos was provided with a flawed

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understanding of the concept of CGK in law. That is not a criticism of Dr Santos. But I must treat his evidence on CGK with considerable caution.

48. Going back to the 21 trestle systems in dispute, aside from Dr Santos's assertion that they were within the skilled person's CGK, Weston did not provide any evidence that this was the case. No doubt the skilled person knew that systems other than those within the CGK existed and that he or she could find out what they were together with details of their design and function. This does not qualify any of that information as being part of the CGK. I find that it was not.

Frames

49. No products sold with h frames were identified within the CGK. They are to be distinguished from CGK frames without the integral upright which creates the h shape.

Kickboard brackets and guides

50. It was within the CGK to use kickboards, i.e. boards of low height, like a plank on its side, placed at the edge of a platform to prevent a person from accidentally stepping over the edge. They were held in place by brackets attached to an upright scaffolding tube. Brackets commonly used were generic in that they could be used for alternative functions as opposed to being designed and used specifically for kickboards. This is an example:



51. Dr Santos drew attention to two brackets on the market by July 2002. One was part of what was known as the BoSS system. Mr Lohmann agreed that the system was very successful and that its components, including its kickboard bracket, were part of the CGK. However, as Dr Santos accepted, it was of a design specific to the BoSS system in which the platforms are custom-designed and the brackets are specifically designed to clip on to horizontal scaffolding tubes. In a standard builders' trestle the relevant horizontal tube supports and is covered by the platform, so BoSS brackets could not be used. The skilled person would therefore have thought that use of these BoSS brackets was confined to a BoSS system.
52. The other brackets Dr Santos referred to were part of what was called the Omega system. The brackets were specifically designed to be used with an Omega transom, or horizontal support. There was no suggestion that they could be used outside such a system. Dr Santos said that within that limited application, they were part of the CGK.

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Mr Lohmann thought that they were not. For reasons I have given, I prefer the evidence of Mr Lohmann.

The Patents

UK 978

53. The title of this patent is “Builder’s trestles”. This is claim 1 as proposed to be amended:

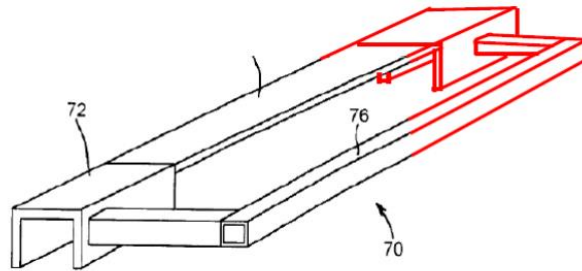
“1. A modular system comprising a plurality of builder's trestles, each trestle comprising a pair of upright supports connected by a crossmember upon which planks or boards can be supported in use to make a platform, at least one upright support of each trestle having an upward extension above the crossmember, the modular system comprising rails having points at which they can be attached between adjacent trestles to form a safety barrier, the spacing between the attachment points for a given rail being variable whereby the spacing between adjacent trestles may likewise be varied; the system further comprising a bracket attachable to a said crossmember, to support the otherwise overhanging ends of the planks or boards wherein said bracket comprises a pair of U-channels having downwardly facing openings to fit over the trestle crossmember, said channels being linked by a metal strip which lies along the top of the crossmember in use, and by a U-shaped tubular framework.”

54. The parties were not agreed as to the meaning that the skilled person would give to the term “trestle”, which I will come back to.

55. The modular system claimed has two or more h form trestles which together support a working platform consisting of planks or boards. The specification states that the invention relates to safety features for the trestles and platforms. The first of these are handrails. They connect the trestles, with attachment points on the rails for attachment to each trestle. The spacing between the attachment points can be varied, which means that the spacing between trestles can safely be varied.

56. The second safety feature is what Safestand calls the “anti-flip” bracket. These are attached to a crossmember, i.e. a horizontal beam of the trestle. The platform, which consists of boards or planks, rests on these beams and will generally overhang the crossmembers at each end. The anti-flip bracket supports the overhanging portion of the platform so that if an individual steps on that portion, the other end of the board or plank will not flip up, potentially leading to an accident.

57. The anti-flip bracket is shown in part in Figure 5. Mr Lohmann added the missing section to show a complete bracket. The channel under the part marked 72 embraces a crossmember; the framework marked 76 supports the board or planks.

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58. EP 738 has much the same title: “Builders’ trestle”. The invention claimed consists of a trestle of the type which makes up the modular system of UK 978, with another safety feature being a removeable upright opposite the upright of the trestle itself. Removeable horizontal rails are attached to the removeable upright. By way of illustration, the removeable uprights and horizontal rails are respectively coloured blue and grey in the products of Weston illustrated above (it was not controversial that Weston’s products have them). Together they provide a safety barrier on working side – the side of the trestle system where typically a wall is being constructed. This is claim 1:

“A builders’ trestle providing a safety barrier and comprising a pair of upright supports connected by a crossmember upon which planks or boards can be supported in use to make a platform, one of the upright supports having an integral upward extension above the crossmember reaching to a height at which one or more generally horizontally extending rails can be attached to form the safety barrier, characterised in that the crossmember is provided at its end opposite the upward extension with a removable upright, with a fitting for receiving the lower end of the removable upright and with further upper and lower generally horizontally extending rails which can be attached to the removable upright to form a further safety barrier, the upper and lower generally horizontally extending rails being selectively removable in use.”

59. The prior art arrangement was to rely on the wall itself as the safety barrier. The advantage of a rail barrier of the claimed invention is that it speeds the construction of a wall. As the wall increases in height, the trestle platform must be raised to allow builders to continue construction at greater height. In the prior art the new level to which the platform was raised each time had to be sufficiently below the top of the wall so that the wall continued to provide a safety barrier on the working side. Having a rail safety barrier on the working side means that there is no need to ensure that the platform is below the top of the wall. The platform can be raised further than would otherwise have been safe, leading to fewer increases in platform height for any given project and speedier construction.

UK 822

60. The title of UK 822 is “Fittings for builders’ trestles” and concerns a bracket for a transverse kickboard, i.e. a kickboard at the end of the platform perpendicular to the kickboards which run along the long side of the platform. A preferred embodiment is shown in Figure 1:

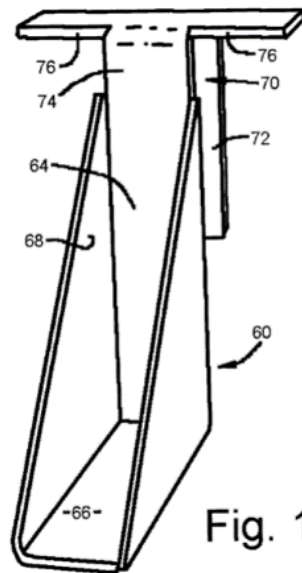
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Fig. 1

61. The feature marked 70 at the back hooks over a kickboard on the long side of the platform. The bracket can be located at any point along the kickboard. A plank is slotted into the space or socket marked 64 to form a transverse kickboard.
62. The prior art arrangement was to attach a transverse kickboard to an upright tube of a trestle. The advantage of the claimed invention is that the transverse kickboard can be positioned anywhere along the longitudinal kickboard, not just where there is an upright, providing useful flexibility.
63. This is claim 1:

“A bracket for securing a first kickboard transversely of a second kickboard, comprising a socket dimensioned for securely receiving an end of the first kickboard and a clip for securing the bracket to the second kickboard, the clip comprising a hook part dimensioned for securely suspending the bracket from the top edge of the second kickboard, and a lateral extension aligned with the longitudinal axis of the second kickboard for stabilising the bracket thereon, characterised in that the socket comprises a back wall positioned between the first and second kickboards in use.”

Construction*Trestle*

64. A major point of dispute was the meaning that the skilled person would give to the word “trestle”, which is central to the understanding and scope of the claims of UK 978 and EP 738.
65. There was in evidence a British Standard, 1139-4 dated 1982, confirmed in June 1990 and still in force. It concerns metal scaffolding and among its definitions there is one for “trestle”:

“a self-supporting metal stand incorporating one or more beams on which a working platform may be laid”.

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66. The beams are what the patents call the crossmembers. The BS clearly has in mind a trestle of the type used by builders and it was not suggested that “builders’ trestle” would be understood to mean something different to the trestle of the BS. Safestand submitted that this definition was clear and definitive. Weston accepted the definition so far as it went but pointed to a paragraph of the BS on design. That paragraph begins:

“**5.1 General.** Splitheads and trestles shall comply with the requirements of 5.2 to 5.6.”

67. A splithead is a different kind of metal stand and can be ignored. Weston drew particular attention to 5.4 and 5.5:

“**5.4 Stability.** When assembled in accordance with the manufacturer’s instructions, if the base is of rectangular configuration, the least base dimension, measured centre to centre, shall be not less than 0.34 of the maximum extended height. If the base is of an equilateral triangle configuration, each base side dimension, measured centre to centre, shall be not less than 0.58 of the maximum extended height.

5.5 Vertical load carrying capacity. Each trestle, when erected on a level base and tested in accordance with Appendix A, shall be capable of supporting a minimum safe working load of 4.5 kN uniformly distributed to the top of the platform-carrying member.

...

The trestles shall be deemed to comply with the requirements of this standard if the appropriate minimum load specified in A.1 has been reached.”

68. Appendix A sets out a method for measuring vertical load carrying capacity, using a test load of at least 11.25 kN or 2.5 times the quoted safe working load.
69. Weston suggested that the experts had agreed that compliance with the relevant BSs was essential. They did not. Mr Lohmann said that a trestle did not have to comply with BS 1139 to be put on the market. Dr Santos accepted that there was no such legal requirement, although he added that it was highly desirable from a marketing point of view.
70. Dr Santos expressed the view that the definition in BS 1139 should be taken to be supplemented by the requirements of paragraphs 5.4 and 5.5. I do not think I need to rely on expert evidence to understand the relevant part of BS 1139. It seems to me that Dr Santos and, relying on him, Weston, were confusing two distinct matters. The first is the definition of a trestle: what it is. The second is the set of requirements that a trestle, so defined, must meet to comply with the BS. An article which satisfies the definition but does not meet those standards is a non-compliant trestle – but still a trestle. It seems that it would be a lawfully marketable trestle, but that is by the way.
71. The BS definition of a trestle requires the metal stand to be self-supporting. The definition is directed to a single metal stand. On the most natural interpretation therefore, “self-supporting” means that each trestle must be in a form which allows it to stand alone without support. This was the meaning proposed by Mr Lohmann in

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his evidence in chief. He explained why this would make sense to the skilled person: to enable the assembly of a system of two or more trestles, each would have to be self-supporting. In practice, Mr Lohmann said, the necessary stability would be afforded by feet at the bottom of the vertical poles. In cross-examination Mr Lohmann conceded that to be properly called a builders' trestle, the metal stand would also have to be sufficiently stable to support a platform along with at least one other trestle. I am not at all sure that this changed Mr Lohmann's approach to the definition and it was not made clear that his concession, if it can be called that, added anything of substance. A metal stand too unstable to support a platform may likewise not be sufficiently stable to stand on its own.

