

**OPINION UNDER SECTION 74A**

Patent	EP 2295021 B1
Proprietor(s)	TrailerLogic LLC d.b.a Mortuary Response Solutions [US]
Exclusive Licensee	
Requester	White & Black Ltd on behalf of Simon Rothwell
Observer(s)	
Date Opinion issued	25 January 2023

**The Request**

1. The comptroller has been requested by White & Black Ltd on behalf of Simon Rothwell (“the Requester”) to issue a validity opinion in respect of EP 2295021 B1 (“the Patent”) in the name of TrailerLogic LLC d.b.a Mortuary Response Solutions [US].
2. The request was received on 27 October 2022 and was accompanied by a statement explaining the request. The Requester has provided the following evidence accompanying the request:

Appendix 1: Examples of full width rollers for racking

Appendix 2: Nutwell Logistics Mobile Cooled Storage Unit and similar flat pack racking

Appendix 3: 2007 Creform catalogue

Appendix 4: 2007 Trilogiq booklet

Appendix 5: 2005 American Pro-Pipe brochure

Appendix 6: 2001 PDF titled “Creform System as a Management Tool”

Appendix 7: An overview of racking companies including Creform, Trilogiq, GS Ace, Samsung and Flowstore Systems

Appendix 8: Creform statement

Appendix 9: Racking componentry from Creform 2007 catalogue

Appendix 10: Details of the Nuvola Rossa furniture piece designed by Vico Magistri

3. Each of documents E2-E10 have a publication date prior to the priority date of the patent.

## **Observations**

4. No observations have been received.

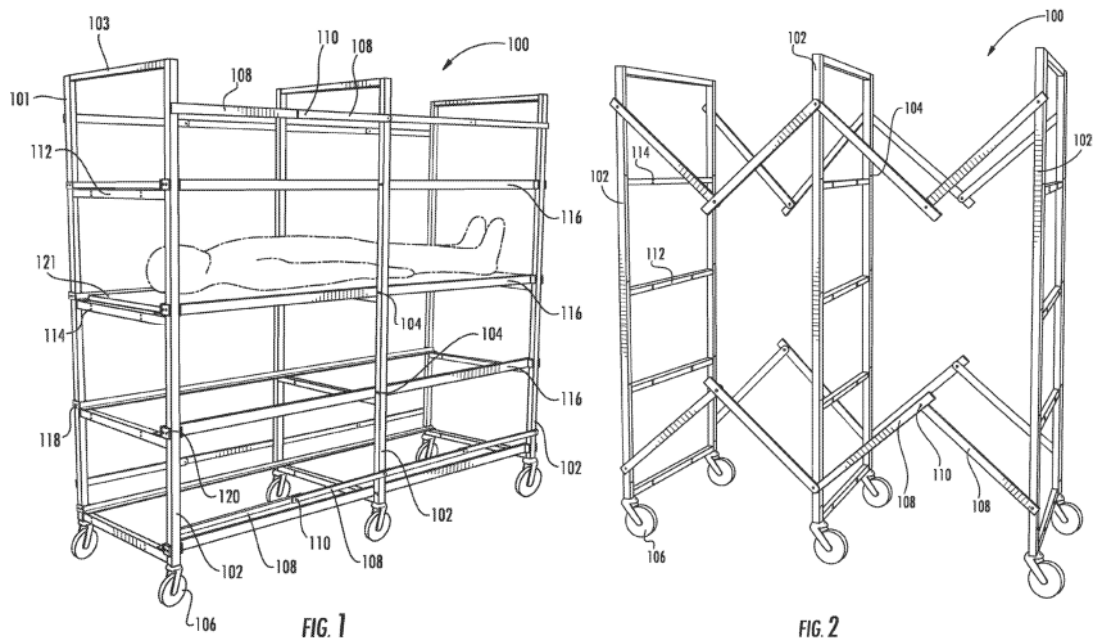
## **Whether the request for an opinion should be allowed**

