

OPINION UNDER SECTION 74A

Patent	GB 2332376 B
Proprietor(s)	Anglian and Midland Sports Surfaces
Exclusive Licensee	
Requester	J B Corrie & Co Limited
Observer(s)	Urquhart-Dykes & Lord
Date Opinion issued	01 August 2014

The request

1. The comptroller has been requested by J B Corrie & Co Limited (“the requester”) to issue an opinion on whether GB 2332376 B (“the patent”) is valid in terms of novelty and inventiveness in light of prior art filed with the request.
2. The requester alleges the claims of the patent are anticipated by a number of fencing systems that were available to the public prior to the filing date of the patent.
3. The request includes a copy of the A specification of the patent along with evidence marked A-H (Exhibits A-H). Exhibit A is a copy of a J B Corrie brochure showing fencing products available from the requester. Exhibits B-H contain photographs, adverts and extracts from brochures illustrating alleged prior art fencing having the features of the claims of the patent.

Observations

4. Observations have been received from Urquhart-Dykes & Lord (“the observer”) detailing how the claims of the patent are not anticipated by the alleged prior art filed by the requester. The observer includes a copy of a brochure for the tennis fencing system covered by the patent.

Observations in reply

5. The requester has provided observations in reply to counter what has been said in the observations. Shortly after the observations in reply had been filed, the observer contacted the Office stating that the observations in reply are not confined to matters strictly in reply as required by Rule 77F(4) and that they should be disregarded. I

agree with the observer that a number of the arguments made in the observations in reply are not strictly in reply to the observations made by the observer. These new arguments have not been considered.

Further observations

6. In their correspondence with the Office regarding the observations in reply, the observer raised the question of being allowed to file further observations on the new arguments put forward by the requester. The Opinion process is intended to be a low cost and quick service. It provides for three well defined rounds of argument i.e. the request, observations and observations in reply. Consequently there is no provision for allowing further observations or arguments filed outside of these rounds. In any case I have disregarded any new argument.

Matters to be considered by this Opinion

7. Section 74A of the Act provides for the comptroller to issue, on request, non-binding opinions on questions of validity relating to novelty and inventive step, and on questions of infringement. Rule 96 of the Patents Rules 2007 as amended provides that any observations should be confined to the issues raised by the request. In this instance the request as outlined on Form 17 is for an opinion in relation to the validity of the patent under section 74A(1)(b). Hence I will not consider any questions of potential infringement of the patent by the prior art fencing systems raised by the requester. I will only consider whether the patent is valid in light of the prior art as requested in the opinion request.
8. If the requester wishes to have an opinion on infringement of the patent then they must file a separate request.

The Patent

9. The patent, GB 2332376 B, is titled "Fencing systems and uprights therefor". It was filed on 19th December 1997, published on 23rd June 1999 and granted on 22nd May 2002. The patent remains in force.
10. The patent describes a tennis court fencing system. According to the patent, adoption of tennis court facilities in residential areas is increasing with time. Residential properties have a limited amount of available land which has meant the tennis courts have to be located in prominent and highly visible garden areas of the property whereby the visual impact of the tennis court becomes a matter of prime concern for the owner of the property.
11. According to the patent the prior art fencing systems include uprights which are "unduly dominant and highly visible whereby the entire fencing system conveys the impression of a confinement area or the like".

12. The tennis fencing system of the patent attempts to overcome the above mentioned problem by improving the visual impact of the fencing uprights of the fencing system. This is achieved by openwork uprights formed as fabrications of lengthwise rods or tubes and associated collars linking the tubes or rods. The arrangement is such that the openwork construction provides a substantially reduced light-interception profile while still having the requisite strength for adequately supporting an openwork fencing medium such as tennis netting. The openwork uprights blend with a given background more effectively than the prior art.
13. Figure 1 below shows a tennis fencing system 10 comprising a plurality of supports or uprights 12 and an associated meshwork or netting format fencing medium 14 in the form of tennis netting, the fencing system forming the surround of a tennis court 16 and having access gates 18, 20. The netting 14 and the supports 12 at the end portions 22, 24 of court 16 are higher than in the central region 26 thereof, in accordance with the nature of the tennis game and the predominant trajectories of the ball paths which are caused during a game of tennis. The corresponding heights of the supports 28 in the central region 26 are likewise reduced in accordance with the reduced height of the fencing medium or netting 14 at that portion of the fencing system. It can be seen in Figure 1 that the supports 12 comprise an openwork assembly of longitudinal members 30 together with associated cross-linking straps or members in the form of collars 32, of which there are three in the tall supports 12 and only two in the shorter supports 28. The longitudinal members 30 carry netting connection means (not shown) to enable the weight of the netting to be carried thereon.