72. Dr Santos' preferred the requirement that the metal stand is self-supporting to mean that the stand must remain upright in use – when it is jointly supporting a platform with a builder on it. Even assuming that this were correct, it would not seem to have practical relevance to the present claim for infringement. It was no part of Weston's case that its own metal stands fall over when a builder climbs on to the platform and that therefore its stands cannot be "trestles" as understood in UK 978 and EP 738.
73. Mr Lohmann was cross-examined at some length on the basis that trestles in use should not be too wobbly for work to be carried out. This invited unresolved questions of what qualified as too wobbly.
74. Weston made an attempt to put figures on to the stability requirements of a builders' trestle by conducting experiments, which I will consider below. However, in my view the experiments were irrelevant to the point of construction.
75. I find that the skilled person would understand "trestle" to have the meaning given to that word by the definition in BS 1139. He or she would not supplement the definition by reference to the stability requirements of a trestle set out in the BS, much less qualify it by imprecise limitations of not being too wobbly in use. An unsatisfactory trestle is still a trestle.
76. It is clear from the BS definition that a metal stand must be self-supporting if it is to be called a trestle. In my view, this should be given its natural meaning, namely that the metal stand must have a form which allows it to stand alone without support. Neither the patents nor the BS prescribe how this should be achieved, but as indicated by Mr Lohmann, it will depend largely or entirely on the feet – their size and shape and the rigidity of their attachment to the upright.
77. There are functional limitations in the claims of UK 978 and EP 738 but these have no bearing on the definition of a "trestle". Claim 1 of EP 738, for instance, requires that the trestles support working platforms. Whether two or more metal stands are suitable for that function will affect whether they fall within the claim but it is irrelevant to whether each of them is a trestle.

Cross-braces

78. A related argument advanced by Weston was that if there are cross-braces connecting adjacent metal stands in use, such that the cross-braces make the stands sufficiently stable in use – with a builder on the platform – those stands would not be identified by

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the skilled person as trestles. (Cross-braces can be seen in the picture of Weston's product shown above).

79. As I have found, a metal stand is self-supporting and is therefore a trestle if it can stand alone without support (also assuming it has one or more beams on which a working platform may be laid). Adding cross-braces between trestles when they are used in series cannot turn each of them into something which is not a trestle. Dr Santos apparently recognised this. In cross-examination he said that he had seen trestles used with cross-braces. He was taken to a photograph in RRD 005 which shows metal stands connected by cross-braces and said that the skilled person would recognise them as four builders' trestles with cross-braces.
80. I have no doubt that in use cross-braces add to the stability of a series of trestles, thereby significantly providing structural support. This would not prevent the metal stands in question from being recognised by the skilled person as trestles.
81. There was a separate though related point of construction raised by Weston, whether claim 1 of UK 978 excluded a modular system with all the features of that claim but which had cross-braces. It does not. On a conventional approach to claim construction, what matters is whether all the features of the claim are present. It is irrelevant whether the alleged infringement has other features as well. A modular system with all the integers of claim 1, plus cross-braces, would fall within the claim.

Planks or boards can be supported in use to make a platform

82. Claim 1 of UK 978 requires that a pair of upright supports is connected by a crossmember upon which planks or boards can be "supported in use" to make a platform.
83. Weston argued that part of the use of the system was its assembly. During its assembly there would be a point at which the cross-braces have not been added and the suitability of the crossmember for supporting working platforms must be assessed also at this stage. I do not accept that argument. To my mind the skilled person would view the system as being in use when it is performing its intended function, i.e. with one or more builders standing on the platform carryout whatever may be the task in hand. The modular system must be suitable for supporting a platform at that stage.
84. Weston developed and advanced evidence directed to its system being less stable than a benchmark system using trestles made by another manufacturer. I found this to be of no assistance. The correct construction of the supported in use integer and thus the requirement it imposes cannot be gauged by reference to a particular system selected by Weston which happens to be currently available on the market.

Variable spacing

85. A feature of claim 1 of UK 978 is the safety barrier. In relation to that barrier, the claim requires that "the spacing between the attachment points for a given rail [is] variable whereby the spacing between adjacent trestles may likewise be varied". The specification explains further features which can allow the distance between trestles to be varied:

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“Each rail may have several attachment points spaced along its length or adjacent one or both of its end to provide adaptability in the system. ... Preferably however, the rails are made variable in length, for example comprising telescopic sections.”

86. This does not seem to me to be difficult to understand. The requirement of the claim is that the distance between the attachment points on adjacent trestles for a given rail must be variable so that the distance between the trestles is variable. The claim does not specify how this is to be achieved. The description says that one way is to have several and thus alternative attachment points on the rail and another preferable means is to have rails which are variable in length, such as by using telescopic sections.
87. The issue raised in argument concerned blocks of trestles permanently fixed together so that there could only be a variation in distance between the blocks, not between trestles within a single block. I make two observations about construction of the variable spacing integer. First, claim 1 of UK 978 does not make periodic changes in spacing between trestles obligatory. This is not a method claim. The requirement is that when the system is set up it must be possible to vary the distance between attachment points on a given rail so that there is more than one possible distance between adjacent trestles. Secondly, the modular system must *comprise* rails with this variable arrangement. It would be sufficient if there are at least two such rails, even if they are present along with other safety rails without that feature.

Infringement

88. Weston’s principal system, the Kwik Kage or KK1500 system, is described in Weston’s Re-Re-Amended PPD. The PPD also states that a run of about 30 systems with shorter frames, the KK600, were produced. They have been discontinued but are still in use. Aside from height, the only difference is that the KK600 frames have shorter cross-braces.

The law

89. There was no dispute about the principles set out by the Supreme Court in *Actavis UK Ltd v Eli Lilly & Co* [2017] UKSC 48 or how they should be applied.

Infringement of UK 978 on a normal construction of the claims

90. Weston’s first argument was that the KK1500 frames are not trestles as would be understood by the skilled person because they do not comply with paragraph 5.4 of BS 1139. I have found that this is irrelevant as a matter of construction. As Mr Lohmann said, there were KK1500 frames at the back of the court room standing alone without support; they comply with the definition in BS 1139 and are trestles. I agree.
91. The second argument was that claim 1 of UK 978 requires the trestles must each provide the working platform with support in use. I have found as a matter of construction that the trestles must be suitable for supporting the platform when one or more builders are carrying out work on the platform.
92. Weston relied on Dr Santos’s detailed consideration of the KK1500’s base to height ratio, the rigidity of its base, the rigidity of the base to upright connections, and overall

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stability and stiffness to arrive at the contention that the KK1500 would not be suitable for supporting a working platform in use without its cross-braces.

93. This could only ever be relevant to infringement only if the “supported in use” integer of the claim must be assessed by reference to trestles without the support of cross-braces. I have found that this is wrong. The trestles fall to be assessed as they are in use – with cross braces if that is how they are used.
94. In fact, there was an issue as to whether the KK1500 system can be used without cross-bracing. Safestand said that Mr Weston had admitted in cross-examination that sometimes this happened. Weston argued that he had said nothing of the kind.
95. Mr Weston was taken to the PPD for this litigation. In its amended form the PPD states:
- “The Kwik Kage System is never used without those cross-braces. ... An Unbraced Kwik Kage System could not be used as a safe working platform on building sites (or the like) by reason of insufficient longitudinal stability.”
96. Mr Weston was then asked whether the PPD was correct to say that the Kwik Kage System is never used without cross-braces. He answered:
- “A. In terms of the system design and the prescriptive system manual, Kwik Kage is never used in its intended fashion without bracing. The actual way it ends up on site and is used on site is that while Weston Homes owns Kwik Kage, we have an installer scheme. So we will train a subcontractor, a brick-laying subcontractor on how to actually use the system and they will be certified for three years. They will get a certificate of familiarisation, which will allow them to erect it and manage it on our sites, but under their control. So it would be wrong to me to say to the court that it is never used in practice without the bracing. However, it should never be used without the bracing, as per the prescriptive manual and as per the training we deliver.”
97. It seems to me that Mr Weston’s evidence was that the system should be used with cross-bracing but acknowledged that sometimes it is not.
98. Mr Weston described the manual and training as “prescriptive”. I am not even sure about that. My attention was not directed to any further evidence about the training, but the manual was in the court bundle. Under the heading “Main Frame Cross Brace Member Assembly” the manual states:
- “Cross brace members can now be affixed in order to brace the two main frames together as per the below instructions.
- Cross brace members are required to be inserted as per photo 1 in order to allow securing pins to be fully inserted vertically.
- ...
- Repeat this process for all main frames set out in the desired run.”
99. This is at best ambiguous. The manual is prescriptive to the extent that insertion of the cross braces must be done as per photo 1. But it follows the instruction that cross brace

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members *can* now be affixed. I am not certain that the user of the system would take this to be a firm instruction that cross braces must be affixed. Mr Weston was asked in re-examination to interpret the words I have quoted but they are in ordinary English and I was not assisted by a witness explaining what they mean.

100. During Mr Weston's oral evidence he did not say that installation of the KK1500 system without cross-bracing would result in its collapse. Of course it may well depend on the nature of the use and the stress it imposes on the system. I think that if it were the case that any sort of normal use of the system without cross-bracing is bound to be dangerous to users, an appropriate warning would be clearly signalled in the manual. Near the start of the manual (version 8, the latest and the version given most attention) there is a section headed "General Health & Safety". In it there is a quite a long list of strongly worded instructions as to safe use of the system, such as (original bold upper case and underlining):

"Kwik Kage brick guards as supplied **MUST** be used once Kwik Kage has been erected to prevent falling of materials."

101. There is nothing in the list about the compulsory installation of cross braces and my attention was not directed to any safety warning about cross-bracing elsewhere within the several versions of the manual that were in evidence.
102. I find that users of the KK1500 system sometimes do not add cross braces and that Weston are aware of this.
103. It feeds into the experiments carried out for the purposes of the litigation. Part of Weston's strategy behind the experiments was to say that the KK1500 system is invariably used with cross-bracing, infringement should be assessed by reference to the system without cross-bracing and the experiments show that used that way it would not satisfy the "supported in use" integer of claim 1. Therefore the system does not infringe.
104. On my construction of claim 1 the argument largely does not work because the integer is to be assessed by reference to the system as it is actually used, and it is largely used with cross-bracing. I will say more about the experiments below since sometimes the system is not used with cross-bracing. However, the supported in use integer of claim 1 is satisfied, at the least, most of the time.
105. The third argument was that because the KK1500 system uses cross-braces (when it does), there can be no question of varying the distance between trestles. Accordingly the requirement that the spacing between attachment points for a given rail must be variable is not met.
106. The PPD states that both the KK1500 and KK600 systems are supplied with telescopic safety rails which can be varied in length. There are blocks of three or four trestles having a fixed distance between them determined by the cross-braces. The telescopic rails are used between the blocks. The distance between the blocks can be fixed at 300 or 600mm.
107. Earlier versions of the manual had a page headed "Telescopic Rails" and stated:

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“This rail ... can be used for when there is a larger gap to bridge between frames”.

108. The relevant page is now headed “Fixed Length & Telescopic Handrail”. It says:

“In most cases fixed length handrails are already set to the correct distance, however an equal number of large telescopic handrails are supplied which can either be set to the same distance as a fixed length handrail or can be made shorter or longer for added. [sic]”

109. Assuming that the user sets up the KK1500 system with cross braces between trestles within a block, there are nonetheless rails in the system, used between blocks, having points at which they can be attached between adjacent trestles of adjacent blocks to form a safety barrier. The spacing between those attachment points is variable. The variable distance integer is satisfied. All the more so when the KK1500 system is used without cross-bracing.

110. Subject to the experiments and use without cross-bracing, all the integers of the claims of UK 978 are satisfied.

The experiments

111. Weston conducted experiments of some days’ duration. They served a Notice of Experiments which concerned only the KK1500 system. The experiments reported in the Notice related to the alleged infringement of UK 978 and EP 738 and were directed to the stability, or lack of it, of the KK1500 system. Safestand required repeats, which took place over two days at the NRFIS (National Research Facility for Infrastructure Sensing) laboratory at Cambridge University. All this notwithstanding, Safestand’s position was that the experiments were of no assistance in resolving infringement.

112. These experiments were directed in large part to whether the frames of the KK1500 system were sufficiently stable to qualify as trestles according to the understanding of the skilled person, i.e. directed to a point of construction. Experiments 1 and 2 concerned a single trestle which, obviously, was not supporting a platform. Paragraph 5(6) of Weston’s Re-Amended Notice of Experiments states:

“(6) The Kwik Kage System does not comprise any components that function/ behave like trestles. The unbraced Kwik Kage System does not comprise any components that function or behave like trestles.”

