

OPINION UNDER SECTION 74A

Patent	GB 2510881 B
Proprietor(s)	Ischbeck Titan Ltd
Exclusive Licensee	
Requester	RMD Kwikform
Observer(s)	Saunders & Dolleymore LLP
Date Opinion issued	13 August 2020

The request

1. The comptroller has received a request from RMD Kwikform (“the requester”) to issue an opinion as to whether Patent GB 2562978 B (“the Patent”) is valid. In particular, the requester asserts that the Patent is not novel or not inventive in light of EP 2503074, WO 2014/000034 and three images showing features of wardrobes and cupboards. Reference is also made to the prosecution of EP 14705416.7 (published as EP 2956600 A0) – which is a European patent application filed by Ischbeck Titan Ltd (“the Proprietor” of the present Patent).
2. In their written statement the requester has also requested an opinion as to whether the Ascent 200 Safety Screen (“the Ascent 200”) would, if manufactured, sold or used within the UK, infringe the Patent. The requester has supplied twenty (1-10&21,22,27-34) of the “Technical Data Sheets” of the Ascent 200, and also a image referred to as “claim comparison.pdf” which was supplied to them by the Proprietor’s representatives and purports to identify the features of the Ascent 200 system which infringe the Patent. Whilst the Form 17 did not indicate this request for an opinion on infringement, it is clear from the requester’s written statement that such an opinion is desired – and therefore I will consider the issue of infringement in this opinion.
3. Observations were received from Saunders & Dolleymore (“the observer”). The observations included arguments refuting the alleged lack of validity. Furthermore, the observer considered EP 14705416.7 to be concerned with another aspect of a product by the Proprietor, and not remotely relevant to consideration of the Patent. The observer also considered the image entitled “claim comparison.pdf” to show identical features to the features recited in claim 1 of the Patent.
4. Observations in reply were subsequently received from the requester.

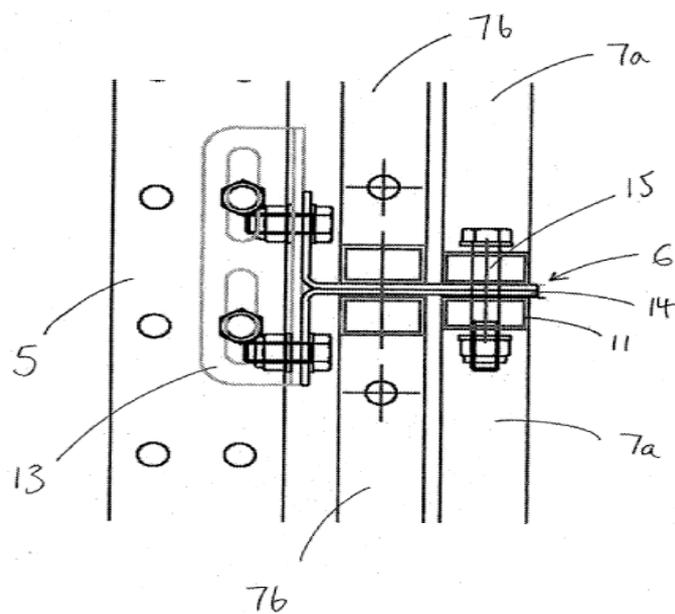
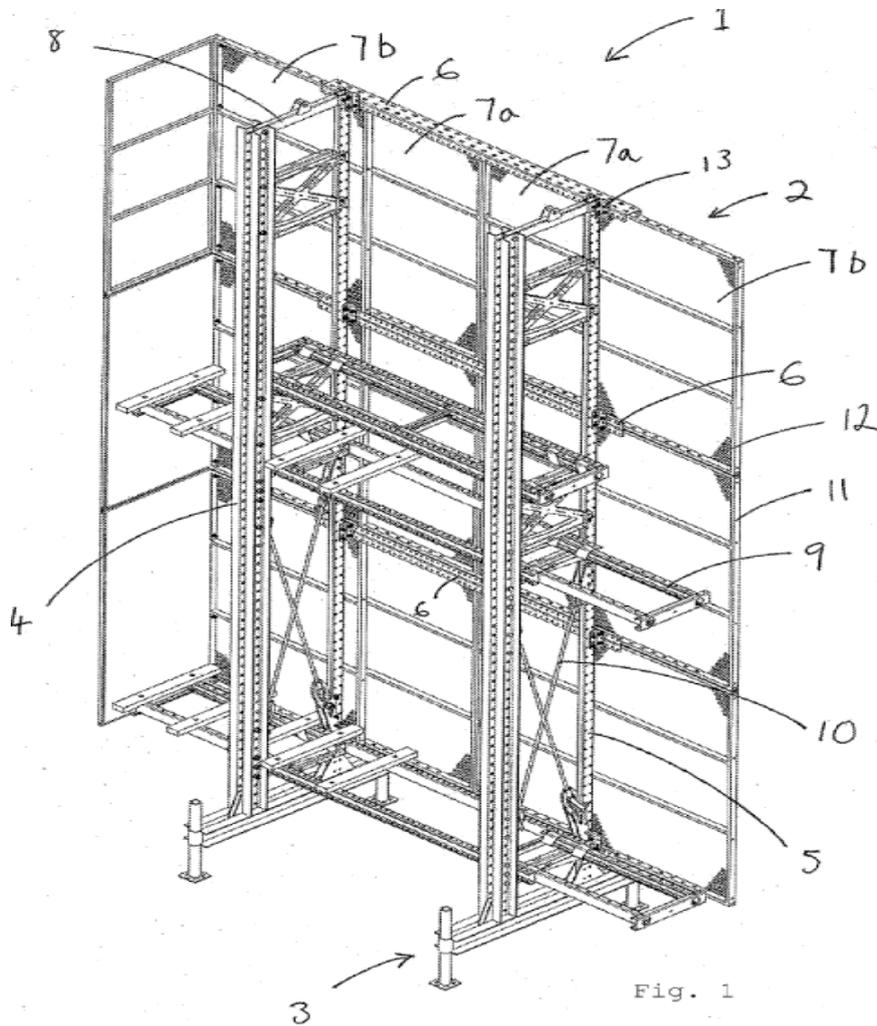
Preliminary Matters – EP Application 14705416.7

