

**OPINION UNDER SECTION 74A**

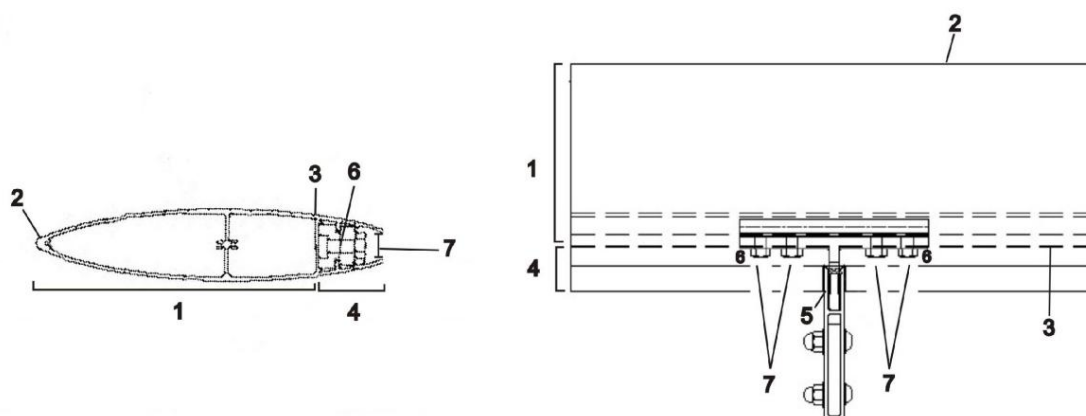
Patent	GB 2464454
Proprietor(s)	Levolux A T Limited
Exclusive Licensee	
Requester	Franks & Co Limited
Observer(s)	Albright IP
Date Opinion issued	01 April 2015

**The Request**

1. The Comptroller has been requested to issue an opinion as to whether a solar shading assembly (the Product) described and illustrated in the request would infringe GB 2464454 (the Patent). The Patent was granted on 9 July 2013 and remains in force. The request was made by Franks & Co Limited on behalf of Maple Sunscreening Limited.
2. Observations were received from Albright IP and the requester filed observations in reply.

**The Product**

3. The Product which is the subject of the request is a solar-shading louver<sup>1</sup> assembly as illustrated in the annexes accompanying the request. The drawings from Annex 1 are reproduced as figure 1 below.



**Figure 1 – Solar shading assembly of Annex 1 of the request**

<sup>1</sup> Although *louvre* is the normal UK English spelling, I have used *louver* for consistency with the Patent.

4. The louver assembly comprises a louver member (1), a bracket (5) for fixing the louver member to a supporting structure, and a cap element (4) which is fixed to the rear (3) of the louver member. The cap element is designed to cover the bracket (5) where it is attached to the rear of the louver member by fastening means (6). The louver member is also provided with apertures (7).

## Observations

5. The observations start by referring to a pending court claim for infringement which was not identified in the request and then claim that the request is not of the actual product identified in the infringement proceedings and that the request is therefore ambiguous. The observations in reply indicate that the infringement proceedings were started after the request was made and that the subject of the request differs from the product identified in those proceedings. The requester is free to direct the request to any product they wish and it does not have to be an actual product but may be a hypothetical product. I will form my Opinion based on the information provided in the request.
6. The observations go on to identify a number of apparent inconsistencies between the drawings provided in Annex 1 of the request (see figure 1 above). These inconsistencies relate largely to the accuracy and location of the cross-sectioning. In general terms I believe the skilled person would have no trouble in reconciling the lateral cross-sectional view with the plan view and would understand that certain features are omitted for clarity, e.g. that part of the cap in the cross-section view which extends beyond and behind the aperture.
7. One inconsistency identified relates essentially to the position of the bolts. In the cross-section view (left in Figure 1) they extend some distance from the rear of the louver member (3). In the plan view (right in Figure 1) they appear to be tightened right up against it. My presumption is that the rear of the louver member (3) has been misidentified in the plan view and is more likely to be at the double-dashed (=) line and the numeral 3 in this view identifies the position of the bracket. There is no apparent access to the interior of the louver member which would allow the bracket to be located forward of the rear of the louver member. This also means that the louver member (1) is narrower than indicated and the cap (4) is wider than indicated in the plan view. However, such an arrangement seems to me to correspond more closely with the relative dimensions shown in the cross-section view, bearing in mind that the cross-section view does not show the full extent of the cap. It does not help that the two views are to different scales.
8. A further inconsistency identified by the observer relates to the apparent double aperture shown in the plan view. In my view, the two lower continuous longitudinal lines on the plan view of the cap are intended to show both the extreme edge of the cap (bottom line) and also the point where it transitions from being substantially straight to curved. As the single aperture extends through both these lines a gap is shown in both of them to indicate this. Ideally this would have been indicated by a U shaped line on the drawing.
9. On the whole I am content that there are no serious inconsistencies in the figures of the annexes.