113. In their written closing submissions Weston summarised the purpose of all the experiments this way:

“[82] The experimental evidence proves, ultimately, that the KK1500 is not as stable as a standard trestle of the same height, and is not as stiff as a standard trestle of the same height. The differences are significant, particularly under some of the test conditions (all of which were within the reasonable working range for a trestle platform).

[83] The conclusion is clear – the KK1500 is not a builder’s trestle, and it does not provide ‘support in use’ to a working platform for two different

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reasons: insufficient stability, and insufficient stiffness. This re-affirms non-infringement of Integers 1A and 1B for both the 978 and the 738 Patents.”

114. Thus, Weston had two targets in mind. The construction point – whether a KK1500 frame was stable enough to be a trestle – and the “supported in use” integer of claim 1.
115. I have found that the skilled person would understand the word “trestle” to have the meaning given to the word in BS 1139. The experiments can add nothing to that point of construction.
116. As to whether the experiments provide any assistance in deciding whether the KK1500 system satisfies the “supported in use” integer, the answer again is no.
117. I do not believe that I need go into the many details of what the experiments and their repeats did or did not establish. I think I am entitled to infer from Mr Weston’s admission that he did not intend the burden of his evidence to be that when his company’s products are used without cross-bracing then necessarily the platform will not be safely supported; it will collapse with a risk of serious injury. Also, as I have said, a clear warning would be expected in the manual if this were the case. It is likely, therefore, that the KK1500 system, even when used without cross-bracing, is suitable in use for supporting a platform on the crossmembers. Probably, where the use is of a nature to place high stress on the platform users would be wise to have cross-bracing in place and that is what they do, but this is by the way. I find that the “supported in use” integer is satisfied when no cross-bracing is used.
118. In my view, Safestand were correct to say that the experiments were of no assistance in resolving any relevant issue between the parties.

Conclusion on infringement

119. UK 978 is infringed by the marketing of the KK1500 system. Weston did not argue that there was any feature of the KK600 system such that its sales would avoid infringement if KK1500 infringes. The KK600 system also infringes on a normal construction of the claims of UK 978.

EP 738

120. Weston’s arguments against infringement of EP 738 echoed those advanced in respect of UK 978. Weston accepted that if their systems infringed UK 978, EP 738 was also infringed.

Validity

121. Weston allege that EP 738 and UK 822 are invalid on the ground of lack of inventive step.

The law

122. There was no dispute about the law. Safestand emphasised Lord Diplock’s well known warning against a step-by-step approach to obviousness in *Technograph Printed Circuits Ltd v Mills & Rockley (Electronics) Ltd* [1972] RPC 346, at 362, and this

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observation of Floyd LJ in *Koninklijke Philips NV v Asustek Computer Inc* [2019] EWCA Civ 2230 at [61]:

“If the invention claimed is, as it is here, a simple idea, then it is correct that this simple idea is the target for the obviousness attack. That does not mean, however, that the court is entitled to assume that the skilled person takes a different approach to the prior art, stripping out from it detail which the skilled person would otherwise have taken into account, or ignoring paths down which the skilled person would probably be led”.

123. There is one point relevant to inventive step in this case that I will say more about. It relates to two items of cited prior art though it is sufficient if I discuss it in relation to one of them. That prior art in question is a patent dating from 1941 referred to as “Berchem”. Presumably under the guidance of Safestand’s legal team, Mr Lohmann considered the prior art by reference to the four stages of *Pozzoli* (*Pozzoli SpA v BDMO SA* [2007] EWCA Civ 588, at [23]):

“(1) (a) Identify the notional “person skilled in the art”;

(b) Identify the relevant common general knowledge of that person;

(2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;

(3) Identify what, if any, differences exist between the matter cited as forming part of the ‘state of the art’ and the inventive concept of the claim or the claim as construed;

(4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?”

124. The fourth stage was taken by Mr Lohmann in sub-stages. His conclusion on the first was that Berchem was so old and so far removed from the invention claimed in the patent in suit that the skilled person would have dismissed it from consideration:

“I think that the Skilled Person in 2004 would have discounted Berchem on the basis that it was old-fashioned and out-dated, and of little relevance to someone looking to develop a new system of working platforms in 2004. I very much doubt the Skilled Person would have considered it worthy of further development.”

125. Mr Lohmann’s submissions continued on the basis that if his first conclusion was wrong, inventive step fell to be considered by reference to whether the differences between the prior art and the patent were obvious, which is what he did.

126. Safestand’s submissions on Berchem and inventive step followed a similar path, arguing that Berchem was of little practical use or relevance to the skilled person at the priority date and continuing:

“Assuming, contrary to this, that the skilled person does not dismiss Berchem out of hand, there are three key differences ...”

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127. This sub-division of the fourth stage of *Pozzoli* is quite often done in arguments on inventive step. It is usually based on the notion that the skilled person is able to tell whether the prior art is a good or hopeless place to start. That could only be meaningful if the destination were known. Smuggled in is the illegitimate assumption that the skilled person does know the destination – the invention in suit. Of course, the skilled person is deemed to know no such thing.
128. Certainly, the skilled person has a background in a particular technical field. It may, for instance, be the case that having carefully considered the prior art the skilled person finds its subject-matter so removed from their own field that the scope for adapting it to be of use in their own field seems very limited. Or, conceivably, that the prior art is so old and out-dated that there is little possibility of any adaptation at all which the skilled person would contemplate. But this must be bound up with everything that the skilled person would consider in relation to stage four. The fourth stage of *Pozzoli* is a single undivided stage. Having read the prior art, would the skilled person contemplate a variation which falls within a claim in suit? If yes, the claimed invention is obvious. No preliminary sub-stage is needed and cutting to the chase saves time.
129. In *Eli Lilly & Co v Human Genome Sciences Inc* [2008] EWHC 1903 (Pat), Kitchen J (at [295]) said that having considered cited prior art, the skilled person may conclude that it is simply not a worthwhile starting point and so put it to one side. It seems to me that “starting point” is quite often interpreted in a manner which Kitchen J did not intend. I put it this way in *Autostore Technology AS v Ocado Group plc* [2023] EWHC 716 (Pat):
- “[403] Giving particular attention to the words ‘starting point’, as AutoStore has done, can lead away from what, in my view, Kitchen J had in mind. As Kitchen J said, the skilled person must be deemed to consider every cited item of prior art with interest, in the sense of giving it diligent consideration. It is not part of the hypothesis in law that the skilled person begins their consideration by assessing the merits of the prior art as a starting point. The skilled person may often be aware of a technical problem in the art, but he or she knows nothing about the invention and therefore cannot know how interesting the prior art may be as a starting point on the road to that invention. It is just a piece of prior art. In reviewing what the skilled person would make of it, I think that it is better to focus solely on what the prior art discloses and what it does not disclose, rather than gauging its interest to the skilled person. Having diligently considered a piece of cited prior art in its entirety at the relevant date, as must be done in every case, the skilled person either contemplates a variation on it which is the invention, or they do not. In the latter case, they put it to one side.”
130. A further point arose, this time from Weston’s submissions on the *Pozzoli* stages. In relation to two items of prior art Weston argued that the difference between the patent and the prior art was a feature that did not form any part of the inventive concept of the patent. On Weston’s preferred way of taking stage (3) of *Pozzoli*, i.e. looking at the difference between the prior art and the inventive concept rather than the invention as a whole, that feature was not a difference relevant to assessing inventive step.
131. If a feature of a claim forms no part of the inventive concept it may often be the case that it represents an obvious alternative embodiment of the inventive concept, so the outcome of the *Pozzoli* analysis is the same either way. No doubt in principle there

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could be unusual facts where Weston's approach to stage (3) would matter, but the facts of this case are not an example.

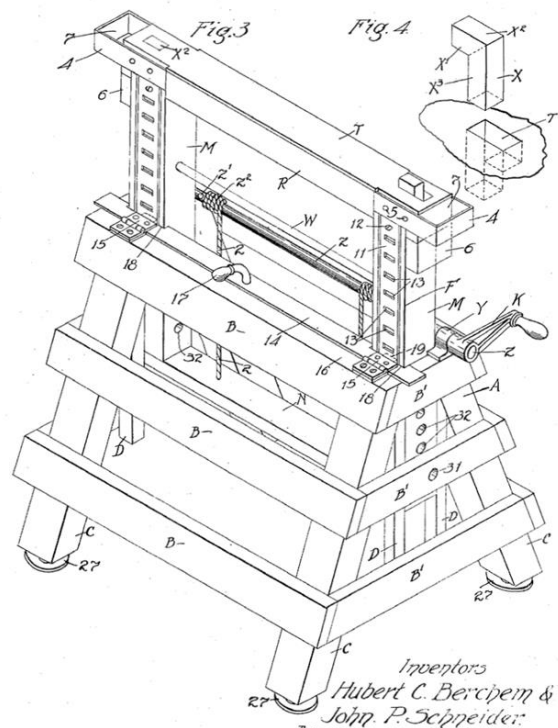
EP 738

132. The two items of prior art relied on are:

- (1) US Patent Application No. 2 237 543 A ("Berchem") and
- (2) UK Patent Application No. 2 364 733 A ("Kelk")

Berchem

133. The invention of Berchem is entitled "Adjustable extension scaffold trestle with guard rail". The patent is dated 8 April 1941 and relates to improvements to a trestle, including an elongatable guard rail and adjustable extensible levelling legs. The trestle disclosed is a "horse scaffold", a heavy wooden structure. Figure 3 gives an impression of the trestle:



134. Mr Lohmann identified three differences between Berchem and claim 1 of EP 738. First, there is no integral upward extension to one of the upright supports at which one or more safety barriers can be attached. He said that having such an extension – to make an h frame – would have made use of the safety rail system described in Berchem impossible. Secondly, there are no removeable horizontally extending rails to form a barrier on the working side. Thirdly, there is no kickboard bracket or in fact any room for a kickboard.
135. Dr Santos' evidence was that the skilled person would have considered the Berchem trestle too heavy and over-engineered, so to begin with the skilled person would have

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replaced it with a height-adjustable builders' trestle which was standard in 2002. He illustrated what he had in mind:



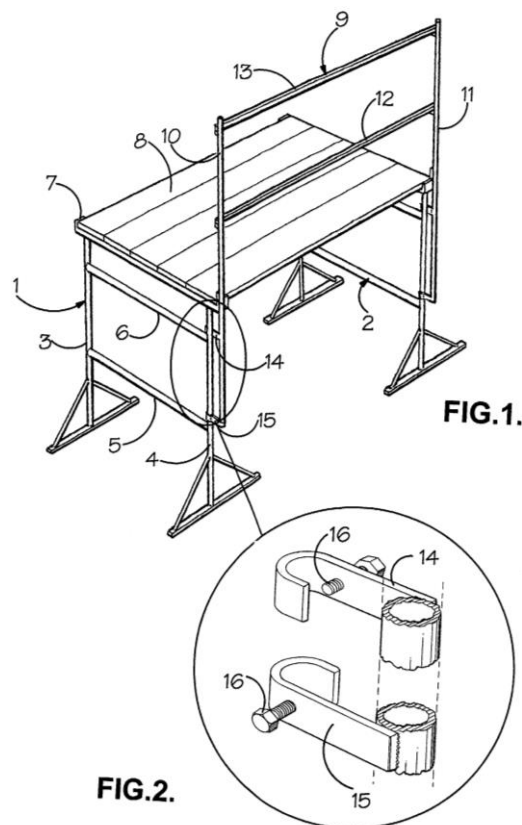
136. From there, it would have been obvious to (a) convert the standard trestle into an h frame with one extended upright and (b) add a removeable upright with removeable guardrails between those uprights on the working side because this would improve productivity. The skilled person would believe that there is room in this arrangement for a kickboard. Kickboards were part of the CGK, so the skilled person would (c) think it obvious to add one. Again to increase productivity, it would have been obvious (d) to integrate a kickboard guide into the crossbeam supporting the platform, allowing faster assembly and dismantling.
137. All these steps proposed by Dr Santos were assertions without substantive reasons to back them up. He was only able identify published CGK in respect of step (c), adding a kickboard. In my judgment, to assume that the skilled person would adopt the starting point of abandoning the Berchem trestle for a standard trestle and then to say that he or she would find it obvious to take each of steps (a) to (d) reflects clearly the vice identified by Lord Diplock in *Technograph*.
138. In cross-examination Dr Santos said each of steps (a) to (d) would be derived from the skilled person's CGK, although as I have said, there was only a published source for the idea of adding a kickboard. For reasons I have discussed, Dr Santos had an exaggerated idea of the common general knowledge. He also appeared to believe that if each of the relevant features was within the skilled person's CGK, any combination of them was obvious. I think that Dr Santos' concept of obviousness in patent law may well have been as flawed as his concept of CGK.
139. I found Dr Santos' evidence on Berchem unpersuasive. I do not accept that all the Dr Santos' steps taken cumulatively were obvious. I do not even accept that some of them individually were obvious. In particular, I find it hard to believe that it would have occurred to the skilled person that there was any point to a safety barrier on the working side. The conventional view was that the wall being constructed provided a sufficient barrier on that side and in my judgment the skilled person would have stuck with the conventional view.

