

OPINION UNDER SECTION 74A

Patent	GB2419827
Proprietor(s)	Kohler Mira Limited
Exclusive Licensee	
Requester	Beck Greener LLP
Observer(s)	Barker Brettell, on behalf of Kohler Mira Limited
Date Opinion issued	22 April 2020

The request

1. The comptroller has been requested to issue an opinion as to whether GB2419287 is novel and inventive. Beck Greener LLP provide 9 documents in order to make their case. GB2419287, the Patent, was filed on 22 October 2004, granted on 24 November 2009 and is currently in force.

2. These 9 documents are identified in the request as:

D1: Extract from Bristan catalogue, which is undated, though the requester suggests that they “understand it describes a product that was bring sold to customers in the summer of 2004.

D2: Extract from Bristan order sheet, covering that summer period, which the requester suggests includes orders of the product shown in D1.

D3: Image showing dated email order of the retaining bracket “RET BEK C”, dated 8 July 2002.

D4: List of component parts of shower set “ML PK” CAS MH” including hose and retaining bracket “RET BKT C”, which the requester asserts was being sold at that point.

D5: List of shipping dates for the shower set including hose and bracket going back to shipping on 6 September 2004.

D6: Order sheet for the shower set dating from 22 July 2004

D7: Image of standard shower hose with end fittings, which is undated

D8: Table showing British standard measurements for pipe threads, again undated

D9: Document showing standard dimensions for shower hose end fittings, labelled BS EN 1113:2008

3. The observer questions whether the evidence provided in D2-D6 is sufficient to prove “to the hilt” that the relevant retainer and hose of D1 was available to the public before the filing date of the application. I am not convinced that this is the correct approach under UK law however, as set out in 2.29.1 of MoPP, where the relevant piece reads:

In cases of alleged prior use, the required standard of proof is the balance of probabilities. Within this standard, the Patents County Court in Kavanagh Balloons Pty Ltd v Cameron Balloons Ltd [2004] RPC 5 held that a flexible degree of probability should be applied to evidence relating to prior use. The cogency of the evidence had to match the occasion and be proportionate to the subject matter. Because of the nature of the monopoly itself and question of public interest, no stricter standard should be applied.

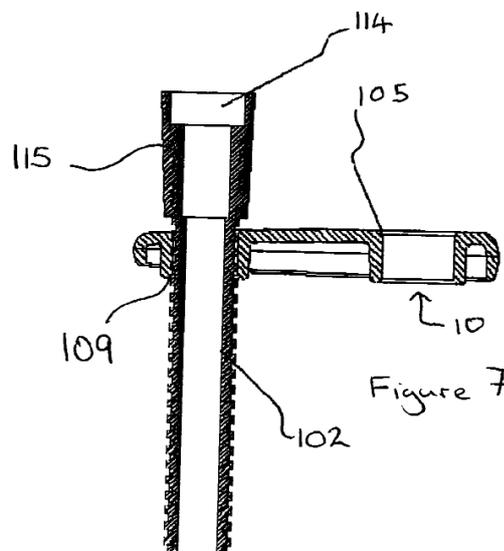
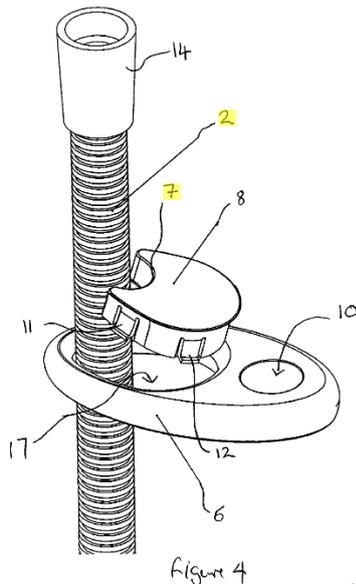
4. Whilst Barker Brettel in their observations assert that the publication dates are not proven, they do not provide evidence to contradict the assertions made in the request. Indeed, in those observations, Barker Brettel say

“The requestor has shown that there were orders of a part called a RET BKT C but not what this is. The requestor has shown that shower sets have been sold but have not substantiated what these parts were. It may be that this information is in the requestor’s own records and should therefore be fully substantiated.”