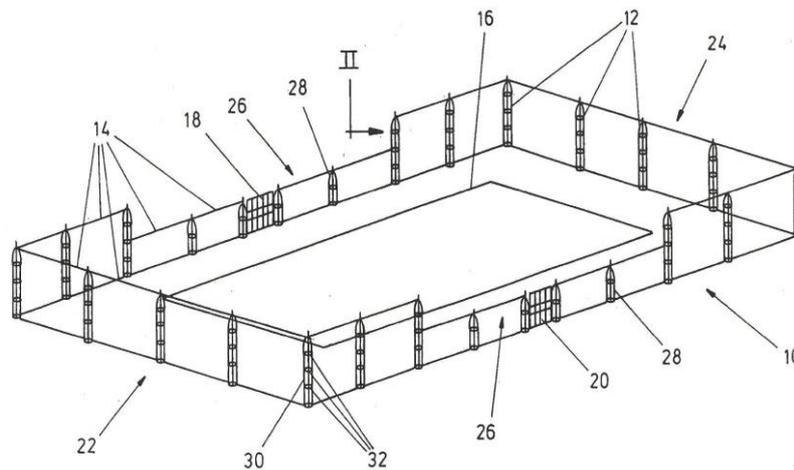


FIG. 1

14. As shown in Figures 2 and 3 below, supports 12 may comprise groups of 4 longitudinal members 30 together with associated collars 32 forming a welded structural assembly. The longitudinal members 30 are disposed symmetrically around the collars 32 and are welded thereto. The welded joints are indicated at 38. At the top of each support 12 the longitudinal members may be curved inwards to form generally U-shaped structures which are inter-welded as a structural assembly.

The openwork construction of the supports 12 produces substantial voids 34 between the longitudinal members 30 so that light can pass throughout the majority of the length of the supports 12 and at multiple angles. There may be provided at the top of each support or upright 12 a decorative device in the form of a ball, but many alternatives could be provided.

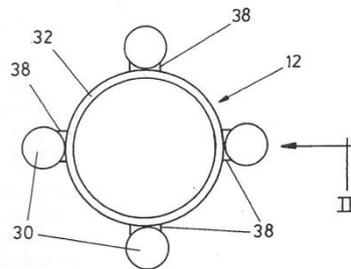


FIG. 3

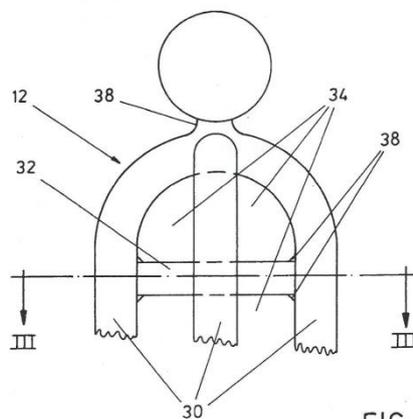


FIG. 2

15. The patent has eight claims – one independent claim, five claims dependent thereon and two omnibus claims. Independent claim 1 reads as follows:

1. *A tennis court fencing system comprising a plurality of supports or uprights and an associated meshwork or netting-format fencing medium in the form of tennis netting, said plurality of supports or uprights each comprising:*

- a) at least three longitudinal members extending generally lengthwise of said uprights;*
- b) at least two longitudinally-spaced cross-linking straps or members for said longitudinal members;*
- c) said longitudinal members being spaced apart by at least a distance equal to their own thickness or transverse dimensions;*
- d) said upright thus having an open-format construction with substantial voids between said longitudinal members, corresponding to the voids in netting, so that light can pass through said open construction throughout the majority of the length of said upright members at multiple angles; and*
- e) whereby in combination with said fencing medium of said tennis court fencing system the light passing through said uprights of said tennis court*

fencing system is comparable to that of said netting whereby in use said uprights have a bending strength of at least the sum of the bending strengths of the component longitudinal members, but a light interception profile from several directions of view which is substantially less than the sum of the interception profiles of said longitudinal members.

Omnibus claims 7 and 8 are in the narrow form and reads as follows:

7. A fencing system substantially as described herein with reference to the accompanying drawings.

8. An upright for a fencing system substantially as described herein with reference to the accompanying drawings.

16. I shall discuss dependent claims 2 to 6 later on, if I find that claim 1 is invalid.

Claim construction

Independent claim 1

17. Before considering the prior art put forward in the request I will need to construe the claims of the patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claims, interpret it in the light of the description and drawings as instructed by Section 125(1) and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.