5. In their initial statement the requester has drawn my attention to application EP 14705416.7 (published as EP 2956600 A0) filed by the Proprietor. The requester states that this application is for “the same invention” and that the EPO have concluded, after three separate amendments being made to the claims during the examination process, that it does not provide an inventive step – with the application being deemed withdrawn due to no reply being received.
6. The observer states that this EP application was directed to another aspect of the Proprietor’s product and is not relevant to consideration of the Patent. In their observations in reply, the requester notes that the EP application is relevant to the current issues as the EP application has the same description, figures and purpose/technical problem as the Patent, and there is no explanation of benefits derived from the claimed features in the Patent.
7. Whilst the EP application and Patent appear to have a similar description and share some figures, I would note from inspecting the case file of this application (via <https://register.epo.org/application?number=EP14705416&lng=en&tab=main>) that *the claims* of this EP application are notably distinct to *the claims* of the Patent. Therefore, on the basis that the EP application and the Patent are directed to notably different inventions, the prosecution of this EP application does not seem to be relevant to the issue of validity with regard to the Patent.
8. Furthermore, I would note that the requester provides no discussion or reference to any *particular* arguments or documents cited during prosecution of this EP application – they simply assert that the Patent is similar to this EP application, and the EP application has been withdrawn following objections to novelty and inventiveness.
9. It is therefore my opinion that EP 14705416.7 relates to a different invention to the Patent. Consequently, in this opinion, I will not consider the documents cited against EP 14705416 as they do not appear to be relevant to the validity of claims of the Patent (and nor has the requester provided any reference to any of these cited documents or argued that any of the cited documents are indeed relevant).

The Patent

10. The Patent was filed on 18 February 2013 and was granted on 23 September 2015. It is still in force. It is known to provide safety screens around a construction, such as the central core of a high rise building, to effectively provide a temporary façade. As construction progresses it is also advantageous that the safety screen can move vertically to protect the perimeter as the construction progresses. Such screens are referred to as ‘climbing screens’.
11. As climbing screens are bulky but often required to arrive on a construction site fully assembled, the Patent aims to reduce the size of a climbing screen for transport. In particular a safety screen 2 for a climbing screen 1 is provided which has a retracted and extended state – with fixed panels 7a, joined together to form a fixed screen, being overlapped with moveable panels 7b in the retracted state, and with less or no overlap in the extended state. The fixed panels 7a are supported by a pair of support

members 6,14, which also slidably receive a moveable panel 7b. Between adjacent moveable panels 7b there is only a planar part 14 of the support members. Figures 1&3 are reproduced below.