5. The Proprietor, through their attorney Potter Clarkson, has asked me to refuse the request for an opinion. The Proprietor has explained that the validity of the patent is an issue in litigation in the Intellectual Property and Enterprise Court (“the Litigation”). The proprietor alleges that the Requester along with Roftek Limited (together “the Defendants”) have infringed the patent. The Defendants allege that the Patent is invalid.
6. The Proprietor argues that the Requester appears to be attempting to bring before the UKIPO matters of validity which properly belong to the Litigation and is, in effect, making a second attempt to litigate the validity of the Patent in circumstances where these issues ought all to have been raised in the Litigation. It is argued the request is both vexatious and frivolous and thus contravenes rule 94(1)(a).
7. The Proprietor also contends that, while the subject matter of the request has not yet been considered at trial in the Litigation, it will be, and this engages rule 94(1)(b).
8. Section 74A(3) of the Patents Act 1977 provides that:
  - (3) *The comptroller shall issue an opinion if requested to do so under subsection (1) above, but shall not do so;*
    - (a) *in such circumstances as may be prescribed, or*
    - (b) *if for any reason he considers it inappropriate in all the circumstances to do so.*
9. Rule 94(1) of the Patents Rules 2007 provides that:
  - (1) *The comptroller shall not issue an opinion if—*
    - (a) *the request appears to him to be frivolous or vexatious; or*
    - (b) *the question upon which the opinion is sought appears to him to have been sufficiently considered in any relevant proceedings.*
10. Therefore, for the reasons set out above, the Proprietor submits that it would be plainly inappropriate to provide an opinion in this case and the request should be refused.

11. The Office replied to the Proprietor explaining that their request for refusing the request had been considered but it has been decided the request for an opinion should be allowed to proceed. This is because it is considered that an opinion whilst being non-binding would assist the parties in preparing for the court case. It is noted also that the IPO opinions service is a form of Alternate Dispute Resolution (ADR) process and that the Courts encourage parties to consider ADR as an alternative to litigation (see for example the recitals in the directions of David Stone dated 22<sup>nd</sup> September 2022 sitting as a High Court Judge in the aforementioned court proceedings).
12. The Proprietor subsequently confirmed they had decided not to respond to the request as such a response would incur unnecessary cost and they considered it unlikely the request would have any bearing on the Litigation in which the Court will make a finding on the validity of the Patent in due course.

## The Patent

13. The Patent is titled "Collapsible cadaver rack". It was filed on 20<sup>th</sup> May 2010, with a priority date of 11<sup>th</sup> September 2009, published on 16<sup>th</sup> March 2011 and granted on 29<sup>th</sup> May 2013. The patent remains in force.
14. The Patent relates to a collapsible rack for storing and transporting cadavers and human bodies.
15. Figures 1 through 3, reproduced below, illustrate a collapsible cadaver rack 100 in three different positions in accordance with an embodiment of the present invention. Figure 1 illustrates collapsible cadaver rack 100 in a first, open and transportable position, while Figure 3 illustrates collapsible cadaver rack 100 in a second, collapsed and storable position. Figure 2 shows the collapsible cadaver rack 100 in an intermediate position between the first open position and the second collapsed position.