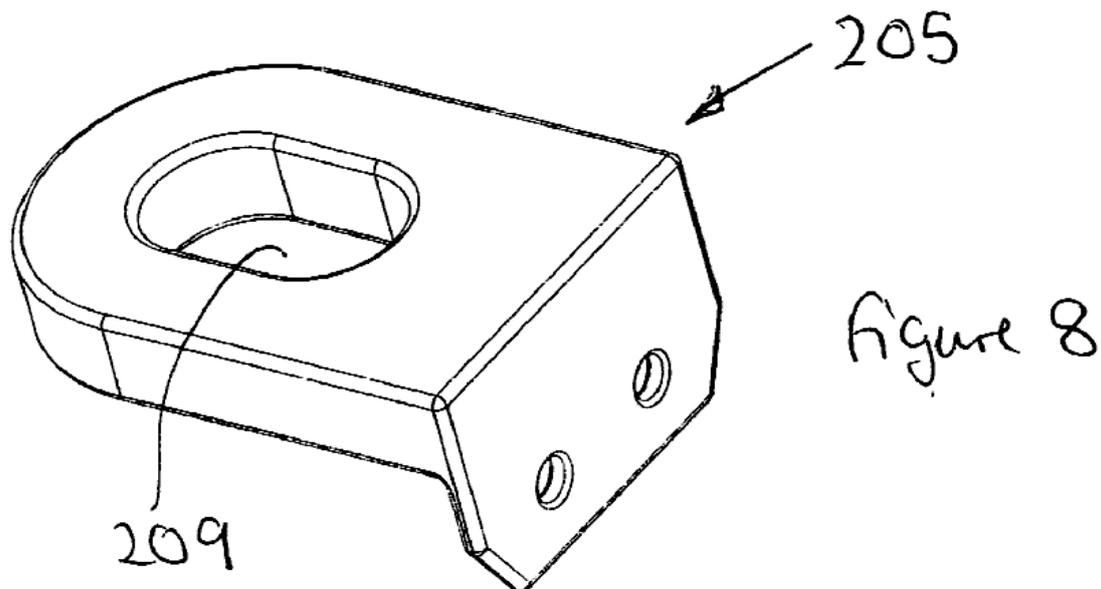
5. Ultimately, this is not a question that I need in an opinion to dwell too long upon. An opinion is not a fully litigated proceeding, and I can therefore proceed, in the expectation that the requester could be asked to provide witness statements or other evidence to provide further evidence in litigated proceedings. As Barker Brettel acknowledge, it may well be that the requester is able to substantiate through other evidence, these claims. Nonetheless, I can still sensibly provide an opinion on whether D1 would provide a basis for suggesting that the Patent is invalid.
6. The remaining documents are undated. Although it appears to me that the BS EN document, is a British standard document, and my understanding is that the 2008 part of the serial number means that this is a document from 2008, after the filing date of the Patent. Again, it may be that the requester can provide evidence to prove the dates of these documents. However, I am not in the same position as I am with D1, in terms of being able to predict whether the requester can show that these documents are actually prior art, because there is no documentation to explain when these might have been available provided in the request.
7. Before I conclude, however, I note that the requester, Beck Greener, base their validity attack to novelty solely on D1. Indeed, even when they turn to inventive step, they do not make direct reference to D7-D9. It therefore again seems to me that I can move forward to the arguments raised in the request without being unduly detained on this question.

The Patent

8. The Patent relates to the fittings for a shower, or other ablutionary installation, with a spray head removably mounted in a holder. The Patent has two independent claims, an apparatus claim 1 and an equivalent method claim, 15.
9. The Patent's stated aim is to address the problem of contamination of the water supply, if the handset is lowered into a position in which it comes into contact with wastewater in the bath or shower tray. This might occur if in prior art arrangements, if the hose is removed from its fittings by a user. The Patent suggests that users may remove screw fittings on the end of the hose to disconnect the hose, and that there are applications where this is undesirable.
10. The Patent describes three embodiments for doing this. First, using a retainer piece (8) which can be inserted only after threading the hose through the retainer hole and is then non-removeable (an example is shown in figure 4). Secondly, by manufacturing the retainer and hose as one piece where the hose with ends (115) that are too large for the hole (shown in figure 7.)



