

OPINION UNDER SECTION 74A

Patent	GB2510881B
Proprietor(s)	Ischbeck Titan Ltd
Exclusive Licensee	
Requester	RMD Kwikform Ltd
Observer(s)	Saunders & Dolleymore LLP
Date Opinion issued	10 January 2023

The request

1. The comptroller has received a request from RMD Kwikform (“the requester”) to issue an opinion as to whether their “Proposed Design” would infringe Patent GB2510881B (“the Patent”).
2. Observations were received from Saunders & Dolleymore (“the observer”). The observations included arguments as to why the Patent must be found to be infringed by the proposed design.
3. Observations in reply were subsequently received from the requester.
4. I note that a previous opinion – 05/20 – has been issued with regard to this Patent.

The Patent

5. The Patent was filed on 18 February 2013 and was granted on 23 September 2015. It is still in force. It is known to provide safety screens around a construction, such as the central core of a high rise building, to effectively provide a temporary façade. As construction progresses it is also advantageous that the safety screen can move vertically to protect the perimeter as the construction progresses. Such screens are referred to as ‘climbing screens’.
6. As climbing screens are bulky but often required to arrive on a construction site fully assembled, the Patent aims to reduce the size of a climbing screen for transport. In particular a safety screen 2 for a climbing screen 1 is provided which has a retracted and extended state – with fixed panels 7a, joined together to form a fixed screen, being overlapped with moveable panels 7b in the retracted state, and with less or no overlap in the extended state. The fixed panels 7a are supported by a pair of support members 6,14, which also slidably receive a moveable panel 7b. Between adjacent moveable panels 7b there is only a substantially planar part 14 of the support

members. Figures 1&3 are reproduced below.

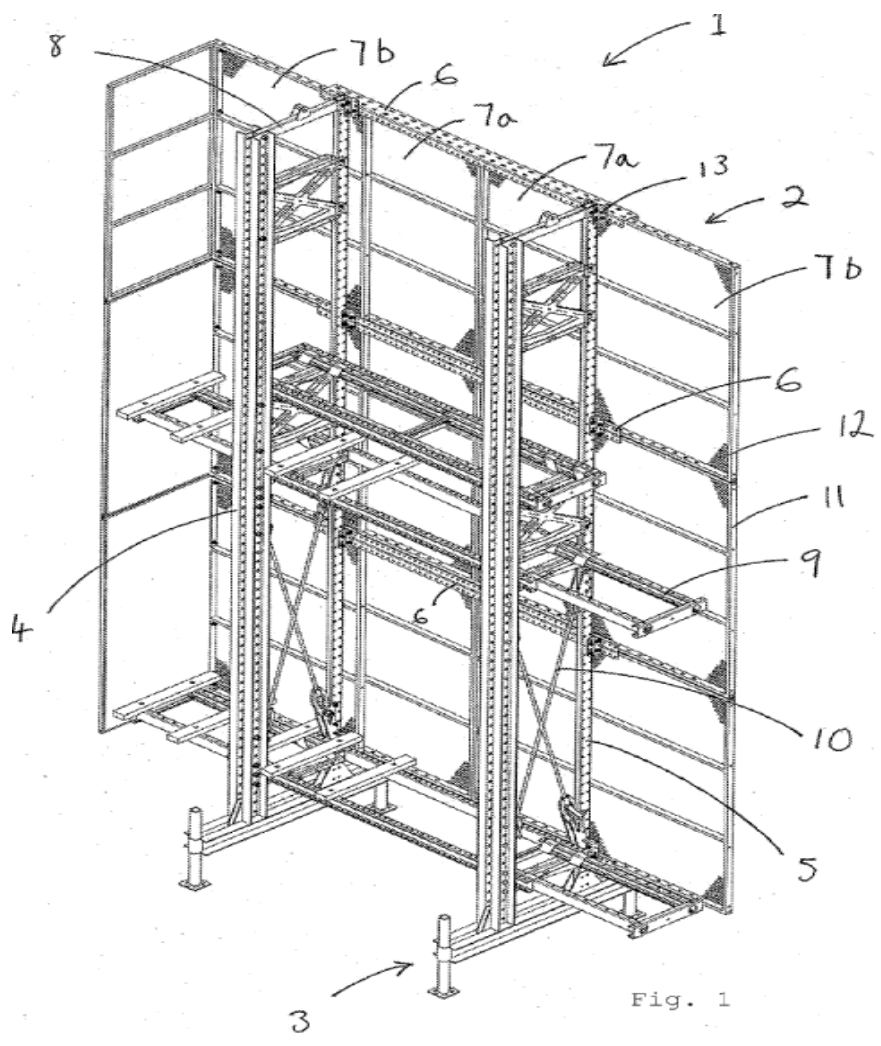
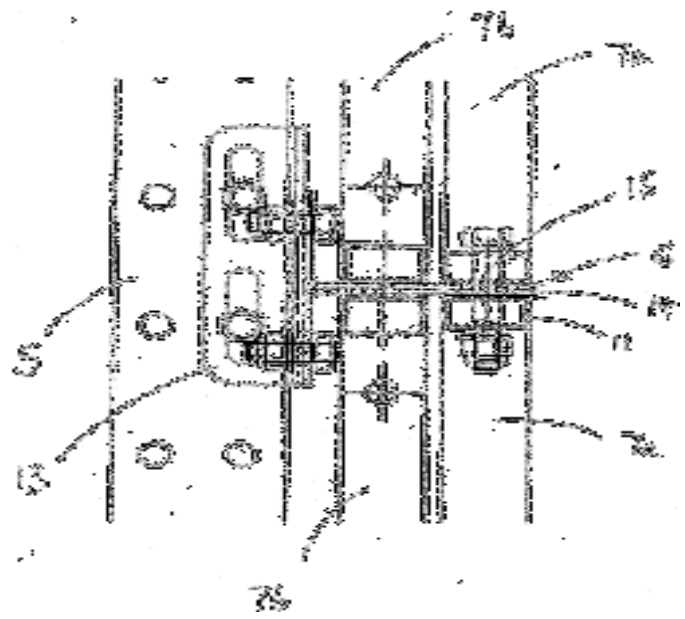