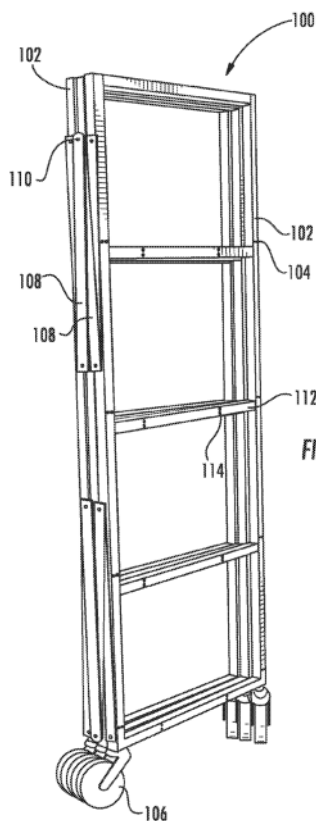


FIG. 3

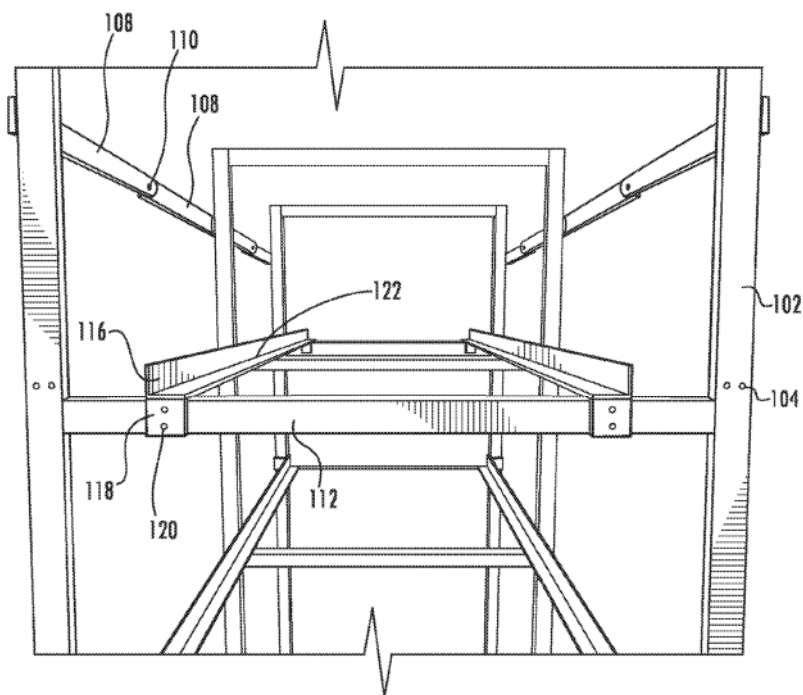


FIG. 5

16. The collapsible cadaver rack has at least two removable guide rails positioned within the collapsible cadaver rack when the collapsible cadaver rack is in open position.
17. The collapsible cadaver rack 100 has at least two vertically-oriented geometrically-shaped supports 102 internally positioned with at least one horizontal support beam 112. The supports 102 may be formed from two long vertical members 101 and two shorter horizontal members 103. Adjacent supports 102 are collapsibly connected by frame members 108. Adjacent frame members 108 may be connected by a hinge 110. Two removable guide rails 116 are positioned at different locations along the horizontal support beam such that a space between the removable guide rails is variable. The removable guide rails are positioned within the collapsible cadaver rack when the collapsible cadaver rack is in an open position. A cadaver transfer board 121 receives a human cadaver.
18. The Patent has 17 claims including a single independent claim 1. Claim 1 of the Patent reads:

*A collapsible cadaver rack (100, 200), the rack (100, 200) comprising:  
at least two vertically-oriented geometrically-shaped supports (102, 202) comprising:  
at least one horizontal beam (112, 218) internally positioned within each support (102, 202),  
wherein the vertically-oriented geometrically-shaped supports (102, 202) are collapsibly connected to each other by frame members (108, 204) such that the rack (100, 200) can be oriented in:  
a first open position where the frame members (108, 204) are in a*

*substantially horizontal position; and  
a second collapsed position where the frame members (108, 204) are in a  
substantially vertical position;  
at least two removable guide rails (116, 208) which each abut a horizontal  
beam (112, 218) of each vertically-oriented support (102, 202),  
wherein each removable guide rail (116, 208) may be positioned at different  
locations along the horizontal beam (112, 218) such that the space between  
the at least two removable guide rails (116, 208) is variable; and  
wherein the removable guide rails (116, 208) may be positioned within the  
collapsible cadaver rack (100, 200) when the collapsible cadaver rack (100,  
200) is in a first open position.*

19. I will consider the dependent claims should that become necessary after my assessment of claim 1.

### **Claim construction**

20. Before considering the inventive step issues raised in the request, I need to construe the claims of the patent – that is to say, I must interpret them in the light of the description and drawings as instructed by Section 125(1):

*125(1) For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.*

21. 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 High Court in *Mylan v Yeda*<sup>1</sup> and the Court of Appeal in *Actavis v ICOS*<sup>2</sup>.
22. In order to interpret the claims through the eyes of the skilled person, they must first be identified. The Requester has put forward substantial argument on what constitutes the person skilled in the art. The Requester explains that the Patent gives no indication as to whom it is addressed, gives no information as to the problem that it aims to solve or the usefulness of the invention. It simply describes a type of collapsible rack. Racks, by their very definition, are simply storage systems for materials (which in this case are cadavers). Therefore, the Requester considers the person skilled in the art to be a person engaged in the design and production of material handling systems, including racking.
23. The Requester discusses that a narrower definition might be a designer of cadaver

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

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

handling systems specifically, but that specialisation did not exist to the Requester's knowledge. The Requester explains that he worked in the industry for 13 years and did not come across a material handling systems designer specialised in cadaver racks. There are industry suppliers whose product ranges focuses on the mortuary market and the cadaver racking systems supplied by these companies all contain standard racking componentry used in other systems.