11. Thirdly, a similar holder may be affixed to the wall, be that one where the retainer has a non-removable insert, or where it is manufactured as one piece. This is shown in figure 8:



Claim construction

12. Before considering the documents put forward in the request I will need to construe the claims of the patent 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.
13. 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 *Generics UK Ltd (t/a Mylan) v Yeda Research and Dev. Co. Ltd & Anor* [2017] EWHC 2629 (Pat) and the Court of Appeal in *Actavis Group & Ors v ICOS Corp & Eli Lilly & Co.* [2017] EWCA Civ 1671.
14. In their observations, Barker Brettell describe the skilled person as a person involved in developing and designing showers and ablutionary installations. This seems entirely reasonable to me.
15. Claim 1 reads: *An ablutionary installation comprising a spray head removably mounted in a holder, a hose provided with end fittings connected to the spray head and to a water supply outlet for feeding water to the spray head, and a retainer, the hose being arranged to pass through a hole in the retainer wherein the end fittings are larger than the hole to prevent separation of the hose from the retainer by disconnecting the hose from the spray head and/or the water supply outlet.*

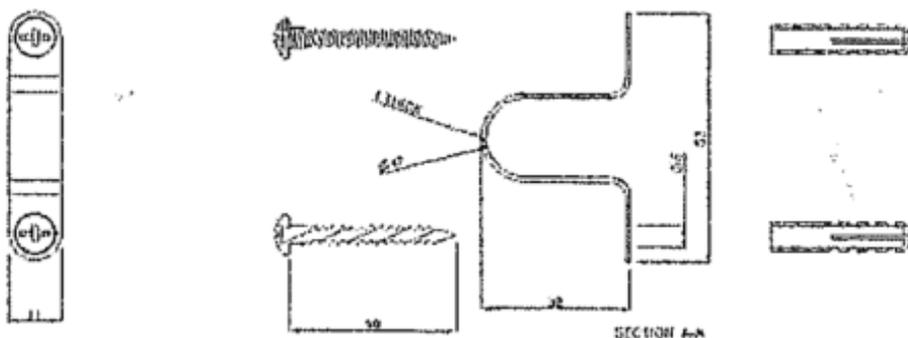
16. Claim 15 reads: *A method of assembling a shower fitting comprising assembling a hose with a retainer between the ends of the hose so that the hose passes through a hole in the retainer, connecting an end fitting at one end of the hose to a movable spray head and connecting an end fitting at the other end of the hose to a water supply, mounting the retainer at a position above a bath, basin, shower tray or the like such that the spray head cannot be placed in contact with water in the bath, basin, shower tray or the like, wherein the end fittings are larger than the hole such that separation of the hose from the retainer is inhibited if the hose is disconnected from the spray head and/or the water supply.*
17. Ultimately, there is little in the claim which results in a debate between the parties. However, there is a question of what the words “*a hole in the retainer*” means. In the request, Beck Greener point to the insert embodiment, to suggest that the hole can be formed by two parts, the insert 8, and the retaining member 6 (shown above in figure 4). This they go on to suggest that the “retainer” itself therefore may not need necessarily to include a hole of the correct size, but can be combined with another structure in order to form a smaller hole, and the two can be separately supplied. This might be true, and I think that Beck Greener describe this in order to suggest that some sectors of the hole might be defined by a second object.
18. In contrast, Barker Brettel suggest that the normal understanding of a hole is that it relates to an opening that goes completely through an object. They suggest that in the Patent the retainer and the hole in the retainer are self-contained. They assert that nowhere in the Patent is it suggested that the hole might be formed in combination with another structure, by which I think that they mean where the retainer does not define the complete hole. In this approach the insert only reduces the size of the hole; the hole being defined by the retaining member 6.
19. So what guidance does the patent provide, it is certainly true that the figures only show arrangements where the hole is surrounded entirely by the retainer. On page 4, line 10, it is suggested that the retainer can be fixed directly to the wall, which might be compatible with either interpretation, but figure 8 shows a wall fixing where the retainer completely surrounds a hole. On page 6, lines 19-24, the retainer is described as having a circular hole, although this might also be oval or another shape, provided that the coupling members will not pass through the hole. In the next paragraph, the idea of an insert is introduced as providing a semi-circular cut out section to help to define the hole. Although that paragraph goes on to suggest that the insert is then permanently secured.
20. The following paragraph on page 7, however, suggests that the hose and retainer may be supplied separately for assembly by the end user during installation, or they may be provided pre-assembled. Lines 16-19 describe that user assembly with the insert being added to reduce the size of the hole. Finally, I note what is said on page 9 for a wall mounted embodiment, that the retainer is formed in one piece with a hole, and that in one modification an insert may be used to reduce the size of the opening.
21. So what do I take from this, I think it is clear that the patent does not describe an embodiment where the hole is only defined in part by the retainer, and in part by the wall. That said an insert may be used to reduce the size of the hole in a larger hole.