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140. Mr Lohmann thought that none of the relevant features in EP 738 would have been obvious as adaptations to Berchem in 2004 and maintained his view in cross-examination. I accept that evidence.
141. EP 738 does not lack inventive step over Berchem.

Kelk

142. Kelk is a UK application published in February 2002 entitled “Improvements in and relating to builders trestles”. The invention applied for relates to a safety barrier on the one side of the trestles. These are Figures 1 and 2:



143. The barrier consists of two or more horizontal bars, marked 9 and 12, each of which is connected to and between two vertical bars (referred to as legs), 10 and 11. Each of the legs has securing means, 14 or 15, to attach it to one of the vertical bars of the trestle, 4. In an alternative embodiment the trestles have an h frame, so that the vertical bar 4 would extend upwards above the platform and the horizontal safety bars would be attached to that extension.
144. The first difference between Kelk and EP 738 is that Kelk does not suggest that the safety barrier should be on working side of the platform. It would make no sense to have no barrier on the non-working side since that would be dangerous, so in effect the variation on Kelk is to have a barrier on both sides. The second difference is that the horizontal bars of the Kelk safety barrier are not selectively removeable in use.
145. Mr Lohmann thought that neither variation would have been obvious in 2004. It was put to him that since aluminium towers used to paint a ceiling have (non-removeable)

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barriers on all sides, if one were painting a ceiling with builders' trestles, one would ensure that there was a safety barrier on both sides. Mr Lohmann said, reasonably I would have thought, that builders' trestles are not used to paint ceilings. He maintained his view that so far as builders' trestles were concerned, there would always be a working side and it was not obvious to have a safety barrier on that side.

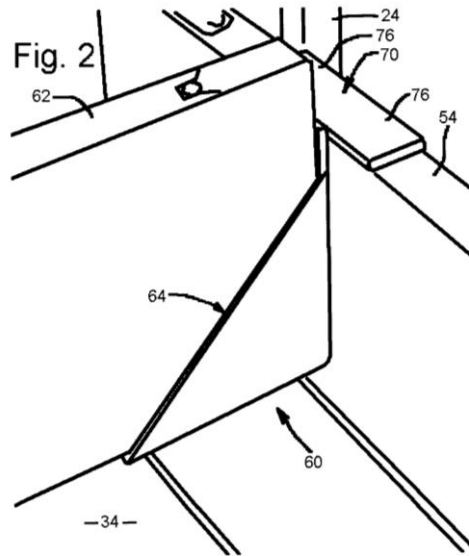
146. In his written evidence Dr Santos said nothing about Kelk not disclosing a safety barrier on the working side but stated that a selectively removeable barrier would have been obvious. In cross-examination he was prepared to agree that the idea of having a removeable barrier on the working side provided a neat and simple solution to fewer lifts of the trestle while ensuring that the safety barrier could be removed when not needed.
147. To my mind, a skilled person having read Kelk in 2004 would not have contemplated the variation of having an additional safety barrier on the working side or of making it selectively removeable. Rather, to paraphrase Dr Santos a little, these together would have been seen as a neat idea. EP 738 does not lack inventive step over Kelk.

UK 822

148. Weston said that UK 822 lacked inventive step over:
- (1) German Utility Model No. 7 827 622 U1 ("Dobersch") and
 - (2) UK Patent Application No. 2 228 955 A ("Harris").

Dobersch

149. Dobersch has the title "Toe board holder especially for steel tube scaffolding". It was published in 1979. Dobersch's toe board is what was generally called a kickboard in the evidence. Dobersch's device is for holding kickboards, where the device can be placed around a vertical scaffolding tube. The document explains that in the prior art transverse kickboards (i.e. those at the end of a platform) were secured by nailing them to longitudinal kickboards or sometimes securing them at one end by conventional holder. The idea in Dobersch is to have a kickboard holder with two slots, perpendicular to each other, so that together they hold both a longitudinal and transverse kickboard. The Dobersch holder, like conventional holders, is placed around and secured to a vertical scaffolding support.
150. Dobersch shares with the invention of UK 822 the function of securing two kickboards, one transversely of the other. The experts identified two integers of the bracket in claim 1 of UK 822 which are not disclosed in Dobersch. The first is "a lateral extension aligned with the longitudinal axis of the second kickboard for stabilising the bracket thereon". This is Figure 2 of UK 822:



151. The lateral extension is marked 76. The specification explains:
- “In use the extensions or projections lie along the top edge of the longitudinal kickboard 54 and stabilise the socket 60, preventing it from twisting about the longitudinal axis of the transverse kickboard 62.”
152. In his written evidence Dr Santos accepted that in Dobersch the principal source of stabilisation is the anchoring of the bracket around the upright. He thought that it would be obvious to vary this to have the lateral extensions of UK 822, which would follow from positioning the bracket on the longitudinal toe board, like that of UK 822, instead of fixing to an upright scaffolding tube.
153. Dr Santos’s change would require the skilled person to have thought of the central idea of UK 822, namely fixing the bracket to the longitudinal kickboard so the transverse kickboard can be positioned anywhere along the longitudinal kickboard, not just where there is an upright pole. In cross-examination Dr Santos agreed that there was nothing of that idea in either Dobersch or the CGK but said that in a real scaffolding project an individual may find that he needs to fix the transverse kickboard away from a vertical pole and under the pressure of site work he or she would be led to such a solution. This did not sound to me like a solution that could be considered without some degree of invention.
154. Mr Lohmann thought that the Dobersch bracket was a good one and that the skilled person would see no reason to adapt it. He maintained his view in cross-examination. He was then asked to assume that the skilled person reading Dobersch would think of moving the bracket away from the vertical pole. Mr Lohmann did not think that the skilled person would seek any advantage in doing so, but he answered. Since the question was put on such an assumption, I could gain nothing useful from the answer because it assumes that the skilled person had the key insight disclosed in UK 822. I accept Mr Lohmann’s evidence.
155. The second difference between UK 822 and Dobersch is that the socket of Dobersch does not “comprise a back wall positioned between the first and second kickboards in

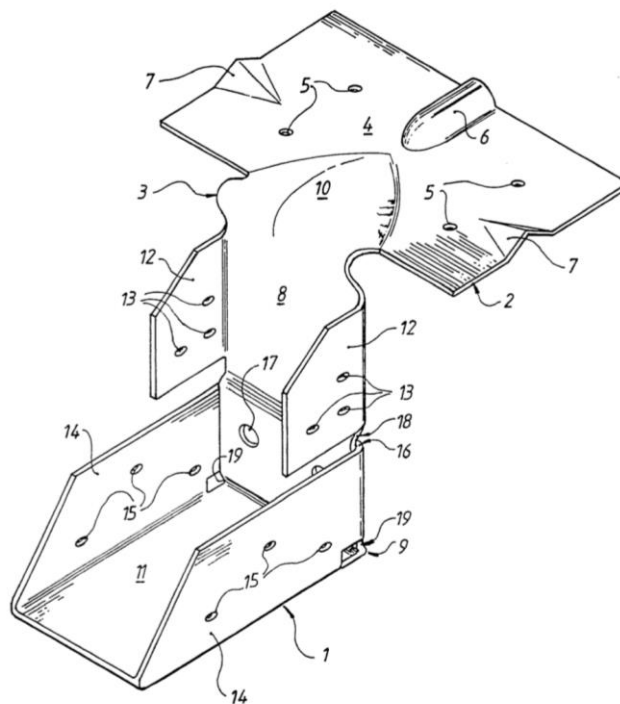
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use”. Dr Santos said that this integer formed no part of the inventive concept UK 822. The integer constitutes the characterising portion of claim 1 so it would be unusual if Dr Santos were correct. However, my finding in relation to the first difference between UK 822 and Dobersch means that UK 822 does not lack inventive step over Dobersch anyway, so I need not reach a firm view on the inventive concept of UK 822.

156. Dr Santos conceded that if the skilled person wanted to have the Dobersch bracket attached to an upright scaffolding pole (as is expressly taught), it would not have been obvious to add a back wall of claim 1 of UK 822 to the bracket because it would prevent the bracket from being pushed laterally onto the scaffolding tube, rendering it unfit for purpose. Mr Lohmann said the same thing.
157. Adding a back wall therefore depended on abandoning the idea of attaching the bracket to a vertical pole and fixing it instead to the longitudinal kickboard. I have found that the skilled person would not have abandoned a central teaching of Dobersch in that way.
158. UK 822 does not lack inventive step over Dobersch.

Harris

159. Harris is a UK application published in September 1990 with the title “Joist hangers”. These are hangers used to support joists which extend from wall to wall in a room. The joists will usually support floorboards. The hangers have what the specification calls a stirrup, a socket which accommodates the end of a joist. This is Figure 1:

Fig 1.

160. The upper horizontal masonry flange 4 lies on and is fastened to the upper surface of the supporting wall. The stirrup portion, 1, has a rear face 8 which lies against and is

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fastened to the vertical face of the wall. The walls are often made of lightweight aerated concrete blocks, being the inner part of a cavity wall. The specification says that such concrete is easily chipped or made to crumble and that prior art hangers frequently caused crumbling at the edge between the vertical and horizontal faces of the wall, giving rise to joist movement and expensive repairs.

161. The idea disclosed is to have a radiused profile 3 in the join between the horizontal masonry flange 4 and the rear face 8. Figure 3 shows this in profile with the wall marked 41, the horizontal flange 42, the vertical face 43 and the radiused profile 44. It provides what might be regarded as a protective gap between the wall edge and the joist holder:

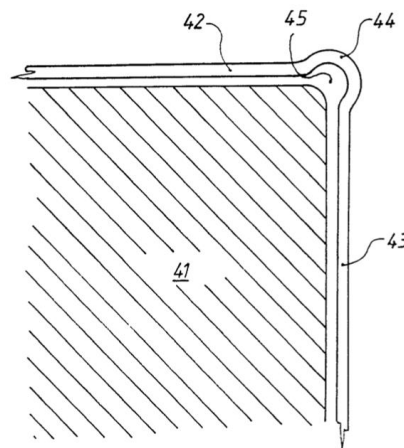


Fig 3.