24. In the absence of any evidence to the contrary, I am minded to accept the Requester's argument regarding the absence of specific cadaver handling systems. However, I am not persuaded that the person skilled in the art would be engaged in the design and production of material handling systems, including racking. I consider material handling systems to encompass a far wider range of systems than racking, which by the Requester's definition above is simply a storage system for materials.
25. Therefore, I consider the person skilled in the art to be a designer or technician of racking systems.
26. The Requester has not put forward any argument concerning the construction of claim 1. I also have no issue with claim 1 and consider it to be clear when read in light of the description and drawings. In my opinion the skilled person would have no issue with understanding the meaning of claim 1. The same is true of dependent claims 2-17.

## **The law**

27. Section 1(1)(a) and (b) of the Patents Act (henceforth 'the Act') reads:

*1(1) A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say –*

- (a) the invention is new;*
- (b) it involves an inventive step;*

28. The provisions in relation to inventive step are found in section 3 which states:

*3. An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of the art by virtue only of section 2(2) above (and disregarding section 2(3) above).*

29. The Court of Appeal in *Windsurfing*<sup>3</sup> formulated a four-step approach for assessing whether an invention is obvious to a person skilled in the art. This approach was restated and elaborated upon by the Court of Appeal in *Pozzoli*<sup>4</sup>. Here, Jacob LJ reformulated the *Windsurfing* approach as follows:

- (1)(a) Identify the notional "person skilled in the art"*
- (1)(b) Identify the common general knowledge of that person;*
- (2) Identify the inventive concept of the claim in question or if that cannot be*

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<sup>3</sup> *Windsurfing International Inc. v Tabur Marine (Great Britain) Ltd*, [1985] RPC 59

<sup>4</sup> *Pozzoli SPA v BDMO SA* [2007] EWCA Civ 588

*readily 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 that would have been obvious to the person skilled in the art or do they require any degree of invention?*

## **The inventive step argument**

30. The inventive step argument advanced by the Requester is based on the definition of the person skilled in the art and what constitutes the common general knowledge (CGK) of that person. The Requester alleges that the claimed invention of the Patent is not inventive in light of the common general knowledge of the person skilled in the art.

### **(1)(a) Person skilled in the art**

31. The person skilled in the art has been discussed above in paragraphs 22-25. I consider the persons skilled in in the art to be a designer or technician of racking systems.

### **(1)(b) Common general knowledge**

32. The Requester’s argument relies upon what constitutes the CGK of the person skilled in the art. The Requester has identified two inventive concepts of the claimed invention – (i) a collapsible rack for storing and transporting cadavers; and (ii) the rack having removable guide rails, the space between which is variable.
33. The Requester argues that the Patent discloses no new components for racking and that all of the components required to assemble the collapsible racking system of the Patent were available at the filing date of the Patent and formed part of the CGK. In support of this assertion the Requester has filed evidence contained in appendices 1-10 as listed above.
34. Appendices 1-9 include details of various racking and material handling systems along with their individual components available from a number of different suppliers prior to filing of the Patent. The supporting material includes a catalogue, a booklet and a brochure of available racking and material handling systems. It also includes an overview of racking supply companies and where they distribute their various products.
35. Whilst the material contained in appendices 1-9 pre-date the Patent and form part of the prior art, this does not mean that they necessarily form part of the CGK of the person skilled in the art. In *Raychem Corp*<sup>5</sup> Laddie J explained CGK as follows:

*“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 to material he has memorized and has at the front of his mind. It*

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<sup>5</sup> *Raychem Corp’s Patents* [1998] RPC 31

*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."*

36. In Generics (UK) Ltd<sup>6</sup> Arnold J held that matter being relied on as CGK must be CGK in the UK. He explained:

*"The reason for this is that, whether one is concerned with the validity of a European Patent (UK), or a UK patent, one is concerned with a right in respect of the UK. It is true that the prior art may have been published anywhere in the world, but I do not think that alters the need for the skilled team to consider that art as if they were located in the UK. I do not think it matters that a fact was common general knowledge in (say) China, if it was not common general knowledge here. The position may be different if all the persons skilled in a particular art in the UK are acquainted with the position in China".*

