

OPINION UNDER SECTION 74A

Patent	GB 2586041 B
Proprietor(s)	Dura Composites Limited
Exclusive Licensee	
Requester	Envirobuild
Observer(s)	
Date Opinion issued	31 August 2023

The request

1. The comptroller has been requested to issue an opinion regarding the validity of GB 2586041 (“the patent”), specifically that it lacks an inventive step in view of a number of prior art documents. An opinion is also sought regarding infringement of the patent by a particular product.
2. Observations have been filed on behalf of the proprietor and observations in reply received from the requester.

Preliminary matters

3. The observations filed on behalf of the proprietor contend that certain of the documents submitted by the requester have either already been considered by the examiner or post date the patent in issue. I will discuss this further when I come to consider the various documents referred to by the requester.

The patent

4. The patent was filed on 31 July 2019 and granted with effect from 8 September 2021 with the title Cladding board. As the opening of the description explains, the invention relates to cladding boards and to arrangements incorporating cladding boards. The paragraph bridging pages 2 and 3 explains the advantages of the invention:

“It will be appreciated that embodiments of the present invention can allow cladding to be installed quickly and easily. For example, mechanical fixings (e.g. screws, bolts, nails, etc.) can be provided through the fixing surface of the fixing plate of the cladding board itself in order to attach the cladding board to an underlying support,

and this can avoid the need for separate specialised fixing clips. The mechanical fixings for a lower cladding board can also be covered by an upper cladding board, and this can improve the visual appearance of the cladding. Furthermore, the interlocking nature of the upper and lower channels of the cladding boards can securely hold the cladding boards to one another and can help to prevent the cladding plate from flexing outwards. This in turn means that the cladding board does not need to have a hollow structure comprising one or more voids, which would be relatively deep and heavy, and can therefore be relatively thin and lightweight.”