Fig. 1



7. The Patent has a single independent claim 1, which reads:

A safety screen for a climbing screen, comprising:

a plurality of fixed panels, and

a plurality of moveable panels;

wherein the safety screen is configured to have a retracted state and an extended state, each of the moveable panels being adapted to at least partially overlap with one or more of the fixed panels in the retracted state and being adapted such that in the extended state the degree of overlap is less than in the retracted state or there is no overlap,

the plurality of fixed panels are joined together to form a fixed screen, each of the fixed panels is supported by a pair of panel support members, and a moveable panel is slidably received between each adjacent pair of panel support members, and

the portion of each of the panel support members that lies between adjacent moveable panels comprises a substantially planar element only.

Claim Construction

8. Before considering the documents identified in the request, I need to construe claim 1 of the Patent, that is to say I must interpret it in the light of the description and drawings as instructed by Section 125(1). In doing so I must interpret the claims in context through the eyes of the person skilled in the art. Ultimately the question is what the person skilled in the art would have understood the patentee to be using the language of the claims to mean. This approach has been confirmed in the recent decisions of the High Court in *Mylan v Yeda*¹ and the Court of Appeal in *Actavis v ICOS*².
9. In order to interpret the claims through the eyes of the skilled person, they must first be identified. I consider the person skilled in the art to be a designer or technician of screens for use in construction.
10. In general, I think that the claims can be readily construed for the purposes of this opinion. The only terminology which requires interpretation is the “substantially planar element only” of the portion of the support members between moveable panels.
11. Looking at the description (in particular pages 6,7&8), it states:

“Each of the moveable panels is preferably slidably received between an adjacent pair of the panel support brackets 6. The moveable panels are not attached to the panel support brackets 6. By such an arrangement, adjacent

¹ *Generics UK Ltd (t/a Mylan) v Yeda Research and Development Co. Ltd & Anor* [2017] EWHC 2629 (Pat)

² *Actavis Group & Ors v ICOS Corp & Eli Lilly & Co.* [2017] EWCA Civ 1671

moveable panels 7b in the vertical direction are separated from one another only by the portion of the panel support bracket that lies therebetween. With a panel support member having a small vertical dimension, as mentioned above, a small (minimal) gap is provided between adjacent moveable panels in the vertical direction.”

