

OPINION UNDER SECTION 74A

Patent	EP 2756136 B1
Proprietor(s)	International Refills Company Ltd
Exclusive Licensee	
Requester	Barker Brettell LLP on behalf of Talbot's Family Products UK LLP
Observer(s)	Norton Rose Fulbright LLP on behalf of International Refills Company Ltd
Date Opinion issued	07 May 2024

The request

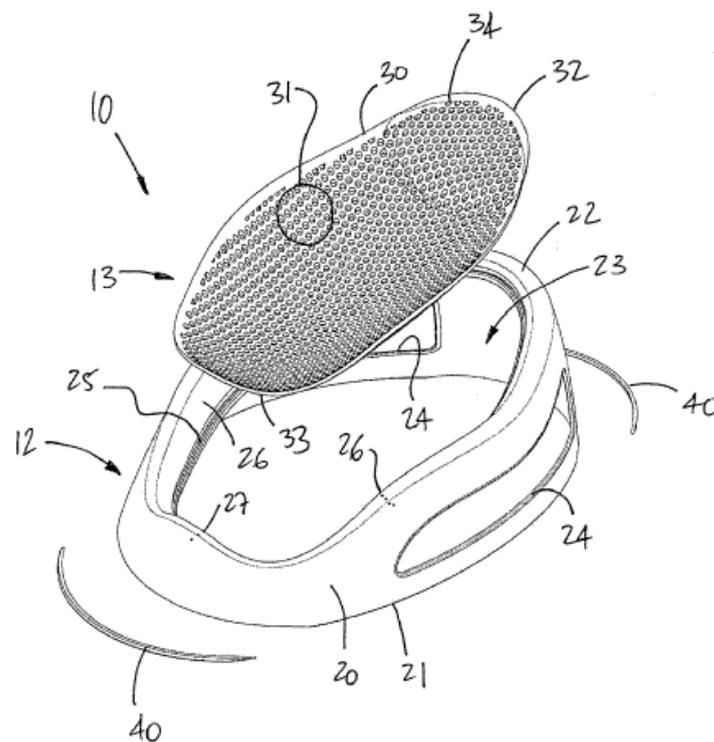
1. The comptroller has received a request from Barker Brettell LLP ("the requester") to issue an opinion as to whether a baby bath product sold by Talbot's Family Products UK LLP ("Talbot's product") infringes Patent EP 2756136 B1 ("the Patent") which was granted in the name of International Refills Company Ltd ("the proprietor") and is still in force.
2. The request was received on the 13th February 2024 and was accompanied by a statement explaining the request along with two videos of the product sold by Talbot's.
3. Observations were received from Norton Rose Fulbright LLP ("the observer") on behalf of the proprietor. The observations included arguments as to why the request should be refused. The observer referred to an alleged Amazon listing of the product in their observations.
4. Observations in reply were subsequently received from the requester.
5. I also note that a physical sample of Talbot's product was sent on the 19th February 2024 (a week after the request) and received at the UKIPO on the 22nd February. I note that Section 2.3 (part 3) of the hearings manual¹ states that any samples should be filed with the request. Therefore, as this physical sample was filed late, I shall not consider it.

The Patent

6. The Patent was filed on 10th September 2012 (claiming a priority date of 12th

¹ [Opinions manual - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100000/opinions-manual)

September 2021) and was granted on 7th November 2018. It relates to a support device used to support babies while bathing. In particular, the device has a frame 12, designed to be placed in a bath or sink, the frame having an opening 23 within which is provided a support panel 13 to support the baby during bathing. The support panel 13 has perforations 31 to allow fluid therethrough, and connection means are provided to hang the support panel 13 to the frame so as to cover the opening 23. Figure 1 of the Patent is reproduced below.



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

“A baby bath-support device (10) comprising:

a frame (12) having a generally rigid body adapted to be positioned on a surface of a bathing tub or sink, the frame defining an opening (23) in an upper portion, the opening comprising a peripheral edge;

a support panel (13) made of a flexible material and defining a concave support surface adapted to support a baby laid thereon during bathing, the support panel having a plurality of perforations (31) through the concave support surface to allow a fluid to flow therethrough, the support panel configured to conform to a shape of the baby; and

a connection arrangement (Fig. 5) between the frame and the flexible material of the support panel for hanging the support panel at the peripheral edge such that the flexible material of the support panel is hung to the frame to cover at least partially the opening,

wherein the frame comprises a wall (20) defining an annular body, with the opening being a top open end of the annular body.”