5. Figure 1A shows a cladding board embodying the invention:

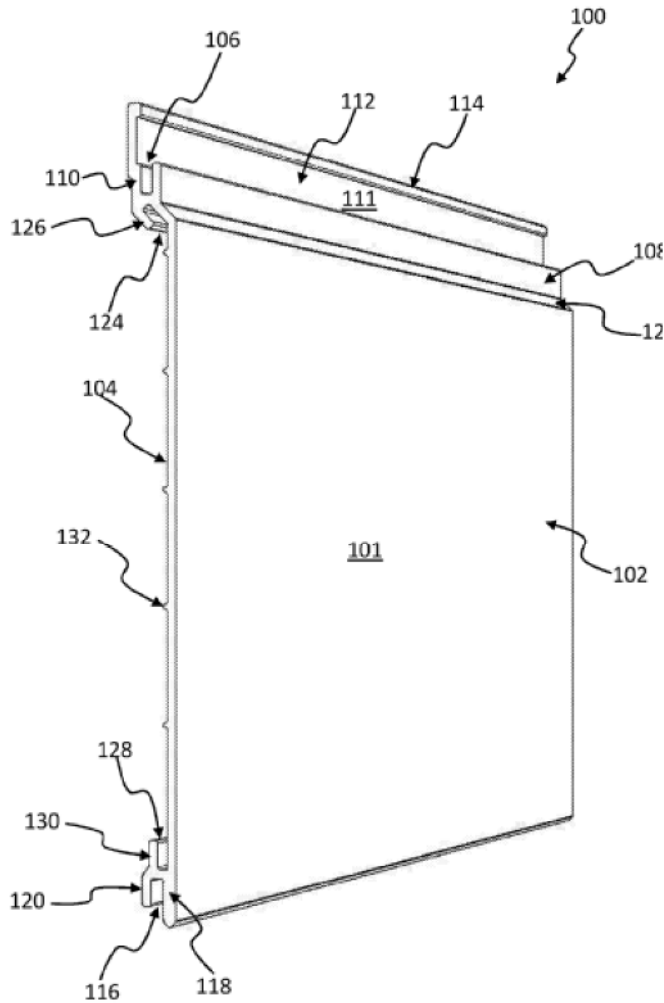


FIG 1A

6. This is described on pages 16 to 18, as follows:

“The cladding board 100 comprises a cladding plate 101 having a substantially planar front facing surface 102 and a substantially planar rear facing surface 104. In this embodiment, the vertical width of the front facing surface 102 is approximately 150mm and the horizontal length of the front facing surface 102 is approximately 3000mm. The thickness of the cladding plate 101 between the front facing surface 102 and rear facing surface 104 is approximately 2mm.

The cladding board 100 further comprises an upper channel 106 which extends longitudinally along the upper edge of the cladding board 100. The upper channel 106 is defined by an upwardly extending front wall 108 and an upwardly extending rear wall 110. The thickness of each of the upwardly extending front and rear walls 108, 110 is approximately 2mm. The depth of the upper channel 106 is approximately 6.5mm and the lateral span of the upper channel 106 is approximately 2.5mm.

The upwardly extending rear wall 110 further extends to a fixing plate 111 having a substantially planar front facing fixing surface 112 for receiving one or more mechanical fixings, such as screws, therethrough. The thickness of the fixing plate 111 is approximately 2mm. The fixing surface 112 is offset rearwardly by around 1mm from the upwardly extending rear wall 110 of the upper channel 106. This allows sufficient space for a protruding head of a mechanical fixing to be seated on the fixing surface 112.

The cladding board 100 further comprises an elongate ridge 114 which extends longitudinally along an upper edge of the fixing plate 111 and protrudes forwardly by around 1mm from the fixing plate 111. The elongate ridge 114 helps to define the extent of the fixing surface 112 and thus indicate where to position the mechanical fixings.

The cladding board 100 further comprises a lower channel 116 which extends longitudinally along the lower edge of the cladding board 100. The lower channel 116 is defined by a downwardly extending front wall 118 and a downwardly extending rear wall 120. The downwardly extending front wall 118 forms part of a lower section of the cladding plate 101. The thickness of the downwardly extending front wall 118 is approximately 3mm and the thickness of the downwardly extending rear wall 120 is approximately 2mm. The depth of the lower channel 116 is approximately 6mm and the lateral span of the lower channel 116 is approximately 2.75mm.

The cladding board 100 further comprises a shoulder section 122 which connects the cladding plate 101 to the upper channel 106. The plane of the shoulder section 122 is angled by approximately 45° relative to the front facing surface 102 of the cladding plate 101. The angled shoulder section 122 means that the front facing surfaces 102 of similar cladding boards 100 are substantially co-planar when interlocked with one another.

As will be explained in more detail below with reference to Figures 4A, 4B and 4C, the cladding board 100 is configured such that, when a lower edge of an upper one of the cladding boards 100 is placed adjacent an upper edge of a lower one of the cladding boards 100, the upper cladding board 100 overlaps the fixing plate 111 and upper channel 106 of the lower cladding board 100 and interlocks with the lower cladding board 100, with the downwardly extending rear wall 120 of the upper cladding board 100 being received between the upwardly extending front and rear walls 108, 110 of the lower cladding board 100, and with the upwardly extending front wall 108 of the lower cladding board 100 being received between the downwardly extending front and rear walls 118, 120 of the upper cladding board 100. Mechanical fixings, such as screws, can also be provided through the fixing

surface 112 of the lower cladding board 100 to fix the lower cladding board 100 to an underlying support structure, such as a batten, and the mechanical fixings of the lower cladding board 100 can be hidden from sight by the overlapping upper cladding board 100.”

