

OPINION UNDER SECTION 74A

Patent	GB 2467005 B
Proprietor(s)	Siltbuster Limited
Exclusive Licensee	
Requester	Kelly Anne Gillan Bryant
Observer(s)	Abel & Imray
Date Opinion issued	09 July 2019

The request

1. The comptroller has received a request from Kelly Anne Gillan Bryant (“the requester”) to issue an opinion as to whether the Hydrodem pH Control System (“the HpC System”) infringes GB 2467005 B (The Patent). The requester has supplied a number of documents, including websites and photographs, detailing the Hpc System. They have also supplied a Silbuster brochure, a letter from the Patent holder alleging infringement of the Patent, and also provided copies of examination reports and responses from the applicant during prosecution of the application.
2. Observations were received from Abel and Imray (“the observer”) on behalf of the patent proprietor, Siltbuster Limited, and observations in reply were subsequently received from the requester.

The Patent

3. The Patent is concerned with the treatment of washout from concreting operations. Washout comprises waste concrete solids and a volume of high pH alkaline water, referred to as washwater. Disposing of washwater can cause problems – as highly alkaline liquid cannot be simply tipped away and there are inherent difficulties in transporting liquid, such as spillage. The Patent therefore provides a unit for receiving, separating and treating washwater, and also a method for neutralising washout using a unit. The unit 10 receives the washout in region 13, contains the washwater in region 14 and accommodates a neutralising agent in region 12. The unit 10 is shown below in isometric view (fig 1) and cutaway isometric view (fig 2).

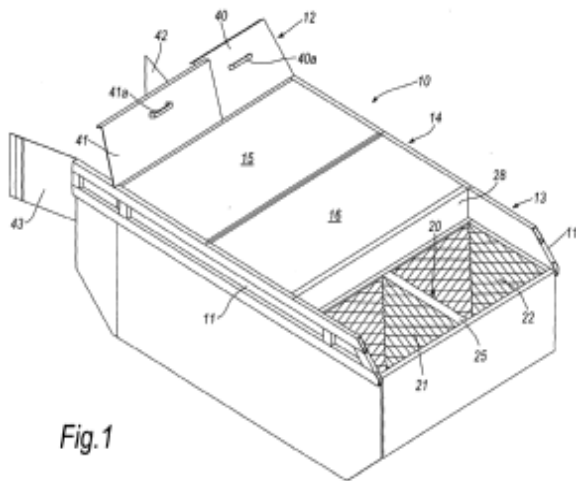


Fig. 1

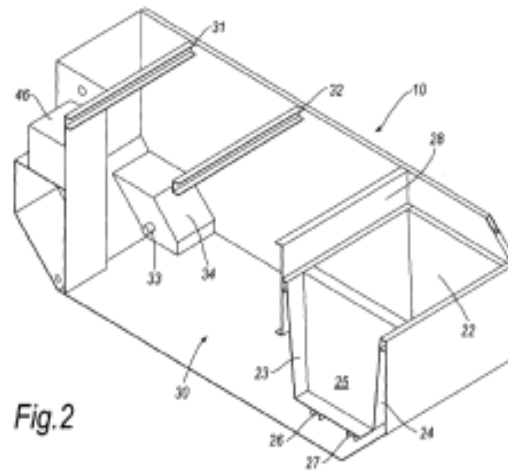


Fig. 2

4. The Patent has 18 claims, including two independent claims – a method claim 1 and claim 5 to a unit. Claim 1 of the Patent reads:

A method of neutralising washout from concreting operations, the method comprising the steps of:

providing a portable unit to contain the washout,

providing the unit with a store of a neutralising agent accommodated within the unit,

receiving the washout in a washout receiving region of the unit, and transferring the liquid (washwater) component from the washout receiving region of the unit to a washwater containment region of the unit whilst retaining solids in the washout receiving region, and

supplying the neutralising agent to the washout in the washwater containment region of the unit, after the washout has left the washout receiving region where solids are retained.