Claim Construction

8. 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*² and the Court of Appeal in *Actavis v ICOS*³.
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 designer or technician of baby bath devices.
10. In general, I think that the claims can be readily construed for the purposes of this opinion. However, the following parts of claim 1 have been highlighted with regard to how they should be construed:

“a support panel (13) made of a flexible material and defining a concave support surface adapted to support a baby laid thereon during bathing, [...] the support panel configured to conform to a shape of the baby”

11. Paragraphs 33 and 41 of the description are relevant to the interpretation of these parts of claim 1. They read as follows:

“[0033] The material used for the panel body 30 is a material that has more resilience than that of the rigid material of the frame 12, for comfort reasons. For instance, the panel support 13 is made of flexible material, to be relatively flexible in order to conform to the shape of the baby, thereby further increasing the stability between the baby and the support 13, in similar fashion to a hammock. Moreover, the material is selected so as to be subjected to the water of a bathing tub. For instance, polymers, and thermoplastic elastomers such as TPR, TPE and/or TPV are well suited to be used for the panel body 30. Alternatives include urethane and silicone, among numerous other possibilities.”

[...]

[0041] For clarity, the rigid nature of the frame 12 and non-rigid flexible nature of the support 13 are detailed. The frame 12 is said to be rigid in that it will generally maintain its shape without deforming excessively when exposed to low bending forces at temperatures similar to that at which the device 10 is used. Likewise, the support 13 is said to be non-rigid and/or flexible in that it will readily deform when exposed to low bending forces at temperatures similar to that at which the device 10 is used.”

² *Generics UK Ltd (t/a Mylan) v Yeda Research and Development Co. Ltd & Anor* [2017] EWHC 2629 (Pat)

³ *Actavis Group & Ors v ICOS Corp & Eli Lilly & Co.* [2017] EWCA Civ 1671

12. The observer has commented that claim 1 does not require the support panel to have any degree of flexibility other than the ability “to conform to the shape of a baby”. They consider that no minimum amount of deformation to accomplish is claimed or described in the Patent.
13. It is my opinion that, in light of the description and figures (in particular paragraphs 33&41), the person skilled in the art would construe the support panel as defining a concave support surface and be made of a relatively flexible and/or non-rigid material, that and will readily deform when exposed to low bending forces in order to conform to the shape of the baby, in similar fashion to a hammock.

Talbot’s product

14. The requester has supplied two videos showing Talbot’s product. The observer feels that these videos are fundamentally insufficient for the UKIPO to make any determination of infringement. However, an opinion is intended to be a relatively quick and simple procedure⁴ and I consider that there is enough information in the videos for me to form an opinion with regard to infringement.

Video 1

15. The first video is 26 seconds long and shows Talbot’s baby bath product from various angles. The grey-coloured perforated region is a support panel. Towards the end of the video, someone knocks/strikes on the support panel, and then turns the product over to knock/strike the support panel from underneath the product. Some screen shots are reproduced below:



⁴ See e.g. Section 1.1 of the hearings manual: [Opinions manual - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

Video 2

16. The second video is 8 seconds long and shows Talbot's baby bath product upside down (at the bottom of the video) along with another product (at the top of the video). The support panels for both products are then pressed by someone using the face of their respective hands.
17. The requestor states that they believe that this 'other' product at the top of the video is "according to ICR's Patent". However, there is no evidence of this – and comparison to an unknown product is not helpful in forming an opinion of whether Talbot's baby bath product itself infringes the Patent. Therefore, I will only consider what is shown regarding Talbot's product at the bottom of the video. Some screen shots showing the application of force to Talbot's product in Video 2 were highlighted by the observer (as figures 1&2) and are reproduced below:



Figure 1



Figure 2

Amazon listing

18. The observer has made reference to an alleged listing/advertisement for Talbot's product, highlighting the description of the product. These figures (as marked up by the observer) are reproduced below:

Nuby Newborn Baby Bath Support, Ergonomic Design, Lightweight and Portable, Suitable from Birth, White

£22.00

Brand	Nuby
Colour	White
Material	Polypropylene
Product dimensions	59D x 40W x 21H centimetres
Item weight	950 Grams
Age range (description)	Baby
Maximum weight recommendation	15 Kilograms
Portable	Yes
Assembly required	No

About this item

- PRACTICAL** – Our Nuby bath support is practical and convenient to use anywhere and being lightweight means you can take it with you wherever you go.
- EASE OF USE** – The super durable material holds its shape, and you can just place the bath support directly in your own bath or within a baby bath. The ergonomic design provides comfort and safety when bathing precious little ones.
- COMFORTABLE** – The soft grey material is super soft and warms quickly for added comfort. Furthermore, it drains water easily and air dries quickly.
- SUITABLE FROM BIRTH** – Our baby bath support is suitable from birth as we have had bathing your baby for the entirety of time, but it's so large you can take it out in the time.
- SAFETY** – Our bath support is made from a durable material and is designed to be safe for your baby.