7. Figure 4A shows two cladding boards 100a, 100b connected together, along with starter and finisher trims 200, 300:

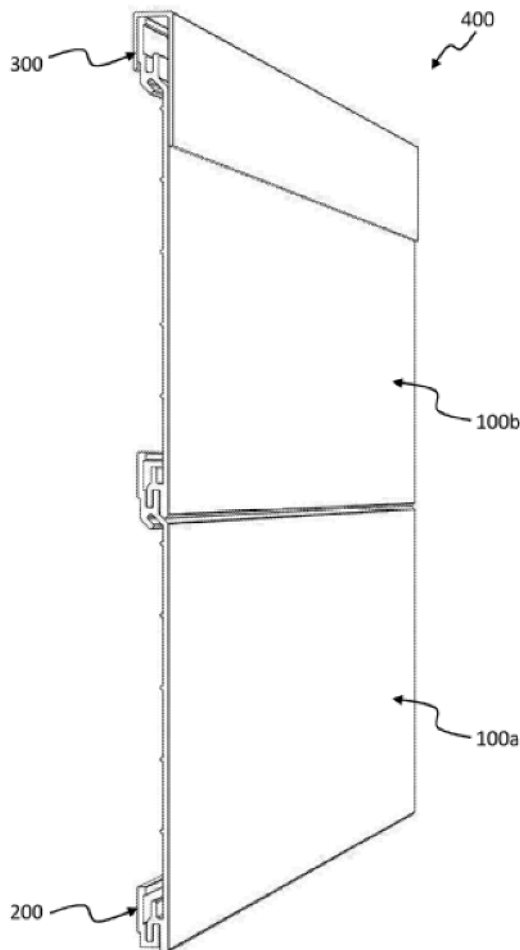


FIG 4A

Claim construction

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

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

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

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

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.

11. Claim 1 is the only independent claim in the patent and reads as follows:

1. A cladding board comprising: a cladding plate having a substantially planar front facing surface and a substantially planar rear facing surface; an upper channel which extends longitudinally along an upper edge of the cladding board, the upper channel being at least partially defined by an upwardly extending front wall and an upwardly extending rear wall, the upwardly extending rear wall further extending to a fixing plate having a substantially planar fixing surface for receiving one or more mechanical fixings therethrough; and a lower channel which extends longitudinally along a lower edge of the cladding board, the lower channel being at least partially defined by a downwardly extending front wall and a downwardly extending rear wall; wherein the downwardly extending front wall of the lower channel has a front facing surface which forms part of a lower section of the front facing surface of the cladding plate; wherein the cladding board is configured such that, when a lower edge of an upper cladding board is placed adjacent an upper edge of a lower cladding board, the upper cladding board overlaps the fixing plate of the lower cladding board and interlocks with the lower cladding board, with the downwardly extending rear wall of the upper cladding board being received between the upwardly extending front and rear walls of the lower cladding board, and with the upwardly extending front wall of the lower cladding board being received between the downwardly extending front and rear walls of the upper cladding board.

12. Although in isolation the claim seems to me to require little interpretation, the opinion request discusses several features of claim 1 in the context of infringement. Where claim 1 requires “*an upper channel which extends longitudinally along an upper edge of the cladding board*” the requester interprets this as implying that the channel must

be “*necessary to the function*” of the product and that this is absent in the potentially infringing product. The request also discusses the requirement of claim 1 for “*the downwardly extending rear wall of the upper cladding board being received between the upwardly extending front and rear walls of the lower cladding board*”. The requester appears to believe that this requirement of “*being received between*” must be something more than to “*lie geometrically between*”, although quite what more is not explicit in the request.

