

OPINION UNDER SECTION 74A

Patent	GB 2373806
Proprietor(s)	Hill & Smith Ltd
Exclusive Licensee	
Requester	Bailey Walsh & Co. LLP, on 19 March 2009
Observer(s)	Swindell and Pearson
Date Opinion issued	8 June 2009

The request

1. The comptroller has been asked to issue an opinion on the inventiveness of the claims of GB2373806B in light of the following documents:

D2- GB2295406A.

D3-EP0118323 – including an English language abstract

D4- Design drawings of the “Mini-Guard” safety barrier

D5- Design drawings of the “Mini-Guard” safety barrier

D6- Brochure “Achats Directs Collectives” with extract showing the “Mini-Guard” safety barrier and upper barrier element.

D7- Publication MELTT pages 61-63 showing the “Mini-Guard” safety barrier

D8- Invoice showing an order for the “Mini-Guard” safety barrier.

D9- Installation Guide for the “Mini-Guard” safety barrier.

2. The comptroller has also been asked to give an opinion on whether a safety barrier would infringe claim 1 of the patent if said safety barrier had all the features of claim 1 but a set of upper elements of only a single format to provide only a single type of delineation between regions.

Observations

3. Observations in reply were received from Swindell and Pearson 17 April 2009. The observations argued that a number of the documents were not relevant because they had not been available to the public. It was also argued that the claims of the patent were inventive and that there would be infringement of claim 1 by a barrier having only a single format of upper elements.

Observations in reply

4. Observations in reply were received on 5th May 2009.

Allowance of the request

5. D2 and D3 were considered in the pre-grant prosecution proceedings of GB2373806B but were not considered in relation to the other documents, thus I can consider them here.

6. D4 and D5 show technical drawings of the "Mini-Guard" barrier and the observer has argued that there is no evidence that they were available to the public at the time of the patent. No counter argument has been supplied by the requestor. Without evidence they were available to the public I cannot consider them in this opinion.

7. D8 is said to represent an invoice but it is in German and no translation has been provided. The observer argues that it was not available to the public as it is by, and addressed to, the same company. The requestor does not provide a counter argument on this point and therefore I again cannot take it into account.

8. D9 is said to show an installation guide for the Mini-Guard barrier but it is not dated, as far as I can tell, therefore there is no evidence it was available at the time of the patent and I cannot take it into account.

9. It has also been argued by the observer that there is no evidence that D6 was available to the public at the time of the patent. This seems to be an advertisement of some kind and is dated 1996 and includes a contact phone number and address. On balance, it appears to me that this document could have been available to the public at the time of the patent and I will consider with regard to inventive step. Even if this was not correct it seems to show the same system as D7 which appears to be an extract from a publication which shows the "Mini-Guard" system and is dated 1997. It has not been specifically argued by the observer that this document was not available to the public and I will therefore consider it.

10. In summary, with regard to inventive step I will consider whether the claims are inventive in light of documents D2, D3, D6 and D7.

The patent

11. There is one independent claim, which reads:

A safety barrier system; having elongate barrier elements arranged to be connectable end-to-end to form a safety barrier upstanding stably between regions; a plurality of sets of upper elements; the sets being interchangeably mountable on said barrier elements to provide further delineation between regions to either side of the barrier elements; the barrier elements each carry a spigot formation at one end and a complementary socket formation at the other end for connection of the barrier elements end-to-end by insertion of said spigot formations into said socket formations; the sets of upper elements having different formats whereby to provide different types of delineation between the regions.

12. The following drawing helps illustrate what is claimed. The upper elements are indicated by numeral 44 and the base portions can be seen to be connected by a spigot and socket formation.