Brand	Nuby
Colour	White
Material	Polypropylene
Product dimensions	59D x 40W x 21H centimetres
Item weight	950 Grams
Age range (description)	Baby
Maximum weight recommendation	15 Kilograms
Portable	Yes
Assembly required	No
See less	

About this item

- PRACTICAL** – Our Nuby bath support is practical and convenient to use anywhere and being lightweight means you can take it with you wherever you go.
- EASE OF USE** – The super durable material holds its shape, and you can just place the bath support directly in your own bath or within a baby bath. The ergonomic design provides comfort and safety when bathing precious little ones.
- COMFORTABLE** – The soft grey material is super soft and warms quickly for added comfort. Furthermore, it drains water easily and air dries quickly.

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. 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?

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

22. The requester has submitted that Talbot’s product does not comprise “a support panel made of a flexible material and defining a concave support surface adapted to support a baby laid thereon during bathing, [...] the support panel configured to conform to a shape of the baby” as required by claim 1.

23. The requester argues the support panel of Talbot’s product is made of hard plastic, as demonstrated by the knocking sound in video 1, and is thus not made of a

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

“flexible material”. The requester also comments that the product’s support panel does not deform or compress under the weight of a baby. In particular, the requester notes from video 2 that the support panel does not substantially deform under significant pressure provided by a fully grown adult – and thus is not “configured to conform to the shape of a baby”.

24. The observer argues that the person skilled in the art would understand that the sound created by striking the surface of the support panel of Talbot’s product in video 1 is not indicative of its flexibility – rather this would be determined by applying pressure or weight to the surface of the product. Furthermore, the observer points out that video 2 shows that the support panel does apparently stretch or deform as pressure is applied – with figure 1 of video 2 showing the panel ‘unflexed’ and figure 2 showing the panel in an apparent flexed state when pressure is applied. Therefore, video 2 demonstrates that the support panel of the Talbot product is made of a flexible material which is capable of deforming as pressure is applied.
25. The observer also notes that the pressure shown in video 2 is not necessarily indicative of how the support panel would behave when a baby is placed in the Talbot product - further noting the Amazon listing states that the Talbot product can accommodate babies up to 15 Kilograms. They also add that the Amazon listing describes the support panel as “super soft”, which is counter to the requester’s assertion that it is made of “a nonflexible material” or “hard plastic”.
26. In my opinion what is shown in the videos, namely the force required in video 2 to deform the Talbot’s support panel, and the force provided when knocking on the panel in video 1 indicate that the support panel of Talbot’s product is not flexible in order to conform to the shape of a baby as properly construed. Whilst the sound produced by knocking on the support panel itself is not necessarily indicative of rigidity or a lack of flexibility – the apparent force with which this knocking/striking is done and the lack of any resulting deformation indicate that the panel doesn’t readily deform when ‘exposed to low bending forces’. Similarly, whilst there is some deformation, the apparent force required to deform the support panel in video 2 in my opinion shows that the support panel of Talbot’s product is not comprised of a relatively flexible and/or non-rigid material, that will readily deform when exposed to low bending forces in order to conform to the shape of a baby. Furthermore, the support panel of Talbot’s product shown in the videos has no ‘hammock like’ flexibility or deformation.
27. Whilst I note the alleged description of the Talbot product in the Amazon listing, the statement regarding the support panel being “super soft” does not in my opinion provide any particular technical insight into the product. Rather this appears to provide enticing language expressing the panel’s texture (i.e. smooth rather than rough) as opposed to providing a clear definition regarding its flexibility. I also note that the listing states that Talbot’s product is of a durable material “which holds its shape”.
28. Therefore, it is my opinion that Talbot’s product does not infringe the claims as a matter of normal interpretation.
29. The second issue to be addressed is asking whether the variant provided by the Talbot product varies in a way(s) which is immaterial? The court in Actavis UK

Limited provided a reformulation of the three questions in *Improver*⁶ 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?

30. 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”.
31. In my opinion the Inventive concept lies in using a flexible material instead of rigid or fabric materials for the support device – as, for example, rigid materials and fabric do not permit an efficient flow and drainage of water about the baby (see e.g. paragraphs 2-4 of the description of the Patent). However, Talbot’s product does not achieve the same result in the same way - as it does not have a support panel which can readily deform/flex when exposed to low bending forces in order to conform to the shape of the baby. Therefore, it is my opinion that the support panel cannot be said to vary in a way that is immaterial.

Opinion

32. It is my opinion that Talbot’s product, as shown in videos 1&2 in the request, does not fall within the scope of the claims as a matter of normal interpretation, nor does it vary from the Patent in a way that is immaterial. Accordingly, it is my opinion that any actions in relation to the Talbot product, in particular its sale, do not constitute infringement of EP 2756136 B1.

Application for review

33. 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.

Ben Widdows
Examiner

⁶ *Improver* [1990] FSR 181

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.