## Infringement

10. Section 60 Patents Act 1977 (the Act) governs what constitutes infringement of a patent; Section 60(1) relates to direct infringement and reads as follows:

*(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.*

## The Patent

11. The Patent is directed to a solar-shading assembly with a hidden fastening device. Figure 2 illustrates the invention. It comprises a louver member (14), a bracket (18) for attaching the louver member to a support (12) and a cap (16) for covering a fastening (20) used to fix the bracket to the louver member. The cap is designed to cover the fastening and hide it from view. For clarity, figure 2 below shows the cap installed on the louver member to only one side of the bracket.

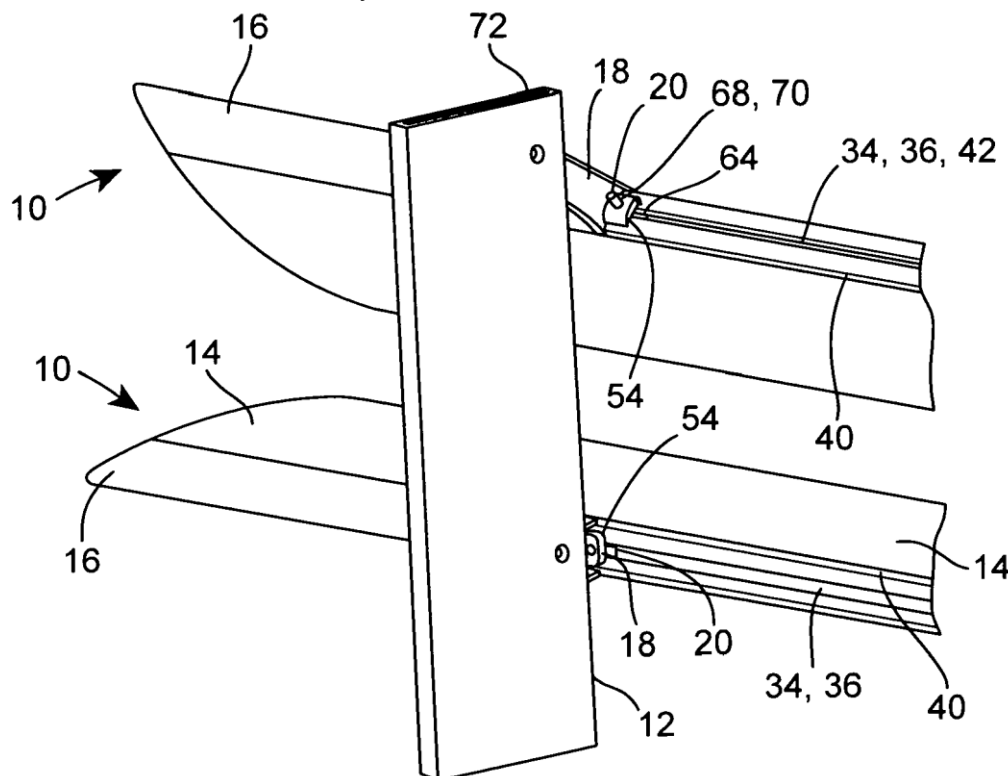


Figure 2 - Solar shading assembly of the Patent

12. The scope of the invention is defined by the claims. There is a single independent claim (claim 1) which reads as follows:

1. *A solar-shading assembly for fastening to a support mullion, the assembly comprising an elongate louver member having longitudinal front and rear edges, an elongate cap element for extending along and covering the rear edge, a bracket which is connectable to the support mullion, and a fastening device for connecting the bracket to the rear edge of the louver member, the in use fastening device being spaced from a mullion connector of the bracket in a direction parallel to the rear edge of the louver member, whereby an end of the fastening device is entirely coverable solely by the cap element so as to hide the fastening device from view.*

## Claim construction

13. The claims must be construed purposively following the well known House of Lords authority on claim construction *Kirin-Amgen v Hoechst Marion Roussel and others*<sup>2</sup>. This requires that I interpret the claims in the light of the description and drawings, to decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.
14. The person skilled in the art is considered to a designer of solar shades, in particular of solar shade louvers.
15. The pre-characterising part of the claim is considered straightforward to construe. Additionally, as I understand it, the requester admits that the Product has all the features of this part of the claim.
16. The characterising part of the claim reads as follows:

*whereby an end of the fastening device is entirely coverable solely by the cap element so as to hide the fastening device from view.*
17. The requester has put forward an interpretation of this phrase based on the meaning of parts of it. The observer in response has made brief comments on the requester's interpretation of these parts. However, I have not found this analysis particularly helpful. In particular, the requester has sought to split the characterising part of the claim up into a number of separate parts and analyse each part, and also to rely on dictionary definitions of certain of the terms. This seems to me to risk indulging in the *meticulous verbal analysis* criticised by Lord Diplock in *Catnic*<sup>3</sup>. For example, there seems little point in considering the meaning of the word *coverable* in isolation, when the purpose of coverable is expressed in the claim as being to hide the fastening device from view.
18. The observer has stated that "the terminology of the patent as granted was discussed at length during prosecution, and it is our opinion that the patent is clear in scope". In the absence of any particularly helpful discussion of how the characterising part of the claim should be construed in the request or observations I have turned to the prosecution file.
19. I am aware that use of the prosecution file is discouraged as noted by Lord Hoffmann in *Kirin-Amgen*:

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<sup>2</sup> *Kirin-Amgen v Hoechst Marion Roussel and others* [2005] RPC 9.

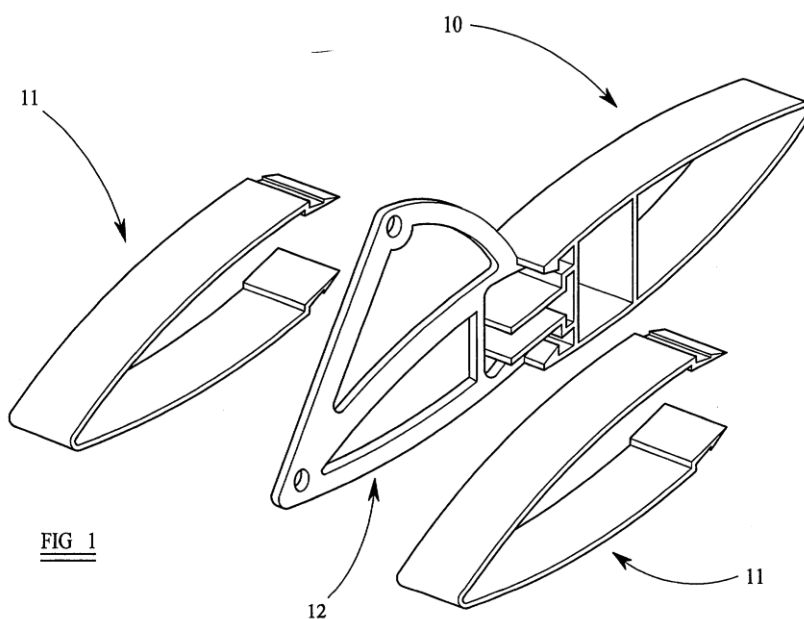
<sup>3</sup> *Catnic Components Ltd. v. Hill & Smith Ltd.* [1982] R.P.C. 183