It would certainly be possible to draft a claim that covered both an arrangement where the retainer completely surrounds the hole, and one where the hole is defined by the retainer and a wall, but does this claim do that?

22. Barker Brettell contend that the literal meaning of the word “in” means that the hole must be defined as “an opening that goes completely through an object.” However, I think it is clear following *Catnic Components Ltd and another v Hill and Smith Ltd* [1982] RPC 183 that the literal meaning is not the end of the question. In *Catnic* a lintel which was 6 to 8 degrees off the vertical was found to fulfil substantially the same purpose in providing vertical support. This, in legal terms is taken one step further in *Minnesota Mining and Manufacturing Co. and anr. v Plastus Kreativ AB and anr.* (BL C/64/95; upheld on appeal [1997] RPC 737). In this case, the word opaque could be interpreted as not totally impervious to light, but sufficiently so to achieve in practice the inventor's stated purposes; a frosted or tinted alternative did not do that.
23. I must therefore I think take a broader construction, that the retainer must fulfil the objective of preventing the hose from being removed, by defining a sufficient part of the hole that that objective must be met. I do so, also on the basis that there is nothing in the description which precludes such an interpretation, even if the embodiments shown here are complete, much in the way that in *Catnic*, the lintels shown were vertical ones only. I say that with some caution, because it is clearly also the case that the “near vertical” lintels involved in that case achieved that same objective – in a way in which a “near horizontal” lintel would not achieve. I think there must also be some caution in saying that any “opening” in the definition of the hole by the retainer must also be limited.

The Prior Art

24. D1 shows a U-shaped bracket which can be used for standard diameter shower hoses, and suggests that this prevents shower hoses from, for example, reaching shower trays and thereby prevent backflow contamination risk. This is perhaps quickly understood from the following diagram drawn from that document:



25. There is however, little further detail in this document about exactly how this is achieved. In their request, Beck Greener explain that in practice the bracket will be mounted on a wall, so that in use, a hole will be formed by the bracket and the wall through which the shower hose is passed. Beck Greener suggest that the function of the hole in the retainer to prevent the end fittings of a hose from passing through is

“clearly achieved” by the bracket shown and the standard dimensions of a hose.