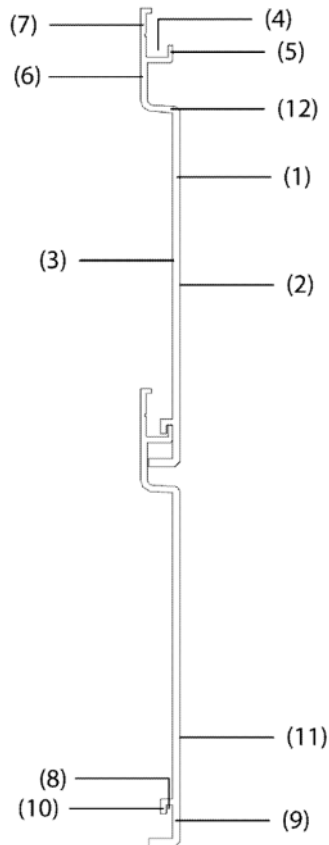
13. The observations from the proprietor argue that the channel of the potentially infringing product is in fact “*necessary to the function*” of that product and that this is explained in the request itself. The observations in reply seek to demonstrate that this is not true by illustrating a variation of the potentially infringing product in which two boards interlock even if the upwardly extending rear wall were to be removed such that no channel was present (Figure D of the observations in reply). In essence this seems to mean that the function to which the upper channel is argued to be necessary by the requester is specifically interlocking boards and not providing a fixing plate.
14. The observations are unclear what more than to “*lie geometrically between*” the request seeks to argue is required by “*being received between*”. They speculate that the argument might be that the span between the upwardly extending front and rear walls of the lower cladding board should be substantially the same as the thickness of the downwardly extending rear wall. Should that speculation be correct, the observations point out that such a limitation is neither required by claim 1 nor implied by the specification. They further point out that the feature is described as optional at lines 1 and 2 on page 6. The passage in question reads “*The upper channel may have a lateral span which is substantially the same as the thickness of the downwardly extending rear wall*”. This speculation is rejected in the observations in reply which explain the view of the requester that “*received*” requires contact between the objects in question. The basis for this view is not explained.
15. For my part I cannot see a basis for arguing that the inventive concept claimed requires the upper channel to be necessary to the function of interlocking cladding boards. The embodiment shown in for example figure 4A above does appear to show the upper channel of the lower board interlocking with the upper board, but nonetheless I do not believe that this is an essential feature of the inventive concept of claim 1.
16. As for the construction to be placed upon the phrase “*received between*” once again it seems to be the case that the embodiment shown in for example figure 4A above does show the downwardly extending rear wall of the upper cladding board being received between the upwardly extending front and rear walls of the lower cladding board by lying in an upper channel having a lateral span which is substantially the same as the thickness of the downwardly extending rear wall. The embodiment also appears to show contact between the interlocking walls. However, the description is clear that such a lateral span is optional. It seems to me that the proper construction of “*received between*” in the context of claim 1 is no more than to “*lie geometrically between*”.

Inventive step

17. The requester argues that the claimed invention is not inventive having regard to a number of documents. To determine whether or not an invention defined in a particular claim is inventive over the prior art, ordinarily one would rely on the principles established in *Pozzoli SPA v BDMO SA* [2007] EWCA Civ 588, in which the well known Windsurfing steps were reformulated:
- (1)(a) Identify the notional “person skilled in the art”;*
 - (1)(b) Identify the relevant common general knowledge of that person;*
 - (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;*
 - (3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed;*
 - (4) Viewed without any knowledge of the alleged invention as claimed, determine whether those differences constitute steps which would have been obvious to the person skilled in the art.*
18. In this case the request makes no explicit reference to these principles. I have no guidance from the request or from the observations to help me identify the notional “person skilled in the art” or the relevant common general knowledge of that person. The requester does construe the claim as discussed above and does rely upon a number of documents cited as matter forming part of the “state of the art”.
19. The observations filed on behalf of the proprietor to submit that I should not deviate from the examiner’s conclusions that the patent was novel and inventive over a patent document which they submit embodies one of the documents to which the request refers. The observations also argue that *“many of the documents submitted as evidence ... either have no verifiable publication date or post-date the filing date of the patent”*. The observations do not specify to which documents they are referring. The observations in reply acknowledge this issue, but argue that for each product *“at least one piece of evidence proves the existence of the product before the filing date of the Patent”*.
20. I shall deal with each document from the request in turn. I should say at the outset that I am taking the dates marked on the various documents as *prime facie* evidence of a date at which a document was made public.
21. There are various figures in the request and the observations in reply that illustrate the products to be considered. Figure A in the request appears to be figure 4A from the patent, albeit marked with alternative reference numbers by the requester. As far as I can tell none of the remaining figures in the request and the observations in reply are reproduced from the documents accompanying the request. For the most part they appear to have been drawn for the purposes of the request. Figure G seems to be an annotated copy of a photograph that I cannot locate in the documents accompanying the request. I shall assume that figures B to G in the request do in fact illustrate the products in question. The proprietor has not objected to these figures.