12. The Patent has a single independent claim 1, which reads:

A safety screen for a climbing screen, comprising:

a plurality of fixed panels, and

a plurality of moveable panels;

wherein the safety screen is configured to have a retracted state and an extended state, each of the moveable panels being adapted to at least partially overlap with one or more of the fixed panels in the retracted state and being adapted such that in the extended state the degree of overlap is less than in the retracted state or there is no overlap,

the plurality of fixed panels are joined together to form a fixed screen,

each of the fixed panels is supported by a pair of panel support members, and a moveable panel is slidably received between each adjacent pair of panel support members, and

the portion of each of the panel support members that lies between adjacent moveable panels comprises a substantially planer element only.

Claim Construction

13. Before considering the documents identified in the request I need to construe claim 1 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.
14. 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 designer or technician of screens for use in construction.
15. Neither the requester nor observer have explicitly discussed how the features of claim 1 should be construed. Nevertheless, I believe there are some features which need consideration. In particular:

“the plurality of panels are joined together to form a fixed screen”

“each panel supported by a pair of support members, and a moveable panel is slidably received between each adjacent pair of panel support members”

“the portion of each panel support members that lies between adjacent moveable panels comprises a substantially planar element only”.

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

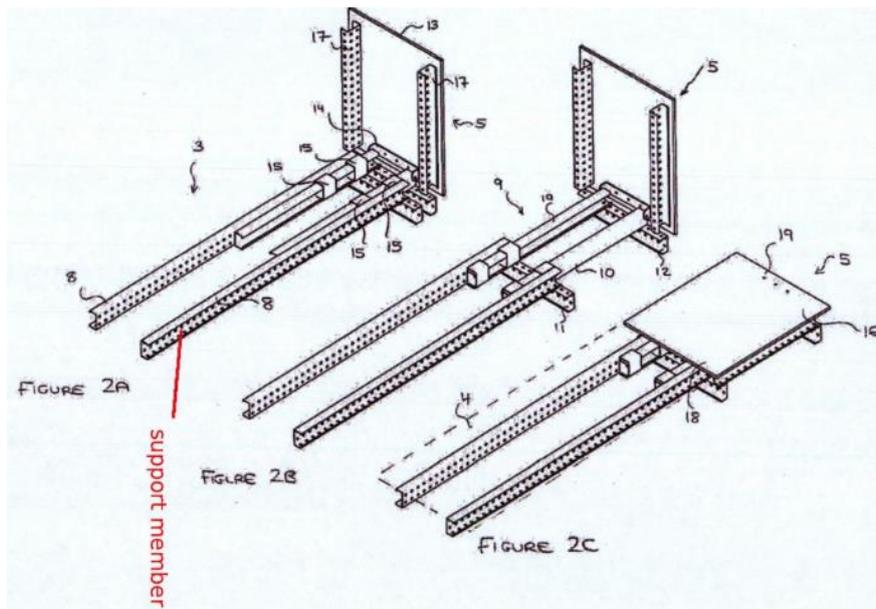
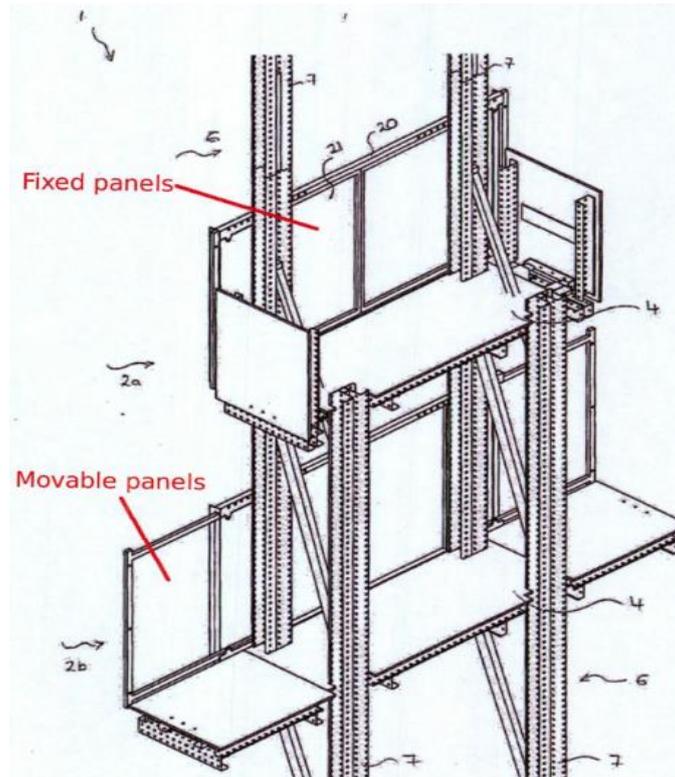
² *Actavis Group & Ors v ICOS Corp & Eli Lilly & Co.* [2017] EWCA Civ 1671