162. Other Figures show hanger profiles with a corner shape other than the semi-circular shape of Figure 3. Aside from avoiding damage to the wall, a claimed advantage of the hanger is that it is formed from a single piece of metal which eliminates the need for welding and possible problems caused by welding faults or corrosion.
163. Mr Lohmann's first point in his written evidence was that Harris would have been of no interest to the skilled person in this case. I have discussed the law on this above.
164. Moving on to the differences between UK 822 and Harris, Mr Lohmann said that there are four. The first two are closely related. Harris's hanger is adapted for use with joists not kickboards. In particular (Mr Lohmann's second point), the stirrup of Harris is dimensioned to receive a joist, not a kickboard. Mr Lohmann was of the view that it would take invention to think of adapting a joist hanger to serve as a kickboard bracket.
165. Thirdly, Harris does not disclose "a hook part dimensioned for securely suspending the bracket from the top edge of the second kickboard". The principal means of attaching the hanger to the wall is by fastening devices driven through fixing holes in the hanger and there is no claimed alternative. The specification includes this:

"The end of the [masonry flange] furthest from the stirrup portion may be bent downwardly so that it abuts the rear face of the wall."

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166. However, Mr Lohmann's opinion was that this would not make obvious the idea of a hook at the back of the hanger for securely suspending the hanger from the wall.
167. Fourthly, Harris has no "lateral extension aligned with the longitudinal axis of the second kickboard for stabilising the bracket thereon". As appears in Figure 1, the masonry flange has what can be described as lateral extensions which lie on the top of the wall. Mr Lohmann said that they are not there to stabilise the hanger, to prevent twisting, but to spread the load of the joist. The stabilising function in Harris is carried out by wing elements, marked 12 on Figure 1. The specification states that these augment the retaining action of the side walls 14 – retaining the joist and "also prevent the retained joist twisting". Therefore, according to Mr Lohmann, even if the skilled person thought of adapting Harris to use as a bracket for a kickboard, he or she would regard the inclusion of lateral extensions as a wasteful addition.
168. Dr Santos in his written evidence agreed with Mr Lohmann on the differences between Harris and UK 822 although, probably more accurately, viewing them as three. He said that it would have been obvious to adapt Harris, particularly by reference to dimensions, for use with a kickboard.
169. Next, the skilled person would see that the disclosure in Harris of bending the masonry flange over the wall could be adapted to hook a bracket over a longitudinal scaffolding board.
170. As for the lateral extensions, Dr Santos continued, Harris refers to the side walls of the stirrup portion as preventing twist of the joist. This would have caused the skilled person to consider how twisting of the holder was prevented in Harris. He or she would immediately have understood that the lateral extensions are suitable for and serve this purpose.
171. Mr Lohmann was cross-examined quite briefly on Harris. He was asked to assume that the skilled person would recognise that there was a similarity between the Harris holder and the UK 822 bracket in the way that twisting was prevented. Mr Lohmann said that even on what he called "a hell of an assumption", the skilled person would not think it obvious to adapt the holder into a bracket for kickboards. He added that the lateral extensions of Harris would provide stability for the hanger, but only if one assumed that they were stiff enough.
172. During Dr Santos' cross-examination on Harris, he accepted that in 2004 the skilled person was familiar with joint hangers and also that the need to hold kickboards in place had been known for a number of years. He was asked why, if it was obvious to adapt hangers such as that in Harris for use with kickboards, nobody had done it before. Dr Santos said that this was a good question. He then agreed that the adaptation had been under peoples' noses for some years but, Dr Santos said, this happens quite a lot.
173. Beginning with this last point, Dr Santos did not to my mind provide a satisfactory answer. By implication he accepted that over the years in question there had been a need for the useful flexibility provided by the UK 822 bracket, i.e. having the possibility of positioning a transverse kickboard anywhere along a longitudinal kickboard, not just where there is an upright. In the real world those interested in the design or manufacture of scaffolds, working platforms and the like probably would not have read Harris. But as Dr Santos said, they were familiar with joist hangers. While it is not conclusive, this

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suggests that it was not obvious to adapt joist hangers into kickboard brackets unless there is good reason to suppose otherwise. The evidence did not reveal any good reason.

174. Even if the general idea of such an adaptation had been obvious, I find Mr Lohmann's evidence on the hook more persuasive than that of Dr Santos. The skilled person would have considered the sentence in Harris about bending the end of the masonry flange over the wall, quoted above. But the weight of the teaching in Harris is to fix the hanger to the wall and this makes sense because there is no need for the joist to move laterally. In fact, joists should always remain firmly in place. Even if that sentence were implemented, it seems to me that the hanger would still be fixed permanently in place, not allowed to move to and fro laterally as is essential to the idea in UK 822.
175. With regard to the lateral extensions, they are there. The issue is whether in Harris and the suggested adaptation to Harris they would be suitable for stabilising the bracket. Mr Lohmann indicated that they could be if they were stiff enough. If this were the only point, it may be that in isolation the skilled person would think of making them stiff. But taken with the other two points, in my judgment the skilled person reading Harris in 2004 would not have contemplated adapting it to anything that would fall within the claims of EP 822.
176. EP 822 does not lack inventive step over Harris.

Amendment of the patents

177. Safestand's unconditional application to amend UK 978 is not opposed and I give permission to make those amendments.
178. The application to amend EP 738 was conditional on a finding that the patent is invalid as granted. I have found that it is valid, so I need not consider its amendment.

Re-Registered Designs

179. Safestand alleges that Weston infringes the RRDs. Weston counterclaims that each is invalidly registered on three grounds:
- (1) The RRD does not depict a design of a single article.
 - (2) The RRD lacks clarity.
 - (3) The RRD does not have individual character having regard to prior published designs shown in:
 - (i) UK 978;
 - (ii) Kelk;
 - (iii) US Patent Application No. 2 552 782 A ("Brownstein"); and
 - (iv) Chudley and Green, *Construction Technology*, 3rd edition, 2003, page 167 ("Chudley").

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180. Weston also says that its products would not infringe any of the RRDs if they were validly registered.
181. Weston’s argument with regard to lack of individual character came down to a squeeze applied in relation to their argument on infringement and was dealt with quite briefly by both sides. In my discussion of the issues I will accordingly take infringement before considering the squeeze.

Clarity and a single article – the law

182. The law on RRDs is governed by the Registered Designs Act 1949 as amended (“the 1949 Act”).
183. Under s.6(3) of the European Union Withdrawal Act 2018 (“the 2018 Act”) I am bound by retained EU case law, which is defined (subject to exceptions which have no relevance here) in s.6(7) as any principles laid down by, and any decisions of the European Court as they have effect in EU law on 31 December 2020. Schedule 1 of the Interpretation Act 1978 as amended defines The European Court as the Court of Justice of the European Union, which includes the General Court as one of its two constituent courts.
184. The 1949 Act was drafted to conform with Directive 98/71/EC. Relevant principles of law are derived from the European Court’s rulings on the Directive and Council Regulation (EC) No. 6/2002 (“the Design Regulation”).
185. Section 1 of the 1949 Act provides:

“1. (1) *A design may, subject to the following provisions of this Act, be registered under this Act on the making of an application for registration.*

(2) *In this Act ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation.*

(3) *In this Act—*

‘complex product’ means a product which is composed of at least two replaceable component parts permitting disassembly and reassembly of the product; and

‘product’ means any industrial or handicraft item other than a computer program; and, in particular, includes packaging, get-up, graphic symbols, typographic type-faces and parts intended to be assembled into a complex product.”

Interpretation of the registration

186. I discussed the principles governing the interpretation of a registered design in *Marks and Spencer plc v Aldi Stores Ltd* [2023] EWHC 178 (IPEC):

“[11] Where the image is a photograph of a product, the design claimed consists of the features – the lines, contours, colours, shape, texture, materials

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and/or ornamentation – visible in the photograph Usually, there will be no problem of interpretation. The present case is an exception. The point at issue is whether one of the features of each of the RDs in suit is an integrated light in the base of the bottle.

[12] A design must be interpreted objectively; the circumstances of the proprietor of the design, and by extension the intention of the designer, are not relevant, see *Celaya Empanaza y Galdos Internacional SA (Cegasa) v Proyectos Integrales de Balizamiento SL* (C-488/10) EU:C:2012:88; [2012] E.C.D.R. 17, at [55].

[13] Objective interpretation of a design is a matter for the court – not the court viewing the matter through the eyes of the informed user, particularly since there is no reason to suppose that the notional informed user is aware of the conventional understanding of what dotted lines, grayscale etc. are intended to convey, see *Sealed Air Ltd v Sharp Interpack Ltd* [2013] EWPC 23, at [20]-[21].

[14] Products manufactured by the proprietor which are said to be protected by the registered design are irrelevant to interpretation of the design ... [see] *Samsung Electronics (UK) Limited v Apple Inc* [2012] EWCA Civ 1339; [2013] E.C.D.R. 2; [2013] F.S.R. 9.”

187. Weston tended to address the interpretation of the registered designs as if they were to be seen by the court through the eyes of the informed user, as did Safestand once or twice, possibly both from force of habit. Although in *Marks and Spencer* I stated the principle that the objective interpretation of a design as registered is a matter solely for court, I will own up to doubt about the breadth of that view of the law having dealt with this case. The interpretation of any of the conventions used in design registrations, dotted lines, greyscale and so on are for the court’s own assessment. However, I would have found these RRDs even more hard to interpret than I did without assistance from Mr Lohmann.
188. No doubt there may be other examples of where the informed user knows more than the court about how to interpret images in a registered design. I have in mind, obviously, only circumstances in which the informed user has specialised knowledge which is relevant to a significant aspect of the interpretation. In such a case interpretation of the images might usefully be done at least in part by the court through the eyes of the informed user. The practical consequence to litigation would be that sometimes there may be expert evidence about this. In an appropriate case such evidence, kept to the minimum necessary, is in my view admissible.
189. I think that Mr Lohmann’s evidence demonstrates that this is an appropriate case and I will consider his comments on the interrelationship between the articles shown in the images in the RRDs.

Design of a single article

190. The definition of a design in s.1(2) of the 1949 Act (see above) reflects the same definition in art.3(a) of the Design Regulation.

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191. The EUIPO publishes guidelines to explain how the Office implements the Design Regulation (“the Design Guidelines”). The current version, which entered into force on 31 March 2023, states that each application should be in respect of a single design (at 5.2):

“The examiner will check whether the views relate to the same design, that is, to the appearance of one and the same product or of its parts.”

192. The Guidelines explain what is meant by a single design (at 5.2.2):

“Views relate to more than one design when there are different embodiments of the same concept, or when the lines used to identify the design or the disclaimers used to disclaim certain features are not used consistently throughout the views.

Different embodiments of the same concept cannot be grouped in a single application because each embodiment is a design on its own. It should not be confused with sets of articles (see paragraph 5.3.7 below).

Different embodiments of the same concept are considered to be different designs.”

193. As there stated, the meaning of “a set of articles” is given at 5.3.7:

“A set of articles is a group of products of the same kind that are generally regarded as belonging together and are so used. See the example below.”

194. The example given is Registered Community Design No. 938 709-0001 which has this illustration:



195. Paragraph 5.3.7 of the Guidelines continues (original emphasis in bold):

“Sets of articles should not be confused with variations of a design. Different embodiments of the same concept cannot be grouped in a single application because each embodiment is a design on its own. See paragraph 5.2.2, Views relating to more than one design.

The difference between a complex product and a set of articles is that, in contrast to a complex product, the articles of a ‘set of articles’ are not mechanically connected.

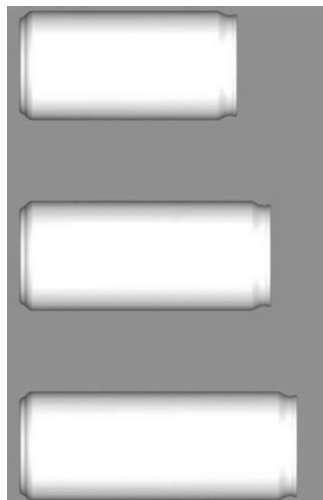
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A set of articles can be a ‘product’ in itself within the meaning of Article 3 CDR. It can be represented in a single design application if the articles making up this set are linked by **aesthetic and functional complementarity** and are, in normal circumstances, sold together as one single product, like a chess board and its pieces, or sets of knives, forks and spoons.