The Technowood product

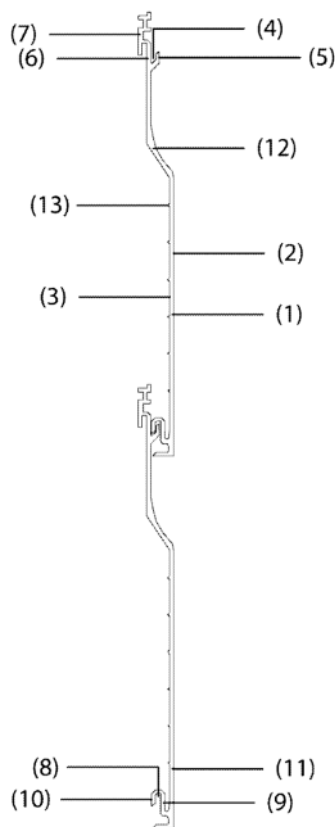
22. I am considering this product first as the requester argues that it shows the difference that they have identified between the products they cite as forming part of the “state of the art” and the inventive concept of the claim as construed.
23. The Technowood ESD-10 Siding product appears in a 16 page brochure or product guide (Annex G accompanying the request). Figure E of the request shows two such boards assembled together:



24. The brochure appears to be undated. The request seeks to date the product from a reference to Technowood in a story dated 24 November 2016 on a webpage from a third party MaterialDistrict (Annex H). The story makes no reference to ESD-10 Siding, nor to planks or siding generally. It simply refers to profiles and plates that “*can be used in all places that wood products can be used*”. In the MaterialDistrict story Technowood refers to products made from aluminium profiles, aluminium composite plates or glassfibre reinforced polyester profiles all laminated with natural wood veneers.
25. For me this is sufficient evidence to establish that wood laminated Technowood products generally were available at the time of the MaterialDistrict story and hence before the patent was filed, but insufficient evidence to show that the ESD-10 Siding product was available at that time. Consequently I cannot take it that the Technowood ESD-10 Siding product referred to in the request was known before the earliest date of the patent.

The VulcaLap product

26. The VulcaLap product is said to be shown in a fire test certificate dated 8th January 2019 (Annex A) and a brochure (Annex B, see page 8) that carries a copyright date of February 2019 at the foot of page 19. The fire test certificate does not illustrate the product tested, named “*VulcaLap RAL/WOOD Finish*”. The brochure shows at least three types of plank (see page 6). It is not readily apparent to me that the fire test certificate refers to the same VulcaLap product as the request. However, for my purposes the brochure is sufficient to show that the VulcaLap product predates the patent. The observations from the proprietor associate the VulcaLap product with patent document GB2405878A published 16 March 2005, significantly pre-dating the patent. I shall take it that the VulcaLap product was known before the earliest date of the patent.
27. Figure B of the request shows a pair of VulcaLap cladding boards connected together:



28. As noted above, the observations from the proprietor associate the VulcaLap product with patent document GB2405878A. The requester has not disputed that the two documents relate to the same product. The observations submit that I should not deviate from the examiner’s conclusions that the patent was novel and inventive over patent document GB 2405878A and hence presumably also over the VulcaLap product to which the request refers. The observations in reply argue that this “*should not prevent different conclusions from being reached in the presence of new evidence ...*”, although they do not specify the new evidence to which they refer.
29. According to Section 74A(3)(b) of the Patents Act 1977 *The comptroller shall issue*

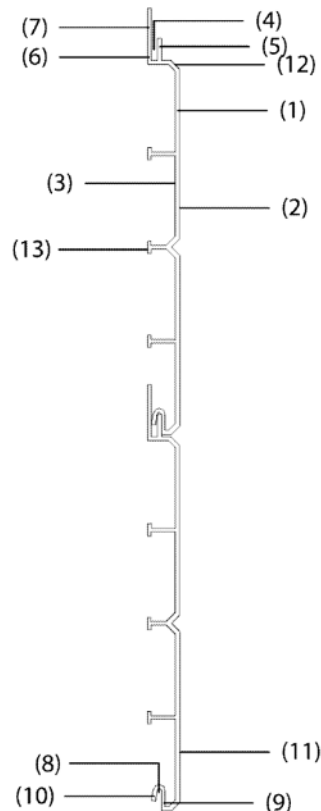
an opinion if requested to do so under subsection (1) above, but shall not do so ... if for any reason he considers it inappropriate in all the circumstances to do so.

30. Section 3.4 of the Opinions Manual explains that this provision is used to refuse requests which “*did no more than repeat arguments already considered pre-grant*”.
31. The examiner cited GB 2405878A in examination reports dated 29 January 2020 and 2 March 2021 as part of novelty and inventive step objections against various claims. The claims of the patent were amended following each examination report. The basis for the last amendments to claim 1 before the patent was granted was found in the figures, according to an attorney’s letter dated 20 April 2021. I have no detail of the examiner’s considerations regarding the claims as finally amended, although I can presume that they considered the claims as amended to be novel and inventive before sending the application for grant.
32. There is no suggestion that the examiner ever considered the Technowood product and so I cannot say that an inventive step argument that combined the VulcaLap and Technowood products was considered pre-grant. I might presume that the examiner considered whether the inventive concept claimed was inventive in light of the prior art that they had cited previously and their formulation of the skilled person’s common general knowledge. Of course it would be possible for the requester to put forward new arguments about the common general knowledge, but as I have already mentioned the requester does not clearly identify what the common general knowledge is in this instance.
33. The difference that requester identifies between claim 1 and the VulcaLap product, indeed the difference between claim 1 and all of the products apart from the Technowood product, is that claim 1 requires that “*the downwardly extending front wall of the lower channel has a front facing surface which forms part of a lower section of the front facing surface of the cladding plate*” (see request page 9 and claim 1 lines 12 to 15)
34. The requester argues this difference “*is self-evident, and would be obvious to a competent professional*” and further that “*this feature is present in the Technowood Product*”.
35. I take it that the “*self-evident*” argument amounts to arguing that the inventive concept of claim 1 was obvious in light of the VulcaLap product and the common general knowledge of the skilled person or “*competent professional*” in the words of the request. In the absence of any evidence in the request regarding the common general knowledge of the skilled person I do not feel that I can agree with this “*self-evident*” inventive step argument.
36. As a result of considering the publication dates of the various documents earlier I concluded that I have no evidence that the Technowood product referred to in the request was known before the earliest date of the patent. Consequently in my opinion the Technowood product could not be used as the basis for an opinion that the inventive concept of claim 1 was obvious.
37. Allowing for the possibility that the Technowood product might pre-date the patent, I could perhaps reach a conditional opinion concerning inventive step in view of the

VulcaLap and Technowood products. However, the requester has given me no basis for the products to be combined, that is to say nothing has been identified to suggest that the skilled person would consider these documents together. Therefore I cannot reach the opinion that claims 1 lacks an inventive step in view of the VulcaLap and Technowood products combined.