16. There are numerous references throughout the specification regarding minimising gaps between panels. Furthermore, Fig 1 shows no substantial gaps between the fixed panels (i.e. 2x3 panels) in a fixed screen. Consequently, I believe that the person skilled in the art would construe that any gaps between panels in a fixed screen are not substantial.
17. I think it would be clear to the person skilled in the art from at least the figures (e.g. figure 3) and description at page 6 line 28 – page 7 line 2 that it is the panel support members themselves which enable the moveable panels received therebetween to slide – rather than the moveable panels simply being received between support members and slidable by the use of some other means. Furthermore, whilst a support member can be “formed by a pair of brackets” (see page 7 lines 18-19), the person skilled in the art would understand claim 1 to mean that a pair of adjacent but spaced apart panel support members (with a moveable panel in between) support each of the fixed panels.
18. Page 8 of the description states that “the intermediate panel support bracket 6 comprises a substantially planar support element 14, which, in effect, comprises a horizontal plate” and that “the thickness of the planar support element 14 is preferably 15mm or less”. It is also clear from figure 3 that the portion of the panel support member between moveable panels is relatively thin (e.g. compared to the dimension of the panels). Thus, the person skilled in the art would construe that the portion of the panel support member between moveable panels is a relatively thin and flat element, and that it is only this part of the panel support member which lies between adjacent panels.

Prior art

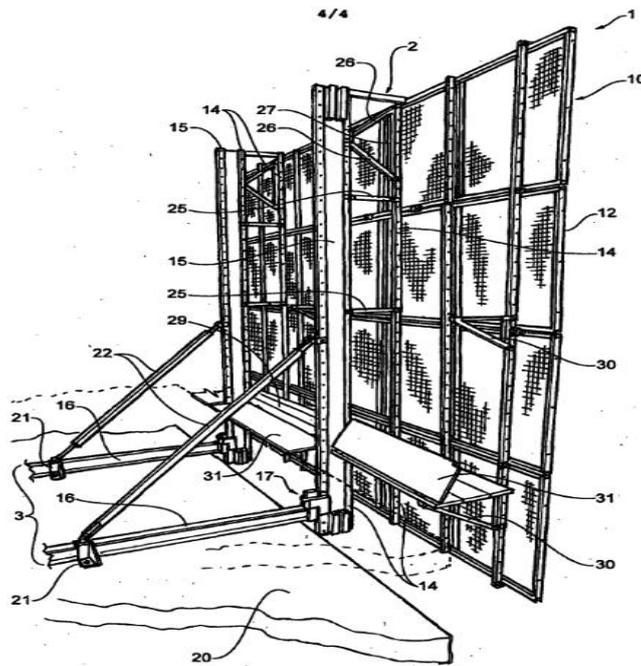
EP 2503074 – D1

19. EP 2503074 was published on the 26 September 2012. It relates to a climbing screen system 1 with extendable platforms 2a,2b. Each platform comprises a guard rail 20 which is extendable and is connected to support structure such that the guard rail has first retracted configuration 2a, and a second configuration 2b in which the guard rail 20 is extended. The guard rail 20 is provided with a guard panel 21 which extends with the guard rail 20 and acts as a safety screen. The support structure 3 comprises two horizontal support members 8, on which a deck 4 is mounted. The support members 8 also support extending sections 9 including rotatable wing panel 13. The marked-up versions of Figure 1 and Figures 2A-C of this document provided by the requester are shown below.



WO 2014/000034 – D2

20. WO 2014/000034 A1 was published on the 3 January 2014 (and republished as EP 2864564 A0 in the regional phase) with a priority date of 26 June 2012. It relates to a safety screen assembly comprising a safety screen 10, including panels 11,12,13, and frame means 2. The safety assembly can move vertically using a reciprocating jack and latch means. The frame means 2 also comprises a platform 29 which provides a walkway, the platform 29 having flaps 31 to provide openings to allow workers to move between platforms. Figure 4 is reproduced below.