18. Section 125(1) of the Act states that:

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

19. And the Protocol on the Interpretation of Article 69 of the EPC (which corresponds to section 125(1)) states that:

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and

drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.

20. Neither the requester nor the observer has provided any argument relating to the construction of the claims.
21. Independent claim 1 sets out the components of a tennis court fencing system. The system comprises a plurality of supports/uprights and associated tennis netting. The supports/uprights comprise a list of features in parts (a)-(e) as reproduced above. I can see no issue with the construction of parts (a), (d) and (e).
22. Part (b) defines “at least two longitudinally-spaced cross-linking straps or members for said longitudinal members”. It is not entirely clear from the claim what is meant by the cross-linking straps/members being *for* the longitudinal members. Turning to the description and drawings the skilled person would understand that each cross-linking strap/member is intended to be connected to each of the longitudinal members thereby linking them together.
23. Part (c) defines the longitudinal members as being “spaced apart by at least a distance equal to their own thickness or transverse dimensions”. I consider the need for the distance to be defined as “equal to their own thickness or transverse dimensions” due to the fact that the longitudinal members may be of solid or tubular construction. I believe that it is clear from the description and drawings that the feature is intended to define the longitudinal members as being spaced apart by at least a distance equal to their own outer transverse dimension in order to provide the intended voids there between for the passing of light. The claim is not intended to be limited to spacing the longitudinal members by a distance equal to the thickness of the wall of a tubular upright which could have a small thickness and would thus result in the claim defining the longitudinal members as being placed close together. This would clearly not give rise to the intended advantage of the invention.
24. Parts (d) and (e) are not considered to add any technical features over those contained in parts (a)-(c) but merely recite the aesthetic and structural results that are produced by a tennis court fencing system having a plurality of supports/uprights comprising parts (a)-(c). In parts (d) and (e) the advantages of the open construction of the uprights with regard to light passing there through to allow the uprights to blend with a given background are defined. In part (e) the uprights are defined as having, in use, a bending strength of at least the sum of the bending strengths of the component longitudinal members. However no technical features of the uprights are defined that would give rise to said ability to blend with a background or resultant strength beyond those contained in parts (a)-(c). Furthermore no further features are discussed in the description or drawings.
25. I can see no issue with the construction of the dependent claims. The dependent claims are clear and a person skilled in the art would have no difficulty in construing the scope of said claims.

Novelty

26. I will consider each of the prior art fencing systems as filed in exhibit A-H in turn. As discussed above when considering the construction of claim 1 I consider that should any of the prior art comprise all of the features contained in parts (a)-(c) then they would serve to produce the resultant features of parts (d) and (e).
27. The requester has not referred to or directed their argument towards the claims at all in either the initial request or the observations in reply. The requester's comments are limited to outlining the features of and discussing the prior art fencing systems contained in exhibits A-H.
28. Exhibit A is a brochure showing fencing systems available from the requester. The brochure shows six different designs of fencing upright – Jester, Monarch, Turret, Prince, Crown and Lance. From the illustrations and drawings in the brochure the Jester, Monarch, Prince and Crown would all appear to be uprights having at least three longitudinally members extending generally lengthwise; at least two longitudinally spaced cross-linking straps/members connected to each of the longitudinal members thereby linking them together and the longitudinal members spaced apart by at least a distance equal to their own outer transverse dimension. Therefore I consider them to be fencing uprights having the features of parts (a)-(c) and the resultant features of parts (d) and (e). The Lance and Turret designs do not have all of the features of parts (a)-(c) e.g. at least two longitudinally spaced cross-linking straps/members linking each of the longitudinal members together.
29. The observer argues that the illustrations are undated and the uprights shown are not in the context of a tennis court. In the initial request, the requester states that the brochure is "an old J B Corrie brochure" and does not establish a date prior to the filing date of the patent from which any of these fencing upright designs were made available to the public. In the observation in reply the requester attempts to address this point but merely states that the brochure is from the mid-late 90's and whilst it would appear that the requester believes the brochure illustrates prior art pre-dating the patent, an assertion of mid-late 90's is not sufficient to render the patent having a filing date of 19th December 1997 invalid.
30. Exhibit B shows a ball stop fencing system. The observer argues that the uprights shown do not have at least three longitudinally members extending generally lengthwise. I am in agreement as the uprights clearly only have two longitudinal members. No date prior to the filing date of the patent has been given for the fencing system being in the public domain. Therefore the system shown in exhibit B does not anticipate claim 1.
31. The observer has also argued that the posts shown in exhibit B do not meet the requirement of claim 1 with regard to being sufficiently "see-through". The observer argues that the posts are highly visible. I would contend this point as the two longitudinal members illustrated are spaced apart by at least a distance equal to their own outer transverse dimension. I would therefore consider the posts to be sufficiently spaced to provide the level of openwork construction as required by that aspect of claim 1. I would further add in all of the photographs contained in the brochure filed by the observer relating to the tennis fencing system covered by the patent it is clear that whilst the uprights blend into the background to a greater