The DecoClad V-Groove product

38. The DecoClad V-Groove product is shown in Figure C in the request in the form of two connected cladding boards:



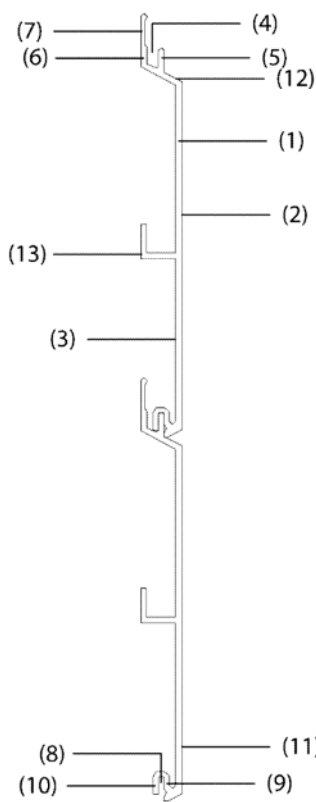
39. The request refers to an Installation Manual (Annex C) for the DecoClad V-Groove product that is marked “*Published 08/2019*” at foot of page 1, which I take to mean August 2019 i.e. after the earliest date of the patent. Annex D is a document titled “*Installation Instructions*”. The document itself appears to be undated. However, it is available at <https://www.foamfast.com.au/assets/decoclad-installation-instructions-dec-16.pdf> and the text “*dec-16*” in that link implies publication in December 2016, well before the patent. More significantly the link can be dated via waybackmachine to at least 16 March 2018 (see <https://web.archive.org/web/20180316121150/https://www.foamfast.com.au/assets/decoclad-installation-instructions-dec-16.pdf>). The request also points to a reference to DecoClad V-Groove without any images on a webpage dated by waybackmachine to 20 Mar 16 (Annex E, see <https://web.archive.org/web/20160320170002/www.decorativeimaging.com.au/building-products/decoclad/>). I shall take it that the DecoClad V-Groove product was also known before the earliest date of the patent.
40. As noted above, the requester identifies the same difference between claim 1 and all

of the products apart from the Technowood product and goes on to argue that this difference “*is self-evident, and would be obvious to a competent professional*” and further that “*this feature is present in the Technowood Product*”.

41. Earlier I came to the opinion that the requester had not shown that claim 1 lacked an inventive step either self-evidently based upon the VulcaLap product or based upon the VulcaLap and Technowood products combined. For the same reasons, in my opinion they have also not shown that claim 1 lacked an inventive step in light of the DecoClad V-Groove product.

The Longboard product

42. The Longboard 4” V-Griving [sic] Siding Panel is shown in Figure D of the request which shows two products assembled together:



43. The request states that the Longboard product is shown in Annex F at page 21 of 156. Page 21 itself is undated. Although it was provided to me electronically, Annex F is described in the request as a binder prefaced by a letter dated 17 June 2015. Pages 3 and 4 of 156 are letters carrying the dates “*June 17, 2014*” and “*February 18, 2014*”. It is not entirely clear what the relationship is between the pages 3, 4 and 21 of Annex F, but for the purposes of my opinion I believe that there is sufficient evidence for me to take it that the Longboard product was also known before the earliest date of the patent.
44. The inventive step argument in the request is the same for this product as for the VulcaLap and DecoClad products. For the same reasons as before, in my opinion they have also not shown that claim 1 lacked an inventive step in light of the Longboard 4” V-Groove Siding Panel.