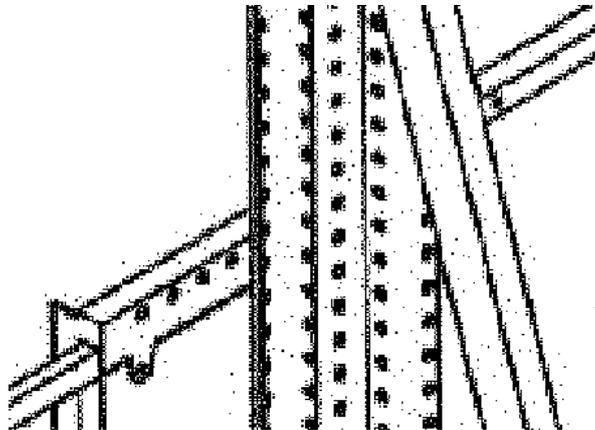
Novelty

EP 2503074 – D1

21. In order for a claim to lack novelty, a prior art disclosure must clearly and unambiguously disclose all of the features of the claim. The requester has argued that D1 discloses features such as moveable panels 21, fixed panels and panel support members 8 (see annotated figures above). The observer states that this document fails to disclose the feature of “the portion of each panel support members that lies between adjacent moveable panels comprises a substantially planar element only”. In particular, the guide rail 20 comprises horizontally extending box sections between which the guard rail panels are received. The observer also notes that there is no detail of the structure of the guard rail 21 or panel 21, or of their attachment to the safety screen. Furthermore, it is noted that the guide rails 20 are not joined together to form a fixed screen. The requester does not consider the features identified by the observer sufficient to constitute novelty.
22. I would note that in D1 there is no reference in the description to a fixed panel – only a guard panel 21 and wing panel 13. Whilst it is at least implicit from figure 1 that there is a fixed panel – it would appear that there is only one fixed panel per platform.
23. The requester has labelled support member 8 (see fig 2-c) arguing that it is analogous to the support member of claim 1. This support member 8, which forms a pair 3, would appear to support a fixed panel (at least indirectly). There is also another pair of support members 8 above/below this pair (see upper and lower platforms in fig 1) which support a fixed panel. However, a moveable panel 21 is not slidably received between each adjacent pair of support members 8 (i.e. the support members do not enable the movement/sliding of the panels) – rather the moveable panel 21 is slidably received between guide rails 20.
24. I would also note that If the moveable panels were taken as the wing panels 13, the

wing panels 13 (at least) do not partially overlap the fixed panel in a platform when in a retracted state.

25. Furthermore, D1 does not disclose fixed panels joined together to form a fixed screen as properly construed. Rather D1 discloses fixed panels attached (via some means) to common support members 7 to form respective fixed panels for respective upper and lower platforms.
26. In D1 if the guard rails 20 are taken as the panel support members (which the observer appears to have done) – then figure 1 (shown below) arguably shows these guard rails each supporting a fixed panel. However, from what is shown in figure 1, the portion of the guard rail which lies between moveable panels (i.e. between moveable panels on the top and bottom platform) is of a horizontally extending cuboid shape with a height/thickness which does not constitute a portion which is a substantially planar element only.



27. It is my opinion therefore, that claim 1 of the Patent is novel in light of D1.

WO 2014/000034 – D2

28. D2 was published after the filing date of the Patent, but with an earlier priority date, and is therefore considered prior art under Section 2(3). The requester has argued that the improved frame for a climbing screen in D2 comprises a plurality of safety screen panels which join together to form a fixed screen. The observer argues that D2 fails to disclose a safety screen with a plurality of moveable panels, including a retracted (where moveable panels overlap fixed panels) and extended state (with less/no overlap). Nor is D2 said to disclose fixed panels supported by a pair of panel support members, and a moveable panel slidably received between each adjacent pair of panel support members. There is also no disclosure of the substantially planar element.
29. Whilst D2 has flaps formed in the platform, none of the panels themselves are moveable/slidable between an extended and retracted state where there is overlap with fixed panels. For this reason (at least) claim 1 of the Patent is novel over D2.