degree than an upright of less open construction, the uprights are still clearly visible especially when compared to the tennis netting which they support.

32. Exhibit C contains an advert from Darfen Ltd for what are described as “pylon posts” and photographs of said posts in use. The advert is dated 1996 and thus pre-dates the patent and contains three photographs showing three different fencing systems. Of the three photographs in the advert it appears that the top photograph is of most interest and in fact shows uprights similar to those shown of “pylon posts” in use also in exhibit C. The pylon post in the advert and three photographs comprises four longitudinal members extending generally lengthwise; where the four longitudinal members are spaced apart by at least a distance equal to their own outer transverse dimension. However the posts in the advert and the first two photographs would not appear to have at least two longitudinally spaced cross-linking straps/members connected to each of the longitudinal members thereby linking them together but rather a plurality of longitudinal connecting members running the length of the longitudinal members. I therefore do not consider the pylon post shown in the advert or the first two photographs to anticipate claim 1.
33. The third photograph in exhibit C appears to have had a number of connecting members added to link some of the longitudinal members together. The added connecting members however do not link all of the longitudinal members together as I have construed claim 1 to require. Furthermore no dates for the post in the three photographs being made available to the public have been given and as there are differences between the advert and the third photograph the date of the advert cannot be relied upon for the photographs. I do not consider the pylon post shown in the third photograph to anticipate claim 1.
34. Exhibit D shows photographs of a bi-steel post. The bi-steel post pre-dates the patent and has been available to the public since at least 1987. However, as argued by the observer, the bi-steel post does not include all of the features of claim 1, namely the post only includes two longitudinal members. Therefore the system shown in exhibit D does not anticipate claim 1.
35. The observer again raises the point regarding the visibility of the bi-steel posts. Similar to my comments in paragraph 31 above, the two longitudinal members are spaced apart by at least a distance equal to their own outer transverse dimension. I would therefore consider the posts to be sufficiently spaced to provide the level of openwork construction as required by that aspect of claim 1.
36. Exhibit E contains a pair of photographs of a tennis court from Helmingham Hall, Suffolk. The tennis court is merely described by the requester as “old” with no date given for the age of the court. Further the illustrated upright does not include all of the features of claim 1 and does not include at least two longitudinally spaced cross-linking straps/members connected to each of the longitudinal members thereby linking them together. The upright further includes a solid relatively thick post at its centre which is not attached to any cross-linking member and is not spaced apart from other longitudinal members by a distance equal to its own outer transverse dimension. The thicker central post significantly reduces the amount of light passing through the upright. The upright shown in exhibit E does not anticipate claim 1.

37. Exhibit F is an illustration of the entrance to the Trafalgar Square tennis courts dated 1913. Whilst the entrance clearly pre-dates the patent and is of open construction it does not show uprights having any of the features of parts (a)-(c) of claim 1.
38. Exhibit G is a photograph of a tennis court having timber trellis and timber cluster posts. No date has been offered by the requester for the court and the uprights do not have the features of parts (a)-(c) of claim 1.
39. Exhibit H is a photograph of what is described by the requester as “the latest aluminium see-through lattice highway signage posts”. Whilst again no date is offered for these posts entering the public domain it appears a fair assumption that they do not pre-date the patent from the requesters own description. The posts would appear from the photograph to have four longitudinal members extending generally lengthwise; where the four longitudinal members are spaced apart by at least a distance equal to their own outer transverse dimension. However the posts would not appear to have at least two longitudinally spaced cross-linking straps/members connected to each of the longitudinal members thereby linking them together but rather a plurality of longitudinal connecting members running the length of the longitudinal members.
40. It is my opinion that claim 1 of the patent is novel over the prior art cited by the requestor. As claims 2-6 are dependent upon claim 1 they are also considered to be novel.
41. Omnibus claims 7 and 8 are of the narrow form and as such are limited to the described embodiments with reference to the drawings. I consider there to be differences between the embodiment described and illustrated in the figures and the prior art as described and shown by the requester in their accompanying evidence. For example the described embodiment requires a tennis court fencing system having uprights comprising four longitudinal members linked by and symmetrically disposed around a circular collar; where the four members are curved inwards at the top to form a generally U-shaped structure; the top being surmounted by a decorative device in the form of a ball. None of the prior art fencing systems put forward by the requester contains all of these features. Consequently there is in my opinion no anticipation of omnibus claims 7 and 8.