5. Claim 5 of the Patent reads:

A unit for treating washout, the unit comprising:

a washout receiving region for receiving the washout, and separating and retaining concrete solids from the washout,

a washwater containment region for receiving washout from the washout receiving region and for the storage and treatment of washwater, and a pH adjuster for neutralising the washwater,

a neutralising agent source accommodation region for accommodating a source of neutralising agent, and

a pH adjuster for neutralising the washwater, wherein the pH adjuster is arranged to be connectable to the source of a neutralising agent, and wherein the pH adjuster is arranged to supply the neutralising agent to the washwater in the washwater containment region after the washout has left the washout

receiving region where solids are retained, and wherein the unit is portable.

Claim Construction

6. Before considering the issues in the request I need to construe the claims 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.
7. The requester has referred to the prosecution file of the Patent in order to construe parts of claims 1&5 – in particular reference is made to examination reports dated 20 July 2013, 18 January 2013 and letters from the Patent proprietor dated 20 November 2012 and 20 May 2013. The requester's justification for use of the prosecution file stems from *Actavis v Eli Lilly*³, where the court held at paragraph 89 that reference to the prosecution file would only be appropriate where:
 - (i) The point at issue is truly unclear if one confines oneself to the specification and the claims of the patent, or
 - (ii) It would be contrary to the public interest for the contents of the file to be ignored
8. The requester submits that it is reasonable to review the prosecution file to unambiguously determine what constitutes/defines areas within a unit as the (i) washout receiving region and (ii) containment region. However, I do not consider that any parts of claim 1 or claim 5 are truly unclear based on the specification of the Patent, nor do I consider it contrary to the public interest for the contents of the file to be ignored, and thus reference to the prosecution file is not appropriate.
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 manufacturer or designer of systems for the treatment of solid/liquid waste materials.
10. There are a number of points of claim construction which I believe need to be considered in claims 1&5. Both the requester and observer have discussed the feature of a 'unit' which, in claim 5, comprises a washout receiving region, a washwater containment region and a neutralising agent source accommodation region, wherein the unit is portable. Equivalent features are provided in the method of claim 1. The observer states that the Patent does not require the unit to be of monolithic construction or that various elements of the unit must be permanently joined or integrally formed, whereas the requester contends that the term portable 'unit' does not cover separate or separable 'modules'.

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

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

11. I believe that the person skilled in the art, based on the description and the figures, would construe a portable unit to be a singular portable apparatus comprising three regions. In particular this is shown in all the figures. I also note page 12 lines 2-3 which state that the unit 10 is a conventional 'skip' shape. Furthermore, page 12 lines 6-9 state that the unit 10 can be conceptually divided into three regions.

12. Claim 5 also states:

“a washout receiving region for receiving the washout, and separating and retaining concrete solids from the washout” and

“a washwater containment region for receiving washout from the washout receiving region and for the storage and treatment of washwater”

13. The requester does not consider an item such as a sack to define a receiving region – rather it is an item within a region. The observer states that in normal use the term region refers to an area and/or space. Thus, according to the observer, claim 5 requires a first area/space (a washing receiving region) in which the function of receiving the washout and separating and retaining concrete solids from the washout is carried out and a second area/space (a washwater containment region) in which neutralising agent is supplied to the washwater after the washout has left the washout receiving region.

14. I note that the description discusses that the washout receiving region may include a sack (page 6 lines 4-10; page 16 lines 6-10) and that washout is received in a sack(s) in a basket(s) which it subsequently drains through (page 16 lines 16-19). Furthermore, baskets may be contained within the washout receiving region by a panel (page 13 lines 6-9). Thus I consider that the person skilled in the art would construe “the receiving region” as a region or area defined by any suitable means to receive washout and transfer washwater out of the region whilst retaining, at least partially, solids in the region. A similar claim construction applies to claim 1.