37. When considering whether catalogues, booklets and brochures of products available form part of CGK, Mann J in Red Spider Technology<sup>7</sup> at paragraph 81 notes that:

*"I accept his evidence that a designer would keep abreast of the competition, and would be generally informed about existing designs of downhole tools. In that context the catalogues of major suppliers would be a resource on his bookshelf of the kind he would refer to in the manner referred to by Laddie J in Raychem Corp's Patents [1998] RPC 31 at 40:*

*"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."*

*What Mr Moyes relies on is the basic knowledge of a designer and the material to which he would resort. The valves in the various catalogues are not common general knowledge (and are not relied on as such), but features of the tools can be common general knowledge if sufficiently apparent."*

38. From the evidence before me, it would appear that the Creform and Trilogiq products were supplied in the UK prior to the filing of the Patent. However, I have no evidence before me to suggest that the Creform catalogue in appendix 3 or the Trilogiq

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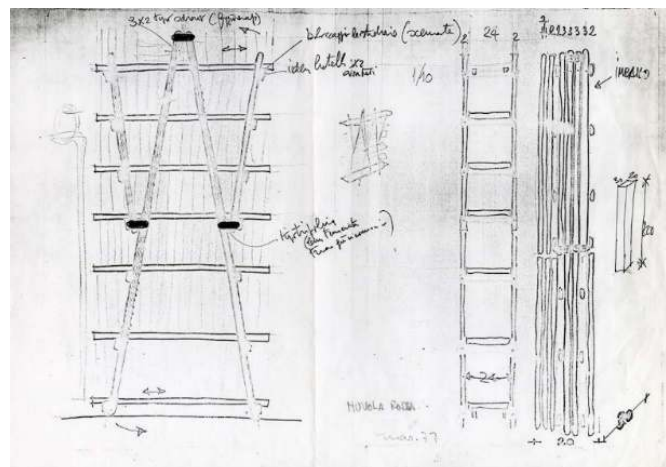
<sup>6</sup> Generics (UK) Ltd (t/a Mylan) v Warner-Lambert Company LLC [2015] EWHC 2548

<sup>7</sup> Red Spider Technology v Omega Corporation [2010] EWHC 59 (pat)



booklet in appendix 4 qualify as publications of a major supplier in the UK which the skilled person would have on his/her bookshelf to keep abreast of the competition. Therefore, in light of Mann J and Laddie J comments above, in my opinion, the brochure cannot be considered to form part of CGK of the skilled person.

39. The American Pro-Pipe brochure would appear to be a publication from North America with the back page including a map showing the locations of representatives throughout the USA and Canada. C Tek Industrial Products, Inc. which manufactures the American Pro-Pipe system would appear to be based in the USA. I have no evidence to suggest the brochure was available in the UK. Therefore, in light of Arnold J comments above, in my opinion, the brochure cannot be considered to form part of CGK of the skilled person. Furthermore, in light of paragraph 37 above, I have no evidence to suggest that the brochure qualifies as a publication of a major supplier in the UK which the skilled person would have on his/her bookshelf to keep abreast of the competition.
40. Of the other companies supplying racking systems discussed in appendix 7, I have no evidence before me to suggest that the products of GS Ace or Samsung were known or supplied in the UK. The products of Flowstore Systems Ltd (UK) appear to have been supplied in the UK, however, I have no evidence before to suggest that the products to be so well-known that they form part of the CGK. Therefore, I do not consider any of these products to form part of the CGK.
41. Whilst, based on the evidence provided, the racking systems from the suppliers discussed above are not considered to form part of the CGK, if it was shown that these racking systems were from major suppliers in the UK they may be considered part of the CGK. Notwithstanding that there is insufficient evidence to show that the particular types of racking systems in these documents is CGK, I am satisfied that the skilled person would as part of their CGK be aware of modular racking made up of interconnectable elongated components.
42. The Requester has also argued that using a scissor hinge or a concertina mechanism has been well-known prior to the Patent as a way of reducing the size of a product e.g. in ironing boards, camping chairs, travel cots, folding furniture and stretcher supports. In support of this the Requester has supplied in appendix 10 details of the Nuvola Rossa furniture piece designed by Vico Magestri, which is illustrated below:



43. Again, in the absence of evidence to the contrary, I am not persuaded that the arrangement in appendix 10 is CGK, however, I accept that the idea of using a scissor hinge to allow something like a table to be collapsed is CGK.