Inventive step

42. The second part of the opinion request is whether claim 1 lacks an inventive step in the light of the prior art in exhibits A-H.
43. In the UK the law to determine whether or not an invention defined in a particular claim is inventive over the prior art and that which I must follow is set out in *Pozzoli SPA v BDMO SA [2007] EWCA Civ 588*, in which the well known Windsurfing steps were reformulated:

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

(1)(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, determine whether those differences constitute steps which would have been obvious to the person skilled in the art.

44. The person skilled in the art is the designer of fencing systems and uprights used therein. In that role their common general knowledge would include prior art fencing systems including tennis court fencing systems.
45. The inventive concept of the claim would be to provide a tennis court fencing system including uprights having an open-format construction with substantial voids between the longitudinal members so that light can pass therethrough to allow the uprights to blend more effectively with a given background. The open-format is provided by at least three longitudinal members being linked together by at least two longitudinally spaced cross-linking members and the longitudinal members being spaced apart by at least a distance equal to their own outer transverse dimension.
46. Firstly I need not consider the test for obviousness with regard to exhibits A, B, E, G and H as no dates have been established by the requester for these prior art fencing systems being in the public domain prior to the filing date of the patent. Thus claim 1 is inventive over these prior art fencing systems.
47. However I would comment that, as mentioned above in paragraph 29, it is clear from their argument that the requester considers the prior art of exhibit A to pre-date the patent. I would add that I consider a person skilled in the art would consider any of the Jester, Monarch, Prince and Crown uprights suitable for use in a tennis court fencing system and as discussed above I consider each of them to include all of the technical features of claim 1. Therefore if a date could be established for any of these uprights being in the public domain before the filing date of the patent I consider they would render claim 1 obvious.
48. Only the advert of exhibit C, exhibit D and exhibit F have been shown to have been in the public domain prior to the filing date of the patent. I will now apply steps (3) and (4) of the test to each of these in turn.
49. The pylon posts of the advert in exhibit C have all of the features of the uprights of claim 1 apart from having at least two longitudinally spaced cross-linking straps/members connected to each of the longitudinal members thereby linking them together. Instead the pylon post has a plurality of longitudinal connecting members running the length of the longitudinal members. I do not consider it would have been obvious at the time of filing the patent to replace the longitudinal connecting members with at least two longitudinally spaced cross-linking straps/members and indeed the skilled person would have had no motivation to do so as the longitudinal connecting members provide the necessary support and stability for the longitudinal members. Therefore I consider claim 1 is inventive over the pylon post of exhibit C.

50. The bi-steel posts of exhibit D only include two longitudinal members rather than at least three as required by claim 1. Again I do not consider it would have been obvious to a person skilled in the art at the time of filing the patent to modify the bi-steel post to include at least three longitudinal members as this would change the shape of the uprights and the cross members linking the longitudinal members together. To do so would lead to a substantial re-design of the bi-steel post. Therefore in my opinion claim 1 is inventive over the bi-steel post of exhibit D.
51. The open construction entrance gate to the Trafalgar Square tennis courts as shown in exhibit F does not disclose any of the features of the uprights of claim 1. It clearly would not have been obvious to a person skilled in the art to take the entrance gate shown in exhibit F and arrive at the tennis court fencing system defined by claim 1. Claim 1 is not obvious in light of exhibit F.
52. It is my opinion that claim 1 of the patent is inventive over the prior art cited by the requestor. As claims 2-6 are dependent upon claim 1 they are also considered to be inventive. Omnibus claims 7 and 8 are also considered to be inventive as any differences between the described and illustrated embodiments are not obvious for the same reasons given above with regard to claim 1.

Conclusion

53. I conclude that the claims of the patent are both novel and inventive over the prior art raised by the requestor.

Application for review

54. Under section 74B and rule 98, the proprietor may, within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.

Mr Marc Collins
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.