15. With regard to the washwater containment region, the description states that after draining “the washwater is collected in liquid chamber 30” (e.g. page 16 lines 19-20). The description also states (page 14 lines 6-9) “The drainage hole 33 is closed by a valve (not shown) to collect liquid in the chamber 30. When liquid is to be drained from the chamber 30, the valve is opened”. Thus, the person skilled in the art would construe the washwater containment region as a region or area defined by any suitable means which can, at least temporarily, store and treat the washwater transferred from the washout receiving region. A similar claim construction applies to claim 1.

16. Claims 1&5 also state

“supplying the neutralising agent to the washout in the washwater containment region of the unit, after the washout has left the washout receiving region where solids are retained”

17. Looking at the description and figures to try and construe this feature it is discussed on page 13 lines 16-18 that “the central region 14 of the unit 10 provides a liquid chamber 30 where liquid drained from the baskets 21, 22 is collected” and (on page

15 lines 18-23) that a feedback system "...controls supply of the carbon dioxide to the liquid chamber so that the liquid in the liquid chamber is neutralised. The carbon dioxide is fed into the liquid chamber 30 by tubes (not shown) that are connected to the liquid chamber 30 via the supply controller 47". Thus I consider that the person skilled in the art would construe this feature to mean that the neutralising agent is only supplied to the washout in the containment region after it has left that receiving region.

18. I would also note that page 13 lines 9-14 of the description discloses that a panel 28 containing the baskets in washout receiving region "only extends about halfway to three quarters the way down the height of the unit". This is also shown in figure 2 (panel 28). The person skilled in the art would thus construe that whilst neutralising agent is only supplied to the washout in the containment region after it has left that receiving region, the supplied washout could subsequently mix/recirculate with the washout in the washout receiving region.

Infringement

19. 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.

20. The request has only discussed whether claims 1&5 are infringed by the HpC System, and my opinion shall also be limited to consideration of claims 1&5.
21. In the Supreme Court in *Actavis v Eli Lilly*⁴ Lord Neuberger stated that the problem of

⁴ Actavis UK Limited and others v Eli Lilly and Company [2017] UKSC 48

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:

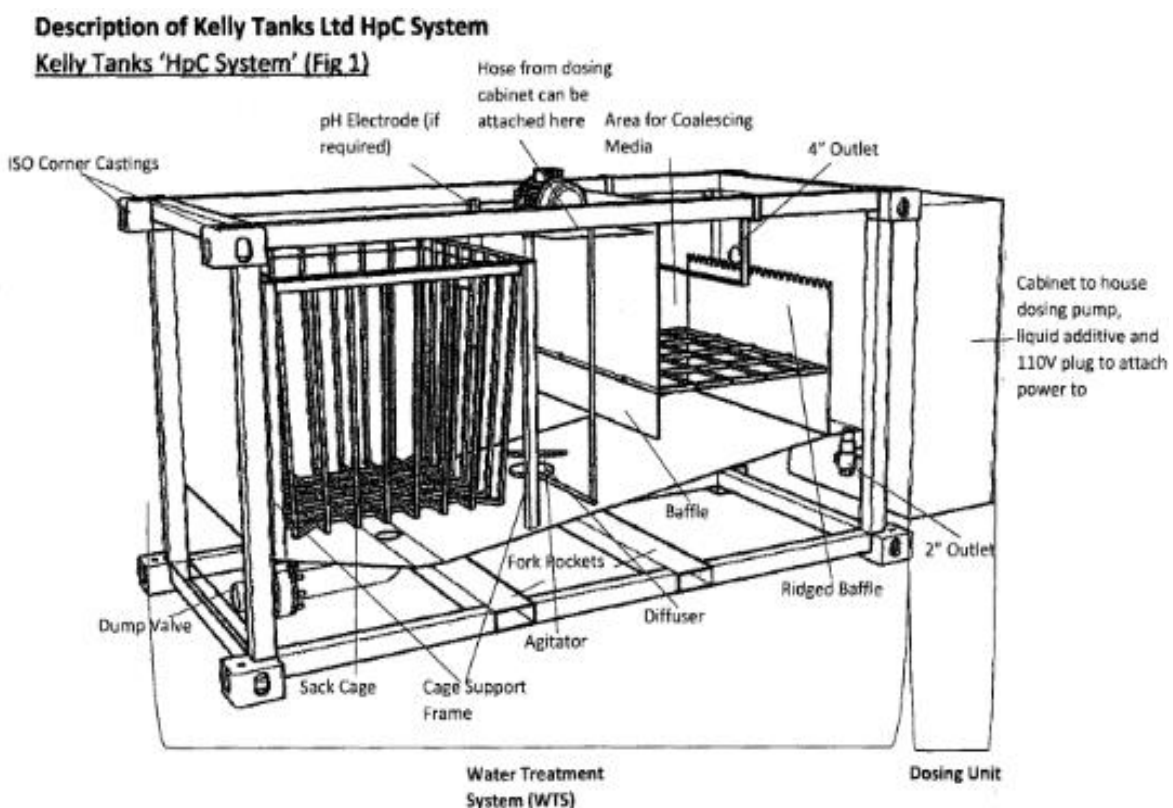
(i) does the variant infringe any of the claims as a matter of normal interpretation; and, if not,