### **(2) Inventive concept of claim 1**

44. As I have already discussed the request identifies the inventive concepts as a collapsible rack for storing and transporting cadavers; wherein the rack has removable guide rails, the space between which is variable.

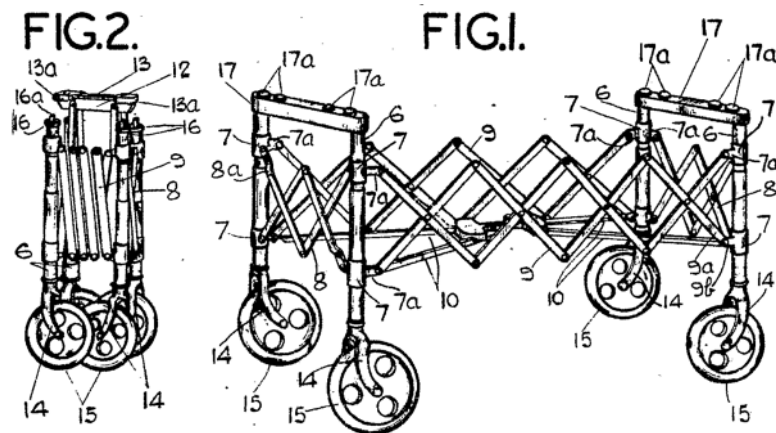
### **(3) What differences exist between the CGK and the inventive concept of claim 1?**

45. The Requester first suggests that there is no difference between the state of the art and the “inventive step in terms of the rack components”. I take this to be suggesting that the various components of the racking are in themselves known. As discussed above I am prepared to accept that racking comprising interconnecting elongate members is well-known and that the idea of scissor joints to make things collapsible is also well known. But as acknowledged by the Requester the inventive concept here lies in how these well-known features are combined to produce a collapsible cadaver rack.
46. The request refers to two patents, GB585540 and GB884831, in the section of the request relating to identifying the difference between the state of the art and the inventive concept. It is not immediately clear whether the attack on obviousness is based on each of these patent document in turn with the addition of CGK or whether the two patent documents are intended to represent also the CGK.
47. The statement by Sachs LJ in *General Tire*<sup>8</sup> is of particular interest here because it sets out the relationship of patent specifications to the common general knowledge Sachs LJ explained:
- “...it is clear that individual patent specifications and their contents do not normally form part of the relevant common general knowledge, though there may be specifications which are so well known amongst those versed in the art that upon evidence of that state of affairs they form part of such knowledge, and also there may occasionally be particular industries (such as that of colour photography) in which the evidence may show that all specifications form part of the relevant knowledge.”*
48. Here I have no evidence before me which suggests either of GB585540 and GB884831 are patent specifications falling into the categories discussed above by Sachs LJ and thus do not form part of the CGK.
49. Hence, I will proceed on the basis that these two documents are prior art and consider whether either supports an inventive step objection.
50. GB585540 discloses a collapsible bier suitable for carrying a coffin or corpse. The invention described therein differs from that of the Patent in issue in that the collapsible bier does not include at least one horizontal beam internally positioned

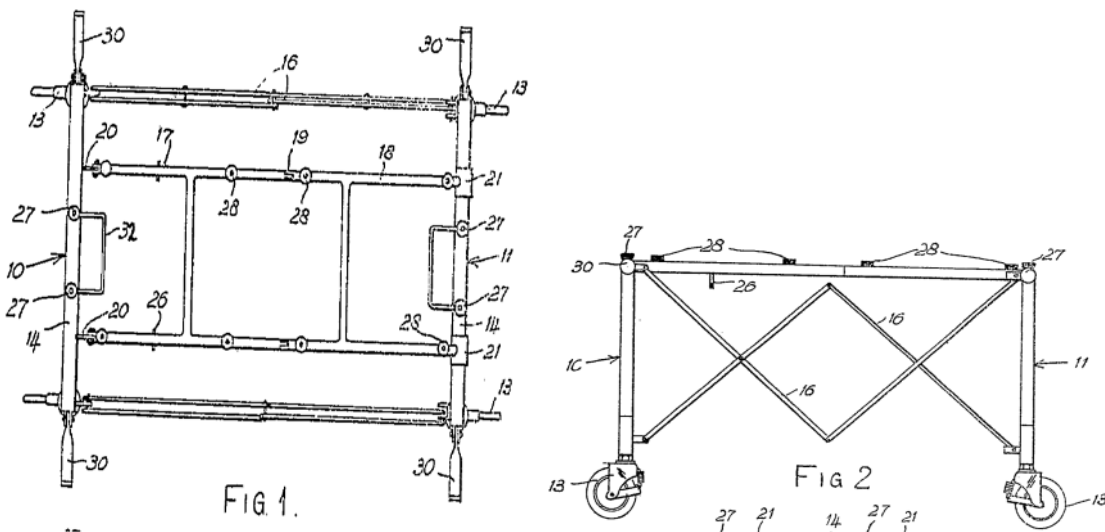
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<sup>8</sup> *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1972] RPC 457