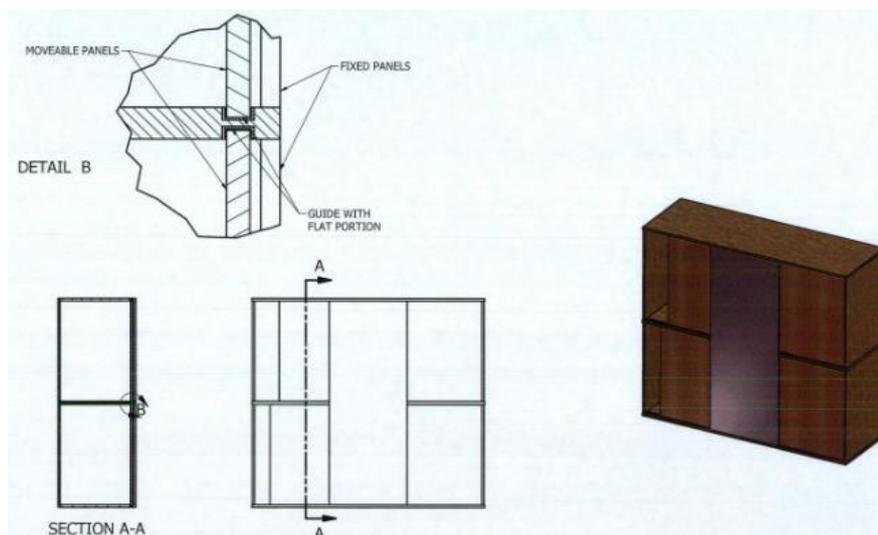
Inventive step

30. The requester has also argued that the claims lack an inventive step. In order to determine whether or not the invention defined in claim 1 is inventive over the prior

art, I will rely on the four step test established in *Pozzoli*³ which reformulated the well-known *Windsurfing*⁴ test. The Pozzoli steps are as follows:

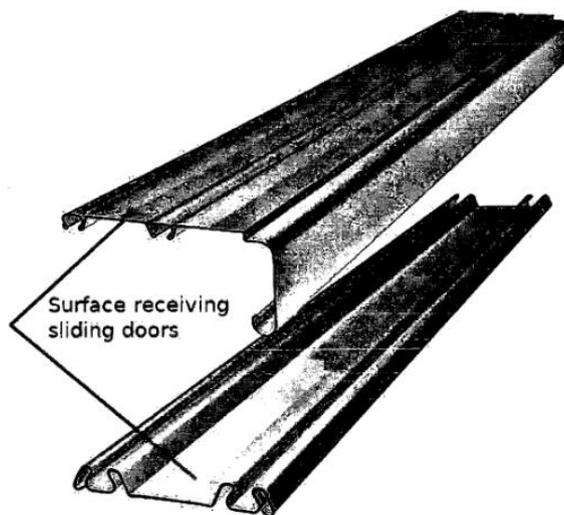
- (1)(a) Identify the notional “person skilled in the art”;
- (1)(b) Identify the relevant common general knowledge of that person;
- (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
- (3) Identify what, if any, differences exist between the 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.

31. As discussed above, I consider the person skilled in the art to be a designer or technician of screens for use in construction.
32. The requester has submitted that the common general knowledge (CGK) of the person skilled in the art would include a knowledge of various features of the Patent that are well known from the furniture sector, such as are common in a variety of wardrobes and cupboards. The requester has submitted three documents (D3-5) showing (1) a wardrobe with a moveable panel/sliding door and panel support member/guide (which is marked with the RMD logo and has a copyright date of 2020); (2) guides for sliding wardrobes (commercialised by Argos) – where the portion on which the sliding doors sit is substantially planar; (3) a vertically stackable sliding door cupboard. D3-5 are shown below:



³ *Pozzoli SPA v BDMO SA* [2007] EWCA Civ 588

⁴ *Windsurfing International Inc. v Tabur Marine (Great Britain) Ltd*, [1985] RPC 59