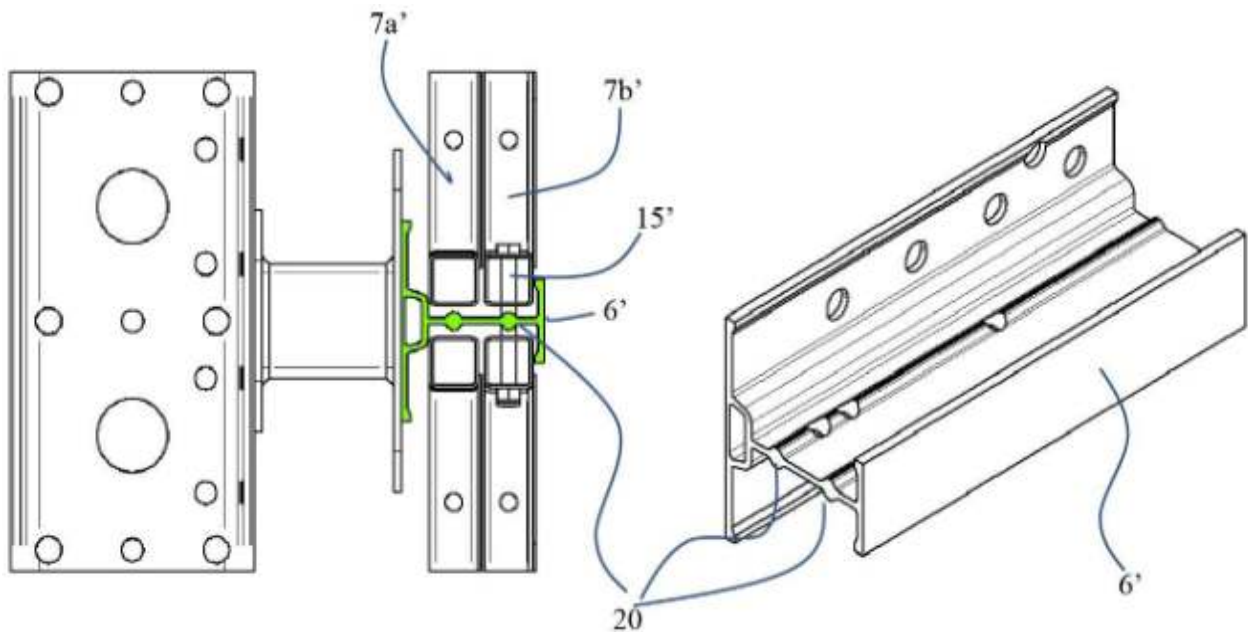
“The intermediate panel support bracket 6 comprises a substantially planar support element 14, which, in effect, comprises a horizontal plate...”

“The moveable panels 7b...are separated from one another by the portion of the planar support element 14 that lies therebetween. It is thereby the thickness of the planar support element that defines the horizontally extending gap between adjacent moveable panels in the vertical direction. The thickness of the planar support element 14 is preferably 15mm or less, such that the horizontally extending gap between moveable panels 7b that lie adjacent to one another in the vertical direction is 15mm or less.”

12. Furthermore, figure 3 clearly shows only a flat plate element(s) between the moveable panels. Consequently, the person skilled in the art would construe this “substantially planar” element as flat or ‘plate like’ with the “substantial” term encompassing any minor deviations from a flat, plate like form – such as manufacturing imperfections. Furthermore, it is only this substantially flat, plate like form which is between the panels.

