



PATENTS ACT 1977

PROPRIETOR	Watermist Limited
OPPONENTS	Protec Fire Detection Limited
ISSUE	Application under section 74B for review of Opinion 4/13 in respect of GB2458698B
HEARING OFFICER	H Jones

DECISION

Introduction

- 1 Opinion 4/13 is concerned with the question of whether acts in relation to fire fighting products sold to and installed by Protec Fire Protection PLC in HM Prison Leeds constitute an infringement of patent GB2458698B. The opinion was requested by the patentee and proprietor, Watermist Limited ("Watermist"), and observations were received from Protec Fire Protection PLC ("Protec"). The Opinion was issued on 16 May 2013, in which the examiner concluded that the sale or supply of the HPX High Pressure Water-Mist Hose Reel Unit ("the Unit") manufactured and supplied by Protec did not constitute an infringement of the patent.
- 2 The patentee has exercised his right to apply for a review of the opinion. The application for review was received within the three month period from the date of issue of the opinion and was accompanied by a statement setting out the patentee's grounds for review. Protec contest the application and set out their arguments in a counterstatement dated 1 October 2013. Both sides have agreed that I should decide the matter on the basis of the papers filed without the need for further evidence or for an attended hearing.
- 3 This is the second review of an Opinion on infringement concerning this patent - the first review, BL O/472/13, in relation to Opinion 1/13, is concerned with different fire fighting products to the one considered here.

Grounds for review

- 4 The grounds for a review of an Opinion are set out in rule 98(5) of the Patents Rules 2007:

*98(5). The application may be made on the following grounds only -
(a) that the opinion wrongly concluded that the patent in suit was invalid, or*

*was invalid to a limited extent; or
(b) that, by reason of its interpretation of the specification of the patent in suit, the opinion wrongly concluded that a particular act did not or would not constitute an infringement of the patent.*

- 5 Watermist submit that the examiner failed to consider the question of indirect infringement under section 60(2), that he misdirected himself with regard to interpretation of the claims and that he failed to realise the relevance of the evidence in deciding the question of whether the Unit infringes the patent. By doing so, they say that the examiner arrived at the wrong conclusion on whether the Unit infringes the patent. These are considered to be relevant grounds for review.

Review

- 6 The nature of a review under section 74B was considered by the Patents Court in *DLP Limited*¹, in which Kitchen J said:

“22.....I believe a Hearing Officer should only decide an opinion was wrong if the examiner has made an error of principle or reached a conclusion that is clearly wrong.”

- 7 Watermist’s first argument is that the examiner failed entirely to consider the question of indirect infringement of the patent under section 60(2) even though he had done so in his Opinion 1/13. I can deal with this very briefly: the reason for not giving an opinion on indirect infringement in Opinion 4/13 was that this was not raised by Watermist in their observations. Watermist do not address the question directly nor do they hint at it in their observations, for example by reference to the Unit being an essential part of the invention or the knowledge that Protec may have had that the Unit would be used to put the invention into effect. As Protec say in their counterstatement, the issue of indirect infringement does not automatically arise in every dispute involving infringement, and if there was a belief that this issue required special consideration then the applicant ought to have made this clear in their request.
- 8 As far as direct infringement is concerned, the examiner explains in his Opinion that the first step in deciding if there is any infringement is to consider whether the Unit falls within the scope of the claims of the patent. He then sets out the correct principles for interpreting the scope of the claims, namely a purposive construction of the claims and their interpretation in the light of the description and the drawings. He does this by directing himself to the guidance in *Kirin-Amgen*² and the Protocol to Article 69 of the EPC. In assessing the scope of the main claim, claim 1, he says that the arguments of the requester and observer rest on the meaning of the term “cabinet”, and he decides to focus his attention on how this term should be construed. This seems entirely appropriate. He then proceeds to construe the meaning of the term by considering what the skilled person in the art would have understood it to mean in light of the description and drawings.
- 9 Watermist argue that the examiner misconstrued the term “cabinet” and therefore came to an incorrect conclusion on infringement. They also argue that the examiner incorrectly interpreted the scope of the omnibus claim, claim 10, and again came to

¹ DLP Limited [2007] EWHC 2669

² Kirin-Amgen and others v Hoechst Marion Rossel Limited and others [2005] RPC 9

an incorrect conclusion on infringement. I shall deal with these arguments in detail below. Claims 1 and 10 of the Patent read as follows:

1. Fire fighting unit comprising a hose reel, a pump for generating a pressurised water supply to the hose, a power unit to drive a pump, and an operator-controlled water releasing and water cut-off mechanism in the water-issuing nozzle region of the hose allowing an operator, in use, to hold and direct the water emerging from the nozzle region; characterised by the features, firstly, that the hose reel, the pump, and the power unit are all housed within a cabinet; secondly, that the cabinet is so constructed that the operator must first open it before he can unreel the hose and operate the unit; thirdly, that the nozzle when operated delivers the water at a pressure which is reduced relative to the pressure at which the pump supplies water to the nozzle via the hose; fourthly, that the water emerges from the nozzle in the form of a generally conical wide-area fine mist or fog of water droplets; fifthly, that the cabinet is a cabinet incorporating an openable and closable hinged lid which forms an openable and closable door to the cabinet; sixthly that the hose reel is mounted inside the cabinet; and finally, that as the hose is unreeled, the hose reel does not detach from the apparatus in use.

10. A fire-fighting unit substantially as described herein with reference to and as illustrated in the accompanying text and drawings.

- 10 The examiner concludes at paragraph 23 of the Opinion that there is nothing in the description or drawings to suggest that a meaning other than that which would normally be attached to the term “cabinet” was intended. More specifically he says that he believes the term would be taken to encompass a box or case-like structure for enclosing components of the fire fighting unit. At paragraphs 21 and 22 he explains that claim 1 requires that “the hose reel, the pump and the power unit are all housed within a cabinet”, that “the cabinet is so constructed that the operator must first open it before he can unreel the hose and operate the unit” and “the cabinet is a cabinet incorporating an openable and closable hinged lid which forms an openable and closable door to the cabinet”. He says that a first requirement of the claim is that all the components are housed in a single cabinet – he says that this suggestion is reinforced by references throughout the claim to “the cabinet”.
- 11 Watermist argue that there is no foundation whatsoever for this conclusion. They say that the word “cabinet” could encompass a room or a recess – the etymology, they say, is from the French cabin-ette, meaning a closed space. In overlooking this alternative, they say that the examiner has artificially restricted the meaning of the term without justification.
- 12 Protec argue that wherever possible, a sensible, everyday definition of a disputed term should be used and they agree with the construction placed on the term by the examiner. I agree with them - it seems to me that the examiner has correctly applied the principles of claim construction and that he has arrived at the meaning for the term “cabinet” that a skilled person would draw from the specification.
- 13 Having construed the scope of the main claim, the examiner then addresses the question of direct infringement. The fire fighting unit installed at HM Prison Leeds is said to be mounted in a recess in a wall having a hinged door, and the examiner considers this to have all the features of claim 1 apart from the cabinet. The

examiner concludes at paragraph 34 that he does not believe that the term “cabinet” extends to a recess in a wall, which I think is an entirely reasonable conclusion to draw. It is certainly not the clearly wrong conclusion which is necessary in order to set aside an opinion. I note again that the question of whether the components of the unit when installed in a recess constitute an indirect infringement of the patent was not something the examiner was asked to give an opinion on.

- 14 As far as the omnibus claim, claim 10, is concerned, the examiner construed this in the light of guidance at paragraph 14.124 and 14.125 of the Manual of Patent Practice and decided to give the claim a narrow construction limited to the embodiment shown in the drawings. Watermist suggest that this approach was incorrect and that he should have construed the scope of the claim as wide as the statement of invention. I disagree. In any case, even if Watermist are correct on this point, this would not help since the statement of invention is, to all intents and purposes, identical to claim 1, which I have already considered above.

Conclusion

- 15 I conclude that the examiner in his opinion did not make an error in principle or reach a conclusion that is clearly wrong. I therefore make no order to set the opinion aside.

Costs

- 16 Both sides have asked for an award of costs in their favour. Given the nature of the review and the fact that both sides agreed for it to be made on the basis of the papers, I would not normally consider it necessary to make an award of costs to the winning party. Also, since most of the grounds for review are similar to those made in BLO/472/13, I do not think that Protec would have been put to too much additional effort to set out their counterarguments for this case. I therefore make no award for costs.

Appeal

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

H Jones

Deputy Director acting for the Comptroller