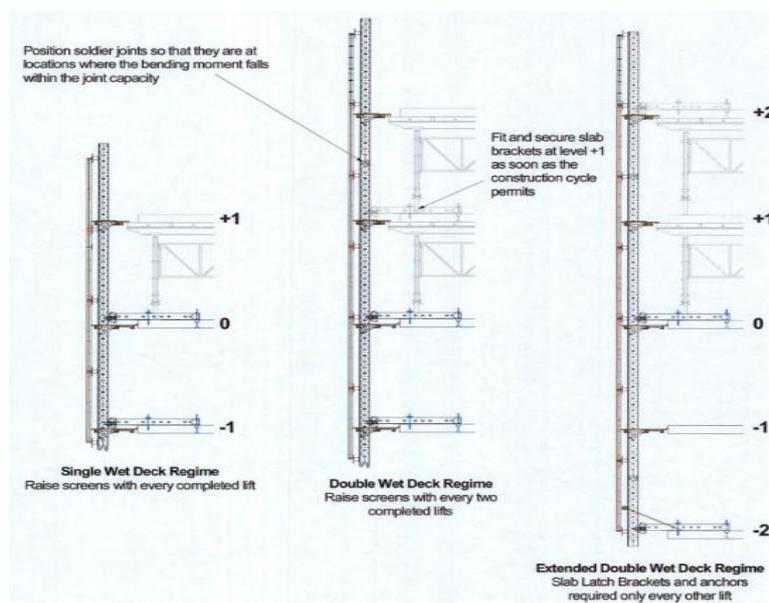
33. The observer has submitted that D3-5 documents are either undated or post-date the filing date of the Patent, and are therefore not valid prior art. Furthermore, the observer submits that the images relate to wardrobes/cupboards and lie in an entirely unrelated field, and do not show various features such as fixed panels. The requester notes that these documents are intended to show the similarity of the Patent to very common objects in wide use.
34. Given that the D3-5 submitted by the requester are undated/post-date the Patent, and that they relate to furniture, it is difficult to ascertain the CGK of the person skilled in the art of screens for use in construction based on the information before me. Nevertheless, I believe that he/she would have knowledge of sliding doors/panels, in general.
35. The inventive concept lies in a safety screen for a climbing screen which has a retracted and extended state – with moveable panels overlapping fixed panels in the retracted state and not in an extended state. The fixed panels are joined together to form a fixed screen, and the fixed panels are supported by a pair of support members which also slidably receive a moveable panel. Between adjacent moveable panels there is a planar part of the support members only.
36. D2 was published after the filing date of the Patent, and therefore does not form part of the state of the art for assessing inventive step. The differences between D1 and the inventive concept are, *where the support members 8 are taken as the panel support members*, that a moveable panel is slidably received between each adjacent pair of support members and that fixed panels joined together to form a fixed screen. *Where the guide rail 20 is taken as the panel support members* the differences are that fixed panels joined together to form a fixed screen and the portion of each panel support member between moveable panels is a substantially planar element only.
37. The requester has argued that the features of the Patent are obvious to the person skilled in the art informed with CGK. The requester also considers the Patent to provide no explanation about a specific contribution to solving the technical problem

of stacked sliding doors.

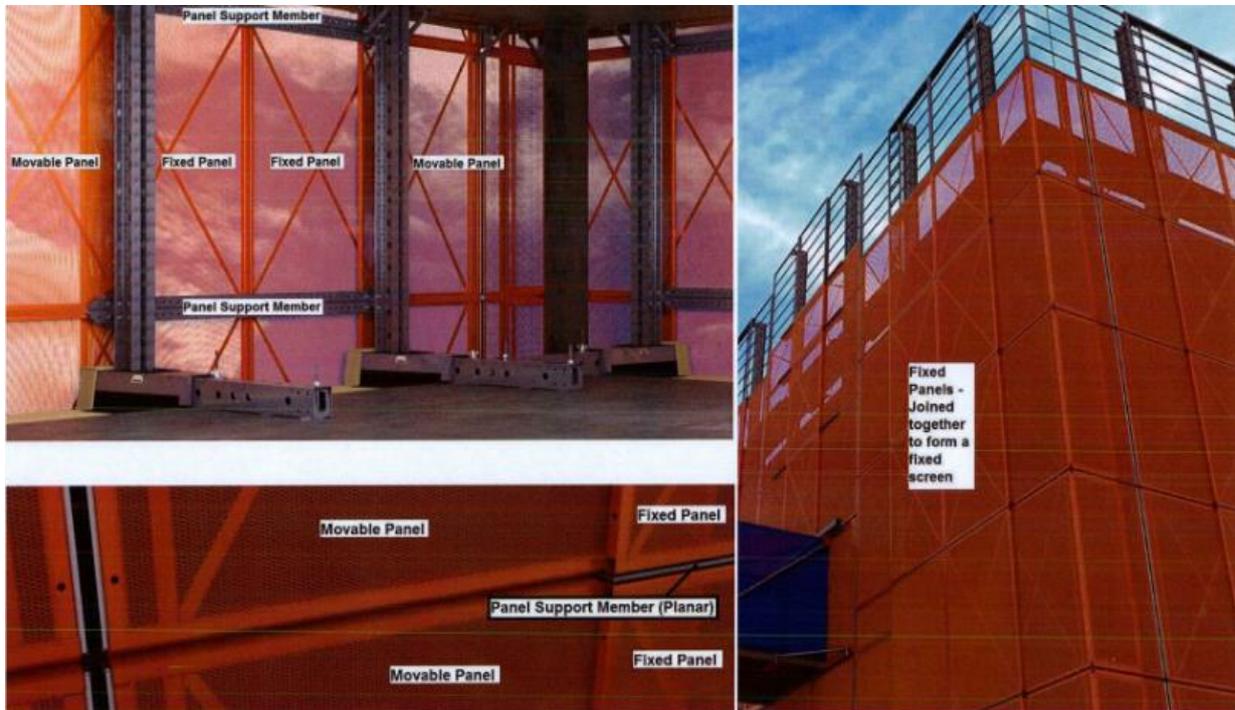
38. The observer states that the Patent aims to solve problems regarding gaps between slidable panels in climbing screens (causing safety issues etc.). The Patent provides a solution through the joining of fixed screens to provide a structure with sufficient rigidity/structural integrity, whilst planar support elements allow for nominal gaps between sliding elements. Furthermore, the structures shown in the furniture of D3-5 are not suited to use in the context of a climbing screen. Thus there is an inventive step according to the observer. The requester states that the observer has provided no reason why the structures shown in D3-5 would not be suited to climbing screens and that these designs should be considered in the context of inventive step.
39. Whilst it might be an obvious modification to have a screen formed from a plurality of fixed panels per platform (rather than a single fixed panel), I am not convinced it would be an obvious adjustment to have a fixed screen such that any gaps between panels (i.e. between platforms) are not substantial. Furthermore, there is no motivation to change to dimensions/shape of the guard rail – particularly given the spacing between platforms – such that it would be a planar element only. Also, if the support members 8 are taken as the panel support members, then significant modification of the platform(s) would be required to have a moveable panel slidably received between each adjacent pair of support members, that would clearly require a degree of invention.
40. Therefore, it is my opinion that claim 1 provides the required inventive step in light of D1&3-5.