The Proposed Design

13. The requester has submitted two drawings of the proposed design which are reproduced below. It should be noted that the requester has labelled, what they consider to be, equivalent parts with the same numerals as the Patent (with the addition of a dash) – except for a pair of ‘ribs’ 20 running along support 6’ along its length, i.e. across the width of the panels. The height of the ribs 20 above the surface of the web is about 5mm, while the thickness of the web between and outside the ribs is about 4mm. The purpose of the ribs is to separate the respective screens from the overall surface of the support 6’ in order to avoid the accumulation of moisture, which would accelerate rusting. The requester also notes that there are also bores through the beam 6’, which are centred on the ribs, but also extend outside of the rib width to facilitate drainage. It is said that the focus of the design is to break the capillary action between the beam and the panel.



Infringement

14. Section 60 of the Act states that:

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

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

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

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

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

15. In the Supreme Court in *Actavis UK Limited*³ Lord Neuberger stated that the problem

³*Actavis UK Limited and others v Eli Lilly and Company* [2017] UKSC 48

of infringement is best approached by addressing two issues, each of which is to be considered through the eyes of the notional addressee of the patent in suit, i.e. the person skilled in the relevant art. Those issues are:

(i) does the variant infringe any of the claims as a matter of normal interpretation; and, if not,

(ii) does the variant nonetheless infringe because it varies from the invention in a way or ways which is or are immaterial?

16. If the answer to either issue is “yes”, there is an infringement; otherwise, there is not.
17. The requester has submitted that the Proposed design does not fall within the terms of claim 1, which specifies a “substantially planar element only”.
18. The observer argues that the portion on which the ribs 20 are formed is a substantially planar element in accordance with claim 1. The presence of two ribs running along the portion of the panel support member that lies between adjacent moveable panels does not result in said portion being other than “substantially planar”. It is evident when viewing the figures of the Proposed Design, that the aforementioned portion of the support member clearly has a substantially planar shape. The observer notes that the only purpose of the term “substantially” is to convey that portions which are substantially planar are to be encompassed within the scope of claim 1 and that claim 1 does not thus require the said portion to be perfectly planar.
19. I think that the person skilled in the art, construing claim 1 as above as a matter of normal interpretation, would not consider an element comprising a web with ribs to be a “substantially planar element”. Furthermore, whilst the support has parts that are planar (i.e. the web), the presence of the ribs means that the portion that lies between the panels is not a substantially planar element only.
20. Therefore, it is my opinion that the Proposed Design does not infringe the claims as a matter of normal interpretation.
21. The second issue to be addressed is asking whether the variant provided by the Tesla Product varies in a way(s) which is immaterial? The court in *Actavis UK Limited* provided a reformulation of the three questions in *Improver*⁴ to provide guidelines or helpful assistance in connection with this second issue. These reformulated questions are:

(i) Notwithstanding that it is not within the literal meaning of the relevant claim(s) of the patent, does the variant achieve substantially the same result in substantially the same way as the invention, i.e. the inventive concept revealed by the patent?

(ii) Would it be obvious to the person skilled in the art, reading the patent at the priority date, but knowing that the variant achieves substantially the same result as the invention, that it does so in substantially the same way as the invention?

⁴ *Improver* [1990] FSR 181

(iii) Would such a reader of the patent have concluded that the patentee nonetheless intended that strict compliance with the literal meaning of the relevant claim(s) of the patent was an essential requirement of the invention?