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

22. If the answer to either issue is “yes”, there is infringement; otherwise there is not.

The HpC System

23. The HpC System comprises a Water Treatment System (WTS) and dosing unit, as shown in Figure 1 below. In use the WTS can be fitted with a sack within sack cage, and waste is deposited from above the sack cage such that the sack/cage captures solids and at least some effluent permeates through the sack. A pH electrode can be located next to the cage to initialise pH dosing from dosing unit – the dosing unit being in the form of a cabinet housing a dosing pump, control unit, liquid additive and power inlet. Liquid additive, stored within the dosing unit can be fed via hose to the WTS. Waste can then pass through coalescing media (i.e. a series of corrugated sheets fixed together) to aid in settlement of suspended solids, and waste continues out through outlet 4”.



Does the HpC System infringe as a matter of normal interpretation?

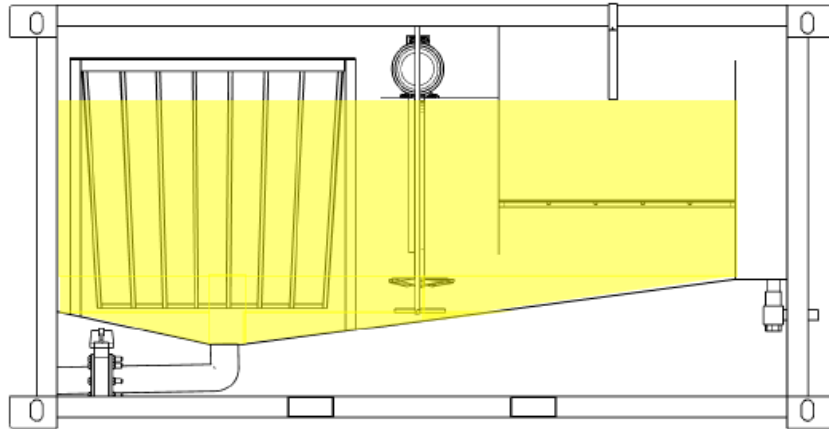
24. The requester has submitted that the HpC System is not a unit as per claims 1&5 of

the Patent – rather it is combination a WTS and a dosing unit. The requester considers the HpC System to be a modular system – such that the HpC System/WTS can be used to dose other chemicals or carry out other functions.

25. The observer considers the HpC System to be a unit. They note that the WTS and dosing unit are both functionally connected, by a hose and wires, and physically connected using resting plates (see photograph below). They also consider that disconnecting the dosing unit and the WTS is not a trivial matter (e.g. requiring heaving lifting equipment), and that the HpC cannot function without the dosing unit – thus making the division of the WTS and dosing unit an artificial one.