within each support; a first open position where the frame members are in a substantially horizontal position; and at least two removable guide rails which each abut a horizontal beam of each vertically-oriented support as required by claim 1 of the Patent.



51. GB884831 also discloses a collapsible bier as shown below however it adds nothing different to GB585540.



**(4) Are the differences inventive?**

52. The Requester considers it obvious to provide the prior art biers of GB585540 and GB884831 with removable guide rails. I agree with the Requester that racking having removable components was known prior to the Patent and that by the very nature of the modular racking made up of interconnectable elongate components using the various connectors and brackets, the spacing between components could be varied. However, I am not minded to agree that it would be obvious to modify either of the above biers to include two removable guide rails as required by the Patent.

53. As can be seen from the figures above, the bier of GB585540 is collapsible in two directions perpendicular to one another. The person skilled in the art would not consider it obvious to provide the bier with a horizontal beam internally positioned within each support as this would prevent the bier from being collapsible in one of

the directions. In the absence of the internal beam, which supports the guide rails, it would not be obvious to include removable guide rails. spacing between the frame members is not variable due to the crossbars connecting them. Further, the bier is provided with rubber blocks 17a on bars 17 for engagement with a coffin supported on the bier. This teaches away from providing the bier with internally supported removable guide rails as the bier is designed to support the coffin on its top surfaces. To modify the bier of GB585540 to include these features would, in my opinion, require hindsight on the part of the uninventive skilled person.

54. The bier of GB884831 is collapsible and is provided with frame members 17, 18 foldable about hinge 19. Again, this bier is not provided with a horizontal beam internally positioned within each support and further the spacing between the frame members is not variable due to the crossbars connecting them. Again, the bier is provided with pads 27, 28 on bars 14 and frame 17,18 for engagement with a coffin supported on the bier, which as above, teaches away from providing the bier with internally supported removable guide rails. Again, I cannot see any motivation for the uninventive skilled person to modify the bier of GB884831 to include these features without the benefit of hindsight.
55. In my opinion, to modify either of the biers to include the features of claim 1 would require significant re-design and it would not be obvious to do so from the CGK of the skilled person without the benefit of hindsight.
56. The Requester argues that all of the component parts required to provide a collapsible racking system as required by claim 1 of the Patent were available for supply prior to the Patent and as such form part of the CGK of the person skilled in the art. The CGK has been discussed at length above, and whilst on balance I consider the component parts to have been available for supply to the skilled person in the UK, I do not consider it would have been obvious to obtain the necessary parts and assemble them to arrive at the collapsible rack of claim 1. In my opinion the uninventive skilled person would have no motivation to do so from his/her CGK.
57. I consider it fair to say that well-known foldable items such as ironing boards, camping chairs etc will form part of the skilled persons CGK, I do not consider it to be obvious to apply such knowledge to the field of racking systems, which by their very nature as evidenced by the material supplied with the request from Creform, Trilogiq and American Pro-Pipe, are predominantly racking systems which are permanently in place for supporting a variety of materials. Again, the uninventive skilled person would have no motivation to apply the knowledge of foldable/collapsible items to the field of racking systems from his/her CGK.
58. I am therefore of the opinion that the invention as defined by claim 1 is inventive with respect to GB585540, GB884831 and the CGK of the person skilled in the art.

## **Opinion**

59. On the basis of the evidence put forward I am of the opinion that claim 1 of the Patent is inventive in light of GB585540, GB884831 and the CGK of the person skilled in the art.

Marc Collins  
Examiner

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**NOTE**

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