22. In order to establish infringement in a case where there is no literal infringement, a patentee would have to establish that the answer to the first two questions was “yes” and that the answer to the third question was “no”.
23. The requester submits that there is no question of any ‘equivalent’ here: the element is either substantially planar or it is not. The requester also notes that the intention of the Patent is for the vertically adjacent panels to be separated by as little as possible (15mm or less), namely by the thickness of the planar support element 14. Any local thickening of the support element would frustrate this intention.
24. With regard to the first question the observer has identified what they consider to be the inventive concept by considering the problems underlying the invention, with the solutions to these problems defining the central inventive concept of the invention. The problem of reduced size of the screen is solved by overlapping moveable panels with fixed panels. The problem of large gaps between panels is solved by the width of the panel support members. In particular, as the size of the gaps between panels in the extended state are determined by the widths of the portions of the panel support members that lie between panels in the retracted state, it is preferred that the thickness of the panel support members be 15mm or less (with 20mm also considered acceptable).
25. The observer considers that it would be clear to the person skilled in the art that the primary requirement of the substantially planar shape is to provide a portion which extends between adjacent panels to form guides between which the panels can slide, whilst not unduly spacing the moveable panels, to thus avoid unacceptably large gaps between adjacent movable panels when in the extended state. It is therefore evident that the precise shape of the panel support members is not part of the fundamental inventive concept, as long as the gaps between moveable panels in the extended state may remain sufficiently small, and this is achieved by the invention employing a substantially planar portion.
26. The observer argues that the Proposed Design, having a said portion of 14mm thickness (including the ribs), provides the same result and thus the provision of the ribs has no effect on the result achieved, and thus the answer to the first question is ‘yes’.
27. With regard to the second question, the observer states that the variation provides an ‘optional’ feature, in that the ribs allow for drainage and avoid accumulation of moisture, which does not alter the underlying design or function relative to the embodiment disclosed in the Patent and in claim 1. Thus, the answer to the second question is said to be ‘yes’.
28. In answering the third question, the observer suggests that there is no wording in the Patent to suggest that the patentee intended that strict compliance with the literal meaning of the relevant claim(s) of the Patent was an essential requirement of the invention. Furthermore, it is evident that the requirement for the portion of the panel support member that lies between adjacent moveable panels is to extend between

these panels in the form of a single element only, without causing undue spacing of these panels. Thus, the skilled person would conclude that the patentee would not have intended strict compliance with the literal meaning of “substantially planar”, provided that the said portion was appropriately shaped to extend between the moveable panels without excessively increasing their separation – thus the answer to the third question is ‘no’.

29. The requester has noted that the word “planar” is used, and the drawings (Figure 3) do indeed show a planar cross-section. Hence the reader will assume that “to all intents and purposes planar” is indeed what is meant.
30. I consider that, based on claim 1 as construed in light of pages 6-8 and figure 3, the inventive concept lies in a reduced sized screen with adjacent moveable panels being separated from one another only by the portion of panel support elements that lies therebetween, with the thickness of the support elements defining the horizontally extending gap between adjacent moveable panels, and that this thickness should be small or minimal. In my opinion the Proposed Design achieves the same result in the same way as the present invention – i.e. the inventive concept – by providing a gap or distance between adjacent panels of 15mm or less through the use of a support member only, and that this result would be obvious to the person skilled in the art. In other words, the web and ribs of the Proposed Design provides the same result (15mm or less gap between moveable panels) in the same way (due to the thickness of the web and ribs) as the Patent. Therefore, I think the answer to the first question and second question would be “yes”.
31. With regard to the third question, I think the issue is whether the “substantially planar element only” is an essential part of the inventive concept (see paragraph 65 of Actavis UK Limited³). I do not think it is – rather I think that it is the thickness provided by a support member such as to define a small or minimal distance between the panels which is the essential feature. Therefore, I do not think that the patentee intended that strict compliance of the literal wording of the claim was essential.
32. Therefore, it is my opinion that the Proposed Design varies from the Patent in a way that is immaterial.

Opinion

33. It is my opinion that the Proposed Design as specified in the request does not fall within the scope of claim 1 as a matter of normal interpretation. However, it is my opinion that the Proposed Design varies from the Patent in a way that is immaterial. Accordingly, it is my opinion that the Proposed Design infringes GB2510881B under Section 60(1)(a) of the Act.

Benjamin Widdows
Examiner

NOTE

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