26. It is my opinion that the HpC System is not a unit of claims 1 or 5 as construed by the person skilled in the art. It is a system comprising two modules, and is thus not a singular portable apparatus comprising three regions.
27. The requester also submits that the HpC System does not have a receiving region and containment region as required by claims 1&5 of the Patent. Instead treatment is carried out in the same region. In particular washout is received, separated, retained and neutralised all within the same region - see area highlighted in yellow in figure below. The addition or removal of a sack in the HpC System (the requester notes that the HpC System can be used without a sack) does not change the fact that this area is the receiving region. The requester also states that washout, when deposited from above the sack, can go over the sides of the sack and/or spill over the top – and thus does not rely on the sack, any mesh or receiving region. Furthermore, the requester considers that the HpC System continuously discharges, and thus does not have a containment region.



28. The observer states that the HpC System clearly has a first region (or area/space) where washout can be received and in which the sack functions to retain solids from the washout. The sack and cage thus form a washout receiving region for receiving washout, separating and retaining concrete solids from the washout as required by claims 1&5. The observer also states that the HpC System has a second region (or area/space) – the area outside the sack cage – comprising a diffuser arranged to provide neutralising agent to fluid located therein. Furthermore, liquid in this region can be retained until the dump valve is opened. The region outside the sack cage is thus for receiving washout from the washout receiving region and for the storage and treatment of washwater as required by claims 1&5.
29. It is my opinion that the HpC System has a washout receiving region of claims 1&5 as construed by the person skilled in the art – defined by the sack and/or cage – which in use receives the washout, and transfers washwater out of the region whilst retaining, at least partially, solids in the region. Furthermore, I am of the opinion that the region outside the cage and/or sack, at least temporarily, stores and treats the washwater transferred from the washout receiving region. Thus, the HpC System has the washwater containment region of claims 1&5 as construed by the person skilled in the art.
30. The requester suggests that, as the HpC System only has one region, the pH adjuster is not arranged to supply the neutralising agent to the washout in the washwater containment region after the washout has left the washout receiving region. The observer states that claims 1&5 require only that washout can be received from the washout receiving region and that neutralising agent can be supplied to the washout after it has left the washout receiving region. Thus, there is nothing in claims 1&5 that excludes cases in which the washout recirculates to the washout receiving region after it has been supplied with neutralising agent.
31. I am of the opinion that the diffuser of the HpC System, in use, supplies neutralising agent to the washout after it has left a washout receiving region. Whilst circulating/recirculating/mixing of the washout to the receiving region may occur (via the sack and/or cage), it would appear that the neutralising agent is only supplied after it has, at least initially, left the washout receiving region.
32. In conclusion, I am of the opinion that the HpC System does not infringe claims 1 or 5 of the Patent as a matter of normal interpretation as the HpC System is not a unit.

Does the HpC System infringe because it varies from the invention in a way(s) which is immaterial?

33. The second issue to be addressed is asking whether the variant provided by the HpC System varies in a way(s) which is immaterial? If the answer to this is yes then the HpC System will infringe.
34. The court in *Actavis UK Limited* provided a reformulation of the three questions in *Improver*⁵ 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?
 - (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?
35. 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”.
36. I think the issue of whether there is immaterial difference can be answered by looking at the first of these questions. It is my opinion that the inventive concept is a single complete piece of apparatus for the receiving, separating and treatment of washout, which can be transported between sites. This is not achieved by the HpC System as it is a modular system comprising a water treatment system and dosing cabinet, which are distinct items and connected together in order to receive, separate and treat washout.
37. Therefore it is my opinion that the HpC System does not vary from the Patent in a way(s) that is immaterial.

Opinion

38. It is my opinion that the HpC System as specified in the request does not fall within the scope of claims 1 or 5 as a matter of normal interpretation, nor does the HpC system vary from the Patent in a way that is immaterial. Accordingly it is my opinion that the HpC System does not infringe GB2481806 B.

Application for review

39. Under section 74B and rule 98, the proprietor may, within three months of the date of

⁵ *Improver* [1990] FSR 181

issue of this opinion, apply to the comptroller for a review of the opinion.

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.