*“The courts of the United Kingdom, the Netherlands and Germany certainly discourage, if they do not actually prohibit, use of the patent office file in aid of construction. There are good reasons: the meaning of the patent should not change according to whether or not the person skilled in the art has access to the file and in any case life is too short for the limited assistance which it can provide.”*

20. Nevertheless, I have found that identification of the reasons for the amendments made during prosecution shed light on how claim 1 should be construed.
21. In particular, the characterising part of the claim was amended to distinguish the invention from the prior art GB 2370598 which is also referred to in the request. More specifically the characterising part of the claim was amended in the following way (underlining to indicate words added):

*an end of the fastening device is entirely coverable solely by the cap element so as to hide the fastening device from view.*

22. This amendment was necessary because the prior art comprised cap elements which hid the fastening device from view in combination with the brackets which hid or at least covered the ends of the fastening devices. Figure 3 below shows the prior art arrangement which comprises a louver member (10), a bracket (12) and caps (11). The fastener for fastening the bracket to the louver member is received in the T-shaped channel and passes through an aperture (not shown) in the adjacent part of the bracket. The fastener is therefore in line with the bracket rather than being offset from it as in the Patent, and as required by claim 1 of the Patent (*the in use fastening device being spaced from a mullion connector of the bracket in a direction parallel to the rear edge of the louver member*). As a result the **ends** of the fasteners of the prior art are covered at least in part by the bracket.



**Figure 3 - Prior art louver assembly of GB2370598**

23. This nevertheless begs the question what is meant by an **end** of the fastener. No definition is provided in the specification. Whilst conceivably it could refer only to the very end face I consider that the skilled person would construe it more generally to mean the end portion of the fastener which is not otherwise hidden by the bracket. I.e.

there is one end part of the fastener which is by its very function hidden by the bracket and another end which is not hidden by the bracket but which is hidden by the cap.

24. As well as noting that the cap of the invention covers then **ends** of the fasteners, it is also apparent that the words *entirely* and *solely* as used in claim 1 are being used together to refer to the fact that it is the cap and only the cap that covers the ends of the fasteners, and these words should be construed accordingly. This is to distinguish the invention from the prior art arrangement in which the caps may be considered to only partially cover the ends of the fasteners, the remainder being covered by the bracket. In particular, I do not consider that *entirely* should be construed as requiring that the ends of the fasteners are completely enclosed. I note again that there is no definition in the description regarding how *entirely* and *solely* are to be construed.
25. Finally, the claim requires that the end of the fastening device is coverable so as to hide it from view. In construing this part of the claim I consider that the requirement that it is hidden from view does not mean that there are obscure angles from which it can be seen but rather it means it cannot be seen save for particularly close inspection. I.e. it is the distance of the view rather than the angle which is important. The specification teaches generally that the cap fully covers the fastening devices but nevertheless indicates that gaps may exist (e.g. substantially abutting – page 5, line 17). Accordingly I consider that the intention of the invention is to hide the fastening from any normal viewing location, whether that be above or below the louvers, but they are not necessarily hidden if inspected closely. I would also observe that such louvers are typically installed across the whole height and width of a window such that they are viewable from a very wide range of angles.
26. This construction also accords with the requester's interpretation put forward in paragraph 22 of the request. In particular, the problem the invention seeks to overcome as set out on page 1, line 12 of the Patent is that architects prefer to have as few of the fixings and fastenings on view as possible. Partially concealing the fastenings would not solve this problem since parts of fastener would still be visible, at least from certain angles.
27. The characterising part of claim 1 is therefore construed as follows:

*an end portion of the fastening device (which is not already hidden by the bracket) is covered by the cap element (and the cap element alone) so as to hide the fastening device when viewed from a normal viewing distance.*

28. At this point it seems convenient to deal with a question raised by the requester in the request and in the observations in reply regarding which of several interpretations of this part of the claim is correct. The interpretations put forward are:
  - i) The fastening device is fully hidden or concealed from view so that it cannot be seen at all; or
  - ii) The fastening device is partially hidden or concealed from view, for example:
    - a. From some angles of view the fastening device can be seen, whilst at other angles it cannot be seen;
    - b. The fastening device is partially hidden or concealed from view for example by an opaque component so that the fastener can itself still

be seen but with reduced clarity.