It must, however, be clear from the representation that protection is sought for a design resulting from the combination of the articles making up the set, and not for each article separately.

Applicants must submit, among the seven views allowed, at least one view showing the set of articles in its entirety.”

196. *Ball Beverage Packaging Europe Ltd v EUIPO* (T-9/15) EU:T:2017:386 concerned a registered design for beverage cans. The design was represented like this:



197. It was an appeal to the General Court from the EUIPO Board of Appeal which had found that the design was not a single design and was therefore not registerable. The Court agreed with that finding and said:

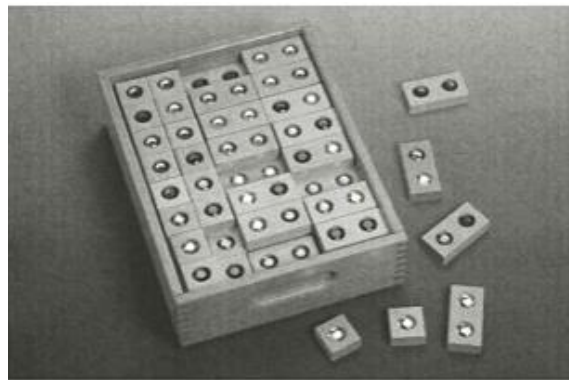
“[60] As the Board of Appeal correctly notes in [18] of the contested decision, the subject matter of a design may only be a unitary object, since art.3(a) of Regulation 6/2002 refers expressly to the appearance of ‘a product’. Moreover, the Board of Appeal correctly stated, in [18] of the contested decision, that a group of articles may constitute ‘a product’ within the meaning of the abovementioned provision if they are linked by aesthetic and functional complementarity and are usually marketed as a unitary product.

[61] Proceeding from that premiss, which is not contested by the parties, the Board of Appeal concluded, in [19] of the contested decision, that the contested design did not satisfy the three conditions set out in [60] above and that, consequently, it could not be perceived as a unitary object. According to the Board of Appeal, when groups of beverage cans are offered, they always consist of cans of the same size, which is understandable, inter alia, in the light of transport and storage.

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[62] The Board of Appeal's conclusion relating, in the present case, to the lack of a unitary object is also not vitiated by error. Irrespective of the way beverage cans are marketed, it is clear that the three cans represented in the contested design do not perform a common function in the sense of a function which cannot be performed by each of them individually as is the case, for example, of table cutlery or a chess board and chess pieces, invoked by the Board of Appeal (see, to that effect, judgment of 25 October 2013, *Merlin v OHIM* (T-231/10) EU:T:2013:560, [32])."

198. In the *Merlin* case there cited, the General Court ruled that a design for "Games (including educational games)"¹ was a design for a unitary object, a game, and was registerable. The Court found (in broad translation) that the game presents itself as a single article, insofar as the constituent parts, while not having physical links with each other, are aesthetically coordinated, and related by the common function of creating a whole from several parts.² This is an illustration of the design:

*Partial views*

199. The Design Guidelines state (at 5.3.4) that one or more of the seven views presented may be a partial view of the design but there must be at least one view of the assembled product:

"A partial view is a view showing part of a product in isolation. A partial view can be magnified.

Partial views must be combined with at least one view of the assembled product (the different parts need to be connected to each other)."

200. The definition of a product includes "parts intended to be assembled into a complex product" (see s.1(3) quoted above). A design may therefore consist of the appearance of such parts.

Alternative embodiments of an article

¹ In the original German (no official English translation published) the title reads: Spielen (einschließlich erzieherischen Spielen).

² ... stellt sich dieses Spiel nämlich insofern als eine Einheit dar, als die Bausteine zwar nicht körperlich miteinander verbunden, aber ästhetisch aufeinander abgestimmt sind und durch die gemeinsame Funktion, aus mehreren Steinen bestehende Strukturen zu bauen, in Zusammenhang stehen.

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201. It follows from *Ball Europe* that if the illustrations show more than one article, unless together they qualify as a set of articles by satisfying the three requirements referred to by General Court, reflecting what is said in the Guidelines, the application will constitute an application for more than one design and will be refused.
202. It is subject to the qualification that a single article may have component parts and provided that there is one illustration of the article as a whole, there may also be illustrations of one or more parts shown individually.
203. It is clear from *Ball Europe* that a single application may not seek to protect alternative versions of a design having a single overall theme – such as designs of beer cans which look the same save that they vary in length. Therefore if the illustrations include images of parts which, taken as a whole, make up alternative embodiments of an article, this will amount to an impermissible application for alternative versions of a design.
204. The foregoing is reflected in a distinction expressed in the Guidelines (see above), namely that sets of articles should not be confused with variations of a single design. Where the design is not for a set of articles as defined in *Ball Europe*, different embodiments of the same concept cannot be grouped in a single application.
205. In *GBL UK Trading Ltd v H&S Alliance Ltd* BL O-374-21, [2022] RPC 3, the Appointed Person considered, among others, the validity of the registration of a design having the following representation of castors:



206. The registration was found to be invalid because the four different types of castor shown were not sold together in the market and were therefore not a single product. The design was not of a set of articles in the *Ball Europe* sense³ and therefore was not by that route a single product. Further, although each castor was a part of a complex product, it was not the same complex product for all of them. The top pair were for use with a piece of furniture taking screw fixings; the bottom pair for furniture taking flat plate fixings.

³ The Appointed Person disapproved of the three requirements to qualify as a set of articles in the *Ball Europe* judgment.

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So this, too, provided no alternative ground on which it could be said that the design as a whole was the design of a single product.

207. There was a separate registration illustrated by just the two lower castors (those with a flat plate fixing). They were sold together in the market and so were a set of articles. In addition, they were each a part of the same type of complex product, i.e. a piece of furniture with corresponding flat plate fixings. On both grounds this pairing was a design of a single product.

The design must be clearly identifiable.

208. Art.36 of the Design Regulation provides:

“1. *An application for a registered Community design shall contain:*

...

(c) a representation of the design suitable for reproduction. However, if the object of the application is a two-dimensional design and the application contains a request for publication in accordance with Article 50, the representation of the design may be replaced by a specimen.”

209. Art.4(2) of the Community Design Implementing Regulation (“CDIR”) states that an applicant may present a maximum of seven different views to represent the design applied for.

210. Although art.36(1)(c) of the Design Regulation contains no express stipulation that the representation of a design applied for must be clear, the CJEU has held that the requirement is implied. In *Mast-Jägermeister SE v EUIPO (C-217/17 P)* EU:C:2018:534 the Court gave detailed reasons why that is:

“[48] According to settled case-law of the Court of Justice, the interpretation of provisions of EU law requires account to be taken not only of their wording but also of the context in which they occur and the objectives of the rules of which they form part (judgments of 19 September 2000, *Germany v Commission of the European Communities* (C-156/98) EU:C:2000:467, [50], and of 19 October 2017, *Raimund v Aigner* (C-425/16) EU:C:2017:776, [22]).

[49] As regards, first, the wording of art.36(1)(c) of Regulation 6/2002, it provides that the application for registration of a design must contain a ‘representation of the design suitable for reproduction’. That wording seems to emphasise the technical quality of the representation. However, as the Advocate General noted in [AG32] of her Opinion, the concept of representation encompasses, in itself, the idea that the design must be clearly identifiable.

[50] In addition, it should be noted that, whilst art.4(1)(e) of Regulation 2245/2002 does not add substantive requirements to that of art.36(1)(c) of Regulation 6/2002, it states, inter alia, that the representation must be of a quality permitting all the details of the matter for which protection is sought to be clearly distinguished.

[51] Analysis of the wording of art.36(1)(c) therefore leads to the conclusion that the representation of the design for which registration is sought must enable that design to be clearly identified.

[52] The literal interpretation of art.36(1)(c) of Regulation 6/2002 is confirmed by the teleological interpretation of that provision, which must contribute to the proper functioning of the system of registration of designs. Accordingly, the function of the graphic representation requirement is, in particular, to define the design itself in order to determine the precise subject of the protection afforded by the registered design to its proprietor (see, by analogy, judgment of 12 December 2002, *Sieckmann v Deutsches Patent- und Markenamt* (C-273/00) EU:C:2002:748, [48]).

[53] In that regard, it should be noted that the entry of a design in a public register has the aim of making it accessible to the competent authorities and the public, particularly to economic operators. On the one hand, the competent authorities must know with clarity and precision the nature of the constituent elements of a design in order to be able to fulfil their obligations in relation to the prior examination of applications for registration and to the publication and maintenance of an appropriate and precise register of designs (see, by analogy, judgments of 12 December 2002, *Sieckmann* EU:C:2002:748, [49] and [50], and of 19 June 2012, *Chartered Institute of Patent Attorneys v Registrar of Trade Marks* (C-307/10) EU:C:2012:361, [47]).

[54] On the other hand, economic operators must be able to acquaint themselves, with clarity and precision, with registrations or applications for registration made by their current or potential competitors and thus to obtain relevant information about the rights of third parties (see, by analogy, judgments of 12 December 2002, *Sieckmann* EU:C:2002:748, [51], and of 19 June 2012, *Chartered Institute of Patent Attorneys* EU:C:2012:361, [48]). Such a requirement, as the General Court points out, in essence, in [47] of the judgment under appeal, is intended to ensure legal certainty for third parties.

[55] It follows that the Community design system arising from Regulation 6/2002 confirms the interpretation that results from the wording of art.36(1)(c) of that regulation by requiring that the representation of a design for which registration is sought makes it possible to identify that design clearly.

[56] That conclusion is indeed also confirmed by the fact that the obtaining of a date of filing, which, in accordance with art.38 of Regulation 6/2002, is the date on which documents containing the information specified in art.36(1) are filed with EUIPO, enables the proprietor of the design concerned to benefit from the right of priority, as provided for in art.41 of Regulation 6/2002. Contrary to Mast-Jägermeister's contention on the basis of art.4 of the Paris Convention, the wording of which corresponds, in essence, to that of art.41 of Regulation 6/2002, the fact that the date of filing enables that right of priority to be obtained justifies in itself the requirement that the representation must not lack precision as regards the design for which registration is sought. As the Advocate General noted, in essence, in [AG55] of her Opinion, an imprecise application for registration would give rise to the risk that a design in respect of which the

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matter to be protected is not clearly identified would obtain excessive protection under the right of priority.

[57] Finally, the interpretation that art.36(1)(c) of Regulation 6/2002 requires the representation of the design contained in the application for registration to enable the matter for which protection is sought to be clearly identified is also confirmed by the contextual analysis of that provision.

[58] In that respect, since art.36(5) of Regulation 6/2002 provides that the application for registration must comply with the conditions laid down in Regulation 2245/2002, reference should be made to other provisions of the latter regulation relating to the application for registration.

[59] Thus, it should be noted, as EUIPO correctly submits, that art.12(2) of Regulation 2245/2002 provides that a correction of the application for registration cannot change the representation of the design concerned. That necessarily implies that, before the application for registration can obtain a date of filing, it must contain a representation that enables the matter for which protection is sought to be identified. It is not possible to interpret Regulation 6/2002 as allowing an application for registration to be considered validly filed when it does not enable the design for which registration is sought to be clearly identified and that deficiency can no longer be remedied.

[60] Accordingly, it is apparent from [49]–[59] of the present judgment that the literal, teleological and contextual analysis of art.36(1)(c) of Regulation 6/2002 leads to the conclusion that that provision must be interpreted as requiring the representation of a design for which registration is sought to clearly identify that design, which is the subject of the protection sought by that application.