Infringement

45. Section 60 Patents Act 1977 governs what constitutes infringement of a patent; Section 60(1) reads:

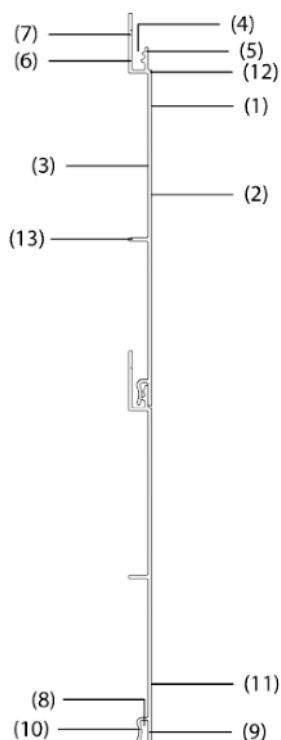
Subject to the provision of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say -

(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.

46. The request is clear that an opinion is sought on whether the product in question would infringe the patent rather than whether it does infringe or has infringed. Therefore I have no need to consider when any action might have taken place nor indeed whether the product has been made disposed of, etc in the United Kingdom. The question upon which I can provide an opinion is simply whether the product described in the request meets the terms of the claims of the patent.
47. The product in question is referred to in the request as the Hyperion product and two such boards are shown interlocked in figure F of the request:



48. The request is clear that figure F shows a cladding board. Taking the requirements of claim 1 in turn the board comprises a cladding plate having a substantially planar front facing surface and a substantially planar rear facing surface. The walls 5 and 6 constitute an upper channel as I have construed it above, which channel extends longitudinally along an upper edge of the cladding board, the upper channel being at least partially defined by an upwardly extending front wall and an upwardly extending rear wall. The upwardly extending rear wall further extends to a fixing plate having a substantially planar fixing surface 7 that the request explains is for receiving one or more mechanical fixings therethrough. A lower channel extends longitudinally along a lower edge of the cladding board, the lower channel being at least partially defined by a downwardly extending front wall 9 and a downwardly extending rear wall 10. The downwardly extending front wall 9 of the lower channel has a front facing surface which forms part of a lower section of the front facing surface 11 of the cladding plate. As shown in figure F, when a lower edge of an upper cladding board is placed adjacent an upper edge of a lower cladding board, the upper cladding board overlaps the fixing plate of the lower cladding board and interlocks with the lower cladding board. As I have construed "*received*" above, the downwardly extending rear wall of the upper cladding board is received between the upwardly extending front and rear walls of the lower cladding board. Similarly the upwardly extending front wall of the lower cladding board is shown received between the downwardly extending front and rear walls of the upper cladding board.
49. The request seeks to distinguish the Hyperion product and claim 1 on the basis that the upwardly extending front and rear walls 5, 6 do not form a channel "*essential to the function of the Hyperion Product*", the function in question being further explained in the observations in reply as interlocking cladding boards. I have already dealt with this point under claim construction above and concluded that the inventive concept claimed does not require the upper channel to be necessary or essential to the function of interlocking cladding boards. To my mind it is sufficient that there are upwardly extending front and rear walls forming the upper channel and these are present in the Hyperion product.
50. The Hyperion product and claim 1 are further distinguished in the request since it is argued that the downwardly extending rear wall of the upper cladding board is not received between the upwardly extending front and rear walls of the lower cladding board, as there is no contact between the downwardly extending rear wall of the upper cladding board and the upwardly extending rear wall of the lower cladding board. I concluded above that the proper construction of "*received between*" in the context of claim 1 is no more than to "*lie geometrically between*". The downwardly extending rear wall of the upper cladding board of the Hyperion product lies geometrically between the upwardly extending front and rear walls of the lower cladding board.
51. In my opinion all of the features of claim 1 of the patent are present in the Hyperion product and consequently I believe that the patent would be infringed by the product. The request refers only to claim 1 in the context of infringement and I offer no opinion regarding the remaining claims.

Conclusion

52. Based upon the evidence placed before me, in my opinion claim 1 of the patent involves an inventive step.
53. Further, it is my opinion that claim 1 of the patent would be infringed by the Hyperion product were it to be the object of any of the acts in section 60(1)(a).

Karl Whitfield
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.