- c. A portion of the fastening device is fully hidden but a portion of the fastening device is exposed.

29. Based on my construction of the claim set out above, I do not consider that any of these are particularly accurate. Whilst interpretation (i) is closer to my construction the use of the word “fully” and the phrase “so that it cannot be seen at all” is considered to be too restrictive. In relation to interpretation (ii) I consider that the fastening device is more than partially hidden or concealed.

## Analysis

30. The significant difference between the Product and the solar shade louver assembly of the Patent is the presence of apertures (7 - Figure 1) in the cap element which coincide with the fasteners. The requester admits that these apertures are larger than the heads of the fasteners, although as pointed out by the observer that is not at all clear from the drawings in figure 1 above. The requester has also supplied photographs of the cap elements (Annexes 2 and 3) in which the holes can be seen. The photograph from Annex 2 is reproduced below.



Figure 4 - Photograph of cap elements of the Product from Annex 2 of the request.

31. Based on my construction of claim 1 I consider that the cap elements and the cap elements alone cover the fasteners. That seems self-evident from the locations of the apertures which coincides with the fasteners.
32. I do not consider that the presence of the holes affects the cap elements ability to act as a cover and I would agree with the observer that, at least in this instance, “irrespective of the apertures, a cover is still a cover”.

33. The final point I need to decide is whether or not the presence of the holes hides the fasteners from view when viewed from a normal viewing distance, or conversely, whether or not the fasteners can be seen when viewed normally.
34. In this respect there seems to be one vital piece of information missing from that provided, and that is the overall size of the louvers. In general it would seem that, provided the relative dimensions all remained equal, the larger the louver was the more likely it would be that the fasteners could be viewed through the apertures from a normal viewing distance, at least so long as the distance from the louver to a window outside which it was installed remained roughly the same.
35. No photograph has been provided showing the installed arrangement which might have helped me decide whether or not the fasteners are hidden.
36. In the absence of this information I am reluctant to form a definitive opinion. However, based on the apparent closeness between the edges of the apertures and the ends of the fasteners as illustrated in Annex 1 (figure 1 above), the fact that the apertures are larger than the heads of the fasteners and the size of the apertures relative to the rest of the cap as shown in Annex 2 (figure 4), it seems likely that the ends of the bolts would be viewable from a normal viewing distance. If true, the Product would not fall within the scope of claim 1. If the Product does not fall within the scope of claim 1 then there can be no infringing actions in relation to it.
37. Alternatively, if the Product were modified either so that the fasteners were recessed deep inside the cap element or so that the apertures were smaller than the heads of the fasteners, then it would seem likely that the ends of the fasteners would be hidden from view. Such an arrangement might therefore fall within the scope of claim 1 in which case the Patent would be infringed. Such an arrangement might also appear to fall within the scope of claims 2 to 5, 11, 12, 16, 18, 19, 21 and 22. (There is insufficient detail for me to make any assessment of any of the other claims).

## **Opinion**

38. I am somewhat reluctant to form a definitive Opinion based on the lack of information relating in particular to the actual size of the Product, and/or the lack of a photograph showing the installed arrangement. Nevertheless, based on a rudimentary judgement and taking particular account of the fact that the apertures are larger than the heads of the fasteners and that the heads of the fasteners are close to the edges of the apertures, I consider that the ends of the fastening devices would not be hidden from view. The Product does not therefore fall within the scope of claim 1 and any relevant actions in relation to it do not infringe GB 2464454.



## **Application for review**

39. 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.

Matthew Jefferson  
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.*