26. I should of course, also note that the provided document does confirm that the intention is to achieve the same objective as that in the Patent, namely to prevent “shower hoses reaching washbasins, bidets, WCs, baths or shower trays.”
27. I have a couple of difficulties here, firstly the quality of the copy with which I am able to access does not make it clear to me, what the dimensions of the bracket actually are. In their request Beck Greener suggest that the diameter of the bracket is 17mm, and highlight part of the figure on which the number 17 appears. It may be that the bracket depth is 10mm, from what I can make out. This might be consistent with the scale of the picture and the figure, where the length of the screw is more clearly shown as 10mm. Further, given that the figure is accompanied by a photograph, it seems to me that the width of the gap is somewhat less than that, but I must also have some degree of caution about that assumption. Ultimately, again this would appear to be something that in fully litigated proceedings could be proved more directly, for example through witness statements.
28. The second difficulty is around the diameter of the end fittings. Beck Greener include D7-D9 in the request, I think to support their contention that the standard thread sizes for a $\frac{1}{2}$ inch or $\frac{3}{4}$ inch pipe would mean that the inside diameter of the end fittings must be 21mm or more. This in turn means that the outside must be greater than that too, and Beck Greener in their request use D8 to suggest that this means that the largest diameter would be 23mm or 26mm. Ultimately, however, I think that these standard thread sizes are common general knowledge, and Barker Brettell do not in their response challenge this.
29. All this means, that I think on balance that I can assume that the dimensions are such that the ends will not pass through the bracket, when the hose is passed through the gap and the bracket fitted to the wall.
30. Barker Brettell note that the bracket might not actually be used, which of course would not achieve the objective in the Patent. However, I must consider what happens if it is used (it might equally be possible not to use the retainer invention of the Patent!) Barker Brettell, also assert that the open U shape means that there is no hole in the bracket. Beck Greener in their observation in reply dispute this. They describe the hole as being the gap between the U-shape clip means that the opening is such that the hose can pass all the way through the clip.
31. This brings me back to the question of how open the retainer can be before it no longer defines a hole. In the Catnic case, the effect on vertical support was described as only being 1 or 2%, by the lintel’s being slightly inclined to the vertical. In Minesota Mining, the frosted/tinted alternative could not be viewed as being opaque. Here, this open U shape is some considerable way from defining the complete hole, and the Patent does not suggest that an open arrangement of any sort is actually envisaged. I therefore ultimately believe that an open U shape is too far departed from the purposive interpretation of “*a hole in the retainer.*” I do not therefore believe that D1 falls within its scope.

Inventive Step

32. Beck Greener in their request, suggest that it would be obvious to the skilled person, to replace the wall mounted bracket shown in D1 with an alternative where the bracket includes a round hole. This Beck Greener suggest is simply an alternative design option, in their observations in reply Beck Greener suggest that this would be a routine workshop modification.
33. Barker Brettell counter this by suggesting that the prior art does not address the problem of preventing the hose and retainer being intentionally moved. To some extent for the pre-assembled arrangement this is true. However, I must also consider the sort of embodiment envisaged in figure 8, which is ultimately a wall mounted ring, that will only mounted in situ.
34. Beck Greener have not set out evidence of the prevalence of wall mounted rings, generally, or in the context of shower hoses, at the date of filing of the Patent. Beck Greener do however suggest in their observations in reply that they believe that the skilled man might have a high and very reasonable expectation of success if they replaced a U-shaped clip with a retainer with a hole. Nonetheless, I must be cautious about reaching some opinion about how a skilled man in 2004, at the date of filing, might of approached prior art with which I have not been presented. An opinion is ultimately based on the evidence provided in a request, and Beck Greener have not in my view set out a full case on inventive step in this respect.
35. Beck Greener also make an argument that claim 1 is obvious in respect of the common general knowledge. This they argue is based on the idea that a hose, spray head and end fittings are well known. They go on to suggest that the only other features of claim 1 are a well-known retainer including a hole and the requirement that the end fittings are not to be capable of passing through the hole. It seems to me that it relies on the idea that the right set of components would happen to be chosen, and it happened that this met the requirements of the claim, in terms of meeting an objective of preventing contamination. In law, of course an inventive step might flow from recognition of the problem. Indeed, it there observations in reply, Beck Greener accept that the skilled man is not expected to try all combinations unless they have a specific problem in mind. It therefore seems to me that this argument might at best not be fully made out, but that it is perhaps based on hindsight.
36. That means I am left in a position where there is a question over the extent to which the requester, Beck Greener LLP have substantiated the date of D1. I also have the question of the extent to which they have provided evidence and argument to support the inventive step challenge that they make to the Patent. Principally for this second reason, I think that means that I cannot based on the evidence presented in the request come to the view that the independent claims are obvious. Having come to that conclusion, there is no need for me to move onto the dependent claims.

Opinion

37. It is therefore my view that the Patent is novel and inventive, in relation to the documents, arguments and evidence raised in this request.

Application for review

38. 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.

Robert Shorthouse
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.