[61] It follows from art.46(2) of Regulation 6/2002 that an application which contains deficiencies relating to the requirements referred to in art.36(1) of that regulation that have not been remedied within the prescribed period is not to be dealt with as an application for a registered Community design and that, consequently, no date of filing is attributed to it.”

211. Safestand argued that the requirement of clarity, derived as it is from art.36(1)(c) of the Design Regulation, applies only to applications for a design. Once a design has been registered by the EUIPO, the design can be invalidated only on grounds provided for in s.11ZA of the 1949 Act. That section makes no reference to clarity and nor does its equivalent in the Design Regulation, art.25.

212. Section 11ZA of the 1949 Act provides:

“(1) *The registration of a design may be declared invalid—*

(a) on the ground that it does not fulfil the requirements of section 1(2) of this Act;

(b) on the ground that it does not fulfil the requirements of sections 1B to 1D of this Act; or

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(c) where any ground of refusal mentioned in Schedule A1 to this Act applies.

(1A) The registration of a design (“the later design”) may be declared invalid if it is not new or does not have individual character when compared to a design which—

(a) has been made available to the public on or after the relevant date; but

(b) is protected as from a date prior to the relevant date by virtue of registration under this Act or an application for such registration.

(1B) In subsection (1A) ‘the relevant date’ means the date on which the application for the registration of the later design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.

(2) The registration of a design may be declared invalid on the ground of the registered proprietor not being the proprietor of the design and the proprietor of the design objecting.

(3) The registration of a design involving the use of an earlier distinctive sign may be declared invalid on the ground of an objection by the holder of rights to the sign which include the right to prohibit in the United Kingdom such use of the sign.

(4) The registration of a design constituting an unauthorised use of a work protected by the law of copyright in the United Kingdom may be declared invalid on the ground of an objection by the owner of the copyright.

(5) In this section and sections 11ZB, 11ZC and 11ZE of this Act (other than section 11ZE(1)) references to the registration of a design include references to the former registration of a design; and these sections shall apply, with necessary modifications, in relation to such former registrations.

213. The only candidate as a subsection which could apply to the present case is s.11ZA(1)(a). For convenience, this is s.1(2) of the 1949 Act:

“(2) In this Act ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation.”

214. There is an obvious policy reason for saying that if it is not possible to identify with sufficient certainty the design registered – because the illustrations in the registration are unclear – then the registration is invalid.

215. The decision by the CJEU in *Mast-Jägermeister* was based, so far as the Design Regulation is concerned, only on art.36 and art.38 (the date of filing of an application for an EU registered design). But *Mast-Jägermeister* only directed its arguments to those articles and there was no need for the CJEU to consider the position in law after registration.

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216. It may be that a registered design with illustrations which do not make it possible to identify the features of the design with reasonable certainty is not a registration for a “design” within the meaning of s.1(2). See also paragraph 46 of *Mast-Jägermeister* quoted above.
217. However, it is enough for me to note that the judgment of the General Court in *Ball Europe* was based on art.3(a) of the Design Regulation, the equivalent of s.1(2) of the 1949 Act. It was not in dispute in these proceedings that the resolution of whether a design is of a single article is relevant to validity after registration. It seems to me that if it not possible to tell with reasonable certainty from the illustrations whether the design is of a single article, which implies being able to tell what that single design is, the registration is invalid.

This case

218. Weston’s arguments on clarity and whether the illustrations depict a single article overlapped. On my view of the law stated above, this makes some sense. The images shown in all the RRDs in suit appear in the schedule to this judgment.

*RRD 0001*The arguments

219. In its opening skeleton argument Weston set out detailed reasons why the RRD lacked clarity. The following, which relate only to image 0001.1, give an idea of the points raised. Weston said that it would not be possible to tell whether:
- (a) either of the red frame elements was part of the platform at 0001.2.
 - (b) either of the yellow straight elements was part of the platform at 0001.2.
 - (c) the upper yellow straight element was connected to the trestle feet.
 - (d) the red rectangular frame on the left of the picture was a part of the platform at 0001.2 (it is not visible in 0001.2).
 - (e) the kickboard bracket on the left of the picture was part of the platform at 0001.2 (it is not visible in 0001.2).
 - (f) the “L” shaped item in the bottom middle of 0001.1 was part of the platform (it is not visible in 0001.2).
220. Safestand did not engage with the detail of Weston’s argument either in their written or oral closing arguments. This was said in its opening skeleton argument:
- “228. ... the RRDs are all depicted in two colours: red and yellow. The anti-flip bracket and transverse kickboard bracket are both sometimes depicted in green.
229. When constructed as a trestle platform (as in Views 0001.2, 0004.3, 0005.6) it is clear that the red indicates the integral parts of the main ‘h’ frame. These can be differentiated from the detachable uprights on the working side

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(which are all coloured yellow). Where an RRD is depicted in contrasting colours, it is fair to conclude that it is protecting not just the shape but the use of contrasting colours (per Lord Neuberger in *Magmatic Ltd v PMS International* [2016] UKSC 12 at [53]).”

Discussion

221. Neither Safestand nor Weston submitted that any of the RRDs in suit is a design of a set of articles in the *Ball Europe* sense. Most of the images presented are views of part of a complex product, the trestle, but there were no submissions about that. I can approach all three RRDs on the basis that the design claimed is of a single article, a trestle. In each case there is at least one view of the assembled trestle plus views of a part or parts of the trestle.
222. In my view all the images shown in a registered design are equally relevant in identifying the design which the registration is seeking to protect. An image of the whole of a product may provide the most helpful starting point, but images of constituent parts matter just as much in the overall assessment.
223. The first issue is whether in the case of each of the RRDs in suit, taking all the views into account, the registration is seeking to protect a single design and thus a design within the meaning of s.1(2) of the 1949 Act. The second is whether it is possible to tell with reasonable certainty that the design is of a single article. As I have said, the latter implies being able to tell what the design is.
224. The task of trying to discern the design which RRD 0001 is seeking to protect requires some work. Image 0001.2 is of the complete assembly and the other images show parts of it. They need to be reconciled.
225. Image 0001.1 shows a red h frame on the left without feet and with no lower crossbar, and a red rectangular frame on the right with feet and a lower crossbar. Mr Lohmann said that the left hand component slots into that on the right to make a completed h frame as shown in image 0001.5. I would not have known this without Mr Lohmann’s evidence but I will assume that it is correct.
226. Mr Lohmann confirmed what I had guessed I relation to the two straight yellow bars in image 0001.1. The upper one is a vertical bar which fits into a slot in the right hand red frame, see image 0001.4. The lower one is a horizontal bar or handrail in the completed trestle.
227. The yellow L shaped item, as Weston describe it, at the bottom of 0001.1 seems to be the ladder holder extension of image 0001.3. But it is not shown in image 0001.2 where one would expect it to be visible, implying that the design has alternative embodiments, with or without the ladder holder. Mr Lohmann confirmed this.
228. The red anti-flip bracket in image 0001.1 is not visible in 0001.2 but that could be because it is hidden by the platform. Images 0001.4 and 0001.5 suggest that it is part of the overall design but can be either red or green. It could of course be red at one end and green at the other, there is no way of telling.
229. Image 0001.4 has no hand rails but this may just imply that they are removeable.

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230. There is no sign of any kickboard brackets in image 0001.2. They appear in 0001.6 and 0001.7 in alternative colours of red and green.
231. My ambiguities in RRD 0001 may be summarised as follows:
- (1) The anti-flip bracket may be red or green in alternative embodiments.
 - (2) The ladder holder extension is either present or absent in alternative embodiments.
 - (3) Kickboard brackets may be optional and even if they are not, they may be red or green in alternative embodiments.
232. For the foregoing reasons, the design which RRD 0001 seeks to protect is the design of a builders' trestle in several alternative embodiments. I think that Safestand in its written argument was seeking to suggest that if alternative colours are shown in a registered design, that just means that the design claimed has contrasting colours. There is a difference between a single design with contrasting but unspecified colours, such as the design in issue in *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12 where the contrast was represented in monochrome by grey and black, and a design shown in colour with alternative colours. That latter is not a single design but several alternatives, albeit each having the same shape. (The judgment of the Supreme Court in *Magmatic* is quoted in relevant part below.)
233. The design represented in the images of RRD 0001 is not a single design. If I had not arrived at a clear conclusion about that, I would have decided that is not possible to tell with reasonable certainty that it is a single design. On either ground RRD 0001 is not validly registered.

RRDs 0004 and 0005

234. All four difficulties relating to RRD 0001 apply to RRD 0004. In addition:
- (4) The h frames may be coloured yellow or red.
 - (5) The handrails may be coloured yellow or blue.
235. My observations in relation to RRD 0005 are:
- (1) The anti-flip bracket may optionally be red (image 0005.6) or green (image 0005.1).
 - (2) I found it difficult to know whether the parts shown in images 0005.2 and 0005.5 fit into the whole as shown in image 0005.6 or whether they are parts of an embodiment alternative to that shown in image 0005.6. Mr Lohmann said that they depict the way in which the cross-brace is attached to the system.
 - (3) Image 0005.7 has an h frame without feet or lower cross bar. Although Mr Lohmann did not say so, I would infer from he said about RRD 0001 that it is slotted into the frame with legs.

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- (4) One might expect the red kickboard bracket of image 0005.4 to be visible in the image of the assembly, 0005.6. It is not, which may imply that the kickboard bracket is optional.

236. For the foregoing reasons neither RRD 0004 nor RRD 0005 is validly registered.

Infringement**The law**

237. Both sides adopted the approach set out in *Cantel Medical (UK) Ltd v ARC Medical Design Ltd* [2018] EWHC 345 (Pat) at [181], here with the steps renumbered at the end for greater clarity as proposed in *Marks and Spencer plc v Aldi Stores Ltd* [2023] EWHC 178 (IPEC), at [19]:

- (1) Decide the sector to which the products in which the designs are intended to be incorporated or to which they are intended to be applied belong;
- (2) Identify the informed user and having done so decide
 - (a) the degree of the informed user's awareness of the prior art and
 - (b) the level of attention paid by the informed user in the comparison, direct if possible, of the designs;
- (3) Decide the designer's degree of freedom in developing his design;
- (4) Assess the outcome of the comparison between the RCD and the contested design, taking into account
 - (a) the sector in question,
 - (b) the designer's degree of freedom,
 - (c) the overall impressions produced by the designs on the informed user, who will have in mind any earlier design which has been made available to the public,
 - (d) that features of the designs which are solely dictated by technical function are to be ignored in the comparison, and
 - (e) that the informed user may in some cases discriminate between elements of the respective designs, attaching different degrees of importance to similarities or differences; this can depend on the practical significance of the relevant part of the product, the extent to which it would be seen in use, or on other matters.

238. Colour plays a significant part in the comparison of the RRDs and Weston's trestles. In *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12. Lord Neuberger, with whom the rest of their Lordships agreed, said:

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[51] Kitchin L.J.'s third criticism of Arnold J.'s judgment was that he failed to take into account the fact that the CRD image, as exemplified in [1] above, was in two colours, one, shown grey, for the greater part of the body (including the horns), and the other, shown black, for the wheels and spokes, the strap and the strip. As mentioned in [14] above, Arnold J. described the CRD as constituting a claim “evidently for the shape of the suitcase” and that decorations on the Kiddee Case were therefore to be ignored. On the other hand, Kitchin L.J.'s view was that the colouring contrasts on the CRD and the allegedly infringing articles represented a potentially significant difference, as the wheels and handles (ie horns) on the CRD rather stood out as features, whereas on the Kiddee Case the wheels were very largely covered, and the handles (at least on the first of the two examples in [4] above) had the same colour as the body.