The Ascent 200 Safety Screen

41. The requester has asked whether the Ascent 200 would, if manufactured, sold or used within the UK, infringe the Patent. They have supplied twenty of the “Technical Data Sheets” of the Ascent 200 – with ‘irrelevant sections’ having been removed. The sheets supplied discuss that the system has fixed and sliding panels. Sheet 21 of this document, showing ‘typical screen sections’, is shown below



42. The requester has also provided a document referred to as “claim comparison.pdf” which was allegedly supplied to them by the Proprietor’s representatives and purports to identify the features of the Ascent 200 which infringe the Patent. This document is shown below:



Infringement

43. 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.

44. In the Supreme Court in *Actavis UK Limited*⁵ Lord Neuberger stated that the problem of 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?

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

46. Answering these questions with regard to the Ascent 200 and its potential infringement of the Patent is difficult due to the limited information that has been provided to me. In particular, the requester has provided no identification, discussion or insight into the features of the Ascent 200. Furthermore, they appear to have not included sheets - indicated in the index of the “Technical Data Sheets” of the Ascent 200 - which would appear, prima facie, to be relevant to infringement (e.g. details of the support member(s) for the sliding panels on sheets 38-40).

47. I would note that the requester does not seem to have disagreed with the identification of features in the “claim comparison.pdf” document. I will therefore form an opinion of infringement in light of the “claim comparison.pdf” document in conjunction with the information from the supplied “Technical Data Sheets” of the Ascent 200.

48. The requester states that the Ascent 200 would not infringe the Patent. In particular the features identified in the “claim comparison.pdf” – i.e. moveable panels, fixed panels, panel support member and fixed panels joined together to form a fixed screen – are sufficiently generic in nature not to constitute any infringement. The observer considers that a comparison of the figures of the Patent with the “claim comparison.pdf” shows that the Ascent 200 is identical to the Proprietors product – at least in respect to the features of claim 1 of the Patent – and that there is clearly infringement

49. Assessing infringement as a matter of normal interpretation, The Ascent 200 comprises fixed panels and moveable panels, with the panels joined together to form a screen. This is disclosed in the “Technical Data Sheets” of the Ascent 200. From the “claim comparison.pdf” there appears to be shown the fixed panels of the fixed screen supported by panel support members at the top and bottom of the fixed panels. Furthermore, there appears to be a planar part of the panel support members which receives the moveable panels so that it can slide between the respective support members at the top and bottom of the fixed panels. Only this planar part is between adjacent movable panels. The “claim comparison.pdf” shows the safety screen in an extended state with no overlap between fixed and movable

⁵*Actavis UK Limited and others v Eli Lilly and Company* [2017] UKSC 48

panels. When the movable panels are moved they would overlap the fixed panels.

50. It is therefore my opinion, *based on the limited information provided to me*, that the Ascent 200 would infringe claim 1 of the Patent as a matter of normal interpretation.

Opinion

51. It is my opinion that claim 1 of the Patent is novel in light of D1 and D2. I also consider that claim 1 of the Patent involves an inventive step in light of D1 and D3-5.
52. It is also my opinion, based on the limited information provided to me, that the Ascent 200 would infringe claim 1 of the Patent.

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.