[52] If, as in the case of the CRD, an applicant for a Community Registered Design elects to submit CADs of an item, whose main body appears as a uniform grey, but which has a black strip, a black strap and black wheels, the natural inference is that the components shown in black are intended to be in a contrasting colour to that of the main body. That conclusion is reinforced by the short passages from Dr Schlötelburg's article cited in [31] and [46] above. It is also supported, as Kitchin L.J. pointed out, by the fact that other features such as the clasps or the horns are not shown in a contrasting colour. It was argued by Magmatic that the wheels were shown black because they had a specific function, but I find that unconvincing: there is no logical connection between the colour and the function, and it does not explain the black strip.

[53] Accordingly, I consider that Kitchin L.J. was right in concluding that the CRD claimed not merely a specific shape, but a shape in two contrasting colours – one represented as grey and the other as black on the images, and that Arnold J. was correspondingly wrong in holding that the CRD was a claim simply for a shape. Once one concludes that a registered design claims not just a three dimensional shape, but a three dimensional shape in two contrasting colours, one colour for the body and another colour (or possibly other colours) for specified components, then it seems to me that it must follow that, when one compares the allegedly infringing article with that design on a “like for like” basis, one must take into account the colouring on that article. If the predominant colour of the first example of the Kiddee Case shown in [4] above was the front part and was coloured red, then one would presumably compare it with the CRD on the basis that the CRD was principally coloured red, but that the wheels and spokes, strap and strips of the CRD were in a contrasting colour, and the Kiddee Case was differently coloured.

[54] I therefore consider that Kitchin L.J. was right in his third criticism of the judge. I should perhaps add that counsel for Magmatic pointed out that Arnold J. rightly took into account that the wheels on the Kiddee Case were substantially covered by wheel arches whereas the wheels on the CRD were not. That is plainly correct, but Kitchin L.J.'s criticism was that the judge nowhere referred to the fact that the wheels of the CRD were shown having a different colour from the rest of the image (other than the strap and the strip).”

239. Thus, although each case will turn on its facts, where the proprietor of a registered design has used colour and thereby made colour a significant aspect of the

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distinctiveness of the design over the prior art, colour may also play a significant part in the assessment of overall impression when the registered design is compared to a design alleged to infringe.

This case*The design sector*

240. The parties agreed that the relevant industrial sector is that of low-level platforms. Dr Santos said that this sector sits within the wider market of scaffolding and access product, but that seems to me to add nothing of significance.

The informed user and the prior art

241. Safestand proposed simply that the informed user is a user of low-level platforms. Weston favoured three alternative informed users: an individual tradesman, the owner of a small construction business and a buyer for a large construction enterprise. Safestand's informed user could be any of Weston's three.
242. If Weston were right, it would be sufficient for a finding of infringement that the designs in issue would be perceived as producing the same overall impression when assessed through the eyes of any one of them, see *Sphere Time v OHIM* (T-68/10) EU:T:2011:269, at [56]. In theory the extent of knowledge of products in the design corpus and the level of attention to be paid to them could vary as between Weston's three users. I doubt that the difference matters but this probably leads to the owner of a small construction business which uses low level platforms.
243. The evidence unsurprisingly indicated that the informed user's knowledge of prior art low level platforms would come from the user's own experience of using platform and seeing others either on site or in the trade literature. Mr Lohmann identified nine systems or products which were well known in 2005-6 and Dr Santos agreed. It was not in dispute that trestles commonly used in the construction industry looked like this:



244. The evidence was not exact about the level of attention that the skilled user would pay to the prior art but I think the user would need to devote enough attention to know which products on the market would be likely best to meet their needs.

Approved Judgment*Design freedom*

245. The experts agreed that aspects of the function of a builders' trestle and the applicable British Standards constrained design freedom, in particular the placement of the uprights and the handrails and the spacing of the trestles. Mr Lohmann pointed out that within those constraints there was considerable freedom in the detail of the design of components of a trestle. I accept that evidence.

The comparison between each of the RRDs in suit and Weston's trestles

246. Weston's principal argument was that it was difficult to conduct the comparison when it was not possible to identify the design of any of the RRDs to begin with, not least in respect of colours. Weston had a point.
247. Weston did go into detail, however, and to give an example they made the following submissions with regard to (only) image 0001.2 in RRD 0001 on the one hand and KK1500 on the other:

“(1) The supporting structures of the 0001.2 Platform are of a typical ‘builder’s trestle’ configuration, with diagonal foot braces, whereas the Kwik Kage System supports are simple frames attached to flat Starter Plates (which are in turn wider than the narrow rectangular profile of the feet of the 0001.2 trestles).

(2) The trestle feet of the 0001.2 Platform are red – the same colour as the trestle, whereas the Kwik Kage Starter Plates are blue, a different colour to the yellow of the Kwik Kage frames.

(3) The Kwik Kage System features diagonal cross-braces between frames (two per bay), whereas the 0001.2 Platform does not have cross-braces.

(4) The frames of the Kwik Kage System are yellow, whereas the trestles of the 0001.2 Platform are red.

(5) The handrail posts of the 0001.2 Platform are red one side [of the platform] and yellow on the other, whereas the Kwik Kage System posts are yellow on one side and blue on the other.

(6) The handrails of the 0001.2 platform are yellow, whereas the handrails of the Kwik Kage System are a dark grey colour.

(7) The trestles of the 0001.2 Platform appear only to feature two cross-members, whereas the Kwik Kage frames feature three cross-members, and the spacing between them is noticeably different.

(8) The 0001.2 Platform appears to have one longitudinal kickboard on the non-working side, whereas the Kwik Kage System features both longitudinal and transverse kickboards fixed in place by the kickboard brackets of the Kwik Kage System.

(9) The Kwik Kage System features anti-flip brackets, which are not visible on the 0001.2 Platform.

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(10) The Kwik Kage System features a prominent staircase and blue gate in the centre of the platform, which are not featured in the 0001.2 Platform.”

248. I think there is force in these submissions save for the last one. The Kwik Kage system can exist without the staircase and gate.
249. It could also be said that point (9) lacks substance if one were to infer the presence of an anti-flip bracket in image 0001.2, hidden by the platform, from what is shown in other images. But this highlights the problem: it is not possible to reach a clear view on a single design protected.
250. The strength of the case for infringement in respect of the KK600 system can be no stronger than that in respect of the KK1500 system.
251. A complete analysis of the designs of the three RRDs when compared and Weston’s Kwik Kage system would, absurdly, require the task to be done by reference to all possible alternative designs for each RRD. That, it seems to me would be a pointless exercise. The root of the difficulty is that, as I have found, there no single design claimed for any of the RRDs in suit.

Validity over pleaded prior art

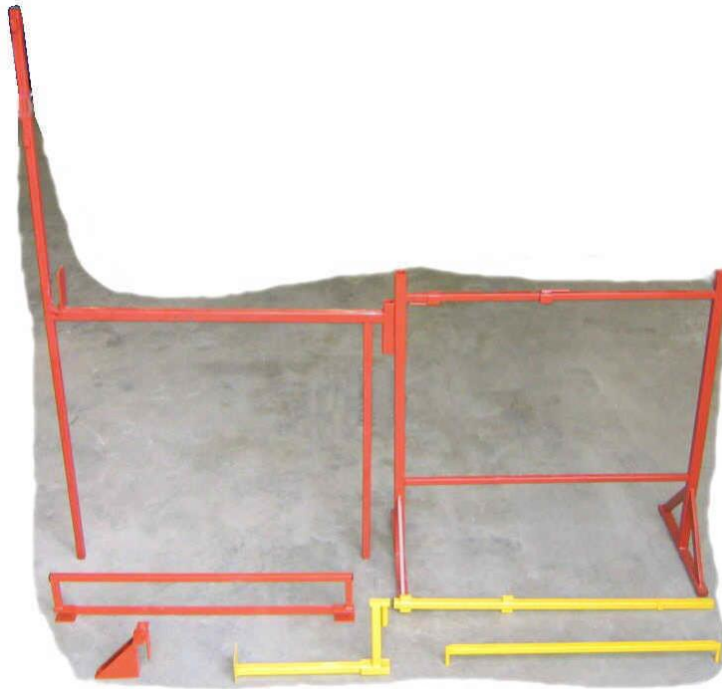
252. The same difficulty presents itself in relation to Weston’s contention that each of the RRDs does not have individual character having regard to the designs disclosed in the four items of prior art cited. In closing Weston advanced their case in relation to the prior art only as a squeeze to be applied to bolster their case on infringement and so it adds little.
253. In fact, Weston’s case in respect of the prior art is pleaded in the Re-Amended Grounds of Invalidity to arise only if its case on unity of design and clarity does not succeed. Given my finding on those matters, it does not arise.

Conclusion

254. UK 978 as proposed to be amended, EP 738 and UK 822 are all valid and infringed by marketing of both the KK1500 and KK600 systems. Safestand has permission to make the proposed amendments to EP 978.
255. None of the RRDs in suit is validly registered. Accordingly, none is infringed.

SCHEDULE

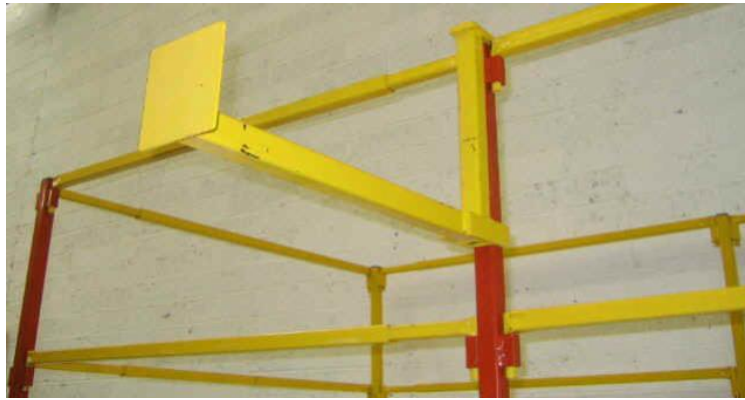
IMAGES IN RRD 0001



0001.1



0001.2



0001.3



0001.4



0001.5



0001.6



0001.7

IMAGES IN RRD 0004



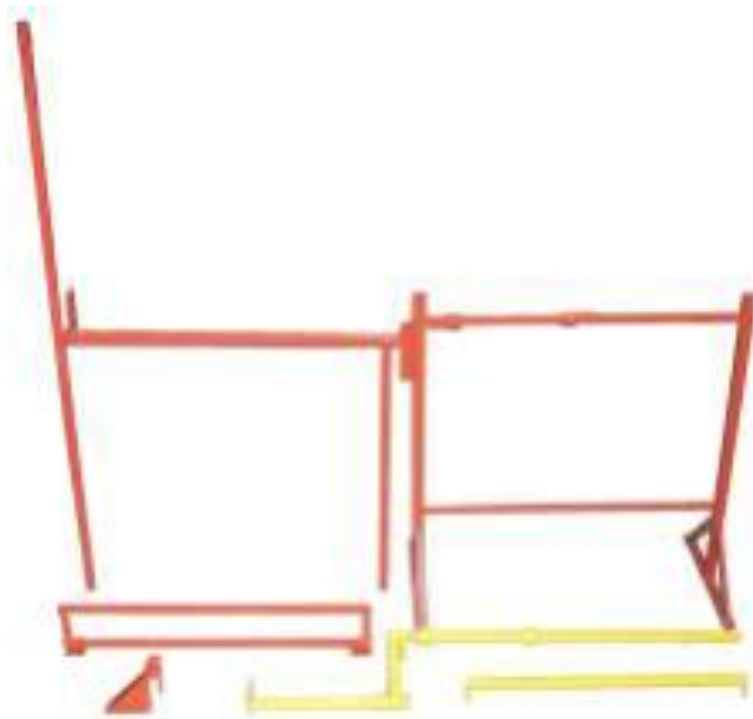
0004.1



0004.2



0004.3



0004.4



0004.5



0004.6



0004.7

IMAGES IN RRD 0005



0005.1



0005.2



0005.3



0005.4



0005.5



0005.6



0005.7