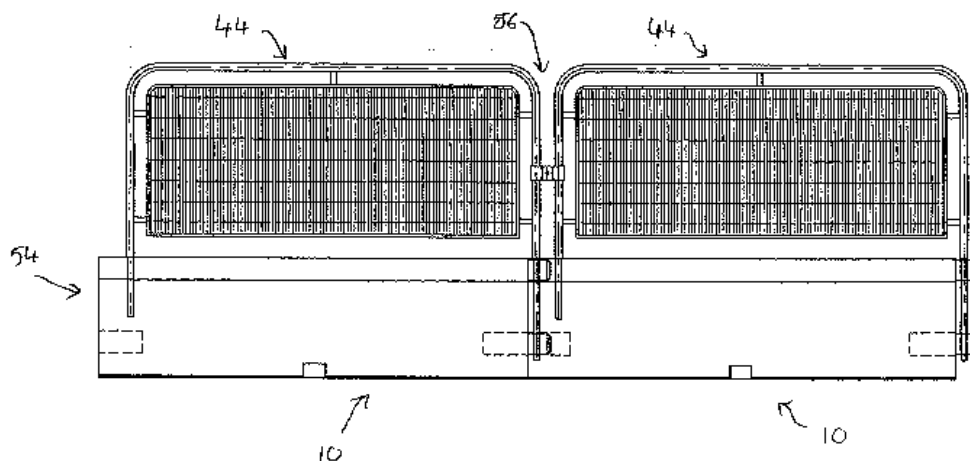


Fig 8

Claim construction

13. There has been a great deal of argument on a number of aspects of claim 1 regarding what the person skilled in the art would understand the claim to mean. I will therefore consider these points in the manner set out in *Kirin-Amgen and others v Hoechst Marion Roussel limited and others* [2005] RPC 9. The key point being “what a person skilled in the art would have thought the patentee was using the language of the claim to mean”. I will

therefore interpret this aspect of the claim in a purposive manner and interpret it in light of the description and drawings, taking into account the Protocol to article 69 of the EPC.

14. A major point of contention is the meaning of “the sets of upper elements having different formats whereby to provide different types of delineation between the regions”. The requestor argues that the words of the phrase should be given their normal dictionary definition, “the Oxford English Dictionary definition of “different” means something that can be distinguished from something else. The Oxford English Dictionary definition of “format” means the style or manner of an arrangement. The Oxford English Dictionary of “delineate” means to outline.”

15. The observer argues that the phrase should be interpreted in light of the description and relates to the provision of different upper elements which allow the barrier to perform different functions such as acting as a crowd restraint barrier, protecting a working zone, and the provision of a highly visible barrier. In this respect I tend to agree with the observer as *Kirin-Amgen* warns against using a literal interpretation as proposed by the requestor. I am of the opinion the person skilled in the art would understand the phrase to mean the provision of different upper elements to allow the barrier to serve different functions.

16. There has also been some argument on what constitutes a safety barrier. The description is largely concerned with providing a vehicle safety barrier but it is explicitly stated in the first paragraph of page 1 that “The present invention relates to safety barriers and in particular, but not exclusively, to temporary safety barriers used as vehicle safety barrier systems.” I am therefore of the opinion that the person skilled in the art that would understand the term to be broader than a vehicle safety barrier and encompass safety barriers of other types. I am also of the opinion that the person skilled in the art would understand that a barrier would delineate two regions. There has been specific argument as to whether D3 shows a safety barrier. Given the construction I have placed on the term I am of the opinion that it does, at least in figures 1, 2, 3, 5 and only in the portion of fig 4 which shows three elements adjacent one another. There is no indication in the other drawings in figure 4 that the elements shown are connectable end-to-end to form a barrier.

Inventive step

17. Section 3 of the Act states:

An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which

forms part of the state of the art by virtue only of section 2(2) above (and disregarding 2(3) above).

18. In order to assess the inventiveness of the claims I shall follow the test set out in *Pozzoli SPA v BDMO SA [2007] EWCA Civ 588*, that restates the version set out in *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd [1985] RPC 59*. I will therefore consider the following steps.

- (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 do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention.

19. I believe the person skilled in the art to be someone involved in the design, manufacture and possible installation of safety barriers.

20. I think that person would have knowledge of not only vehicle safety barriers but safety barriers in general. From what has been discussed in the section on claim construction this seems consistent with the patent where it is stated the patent is relevant to safety barriers and not exclusively vehicle safety barriers.

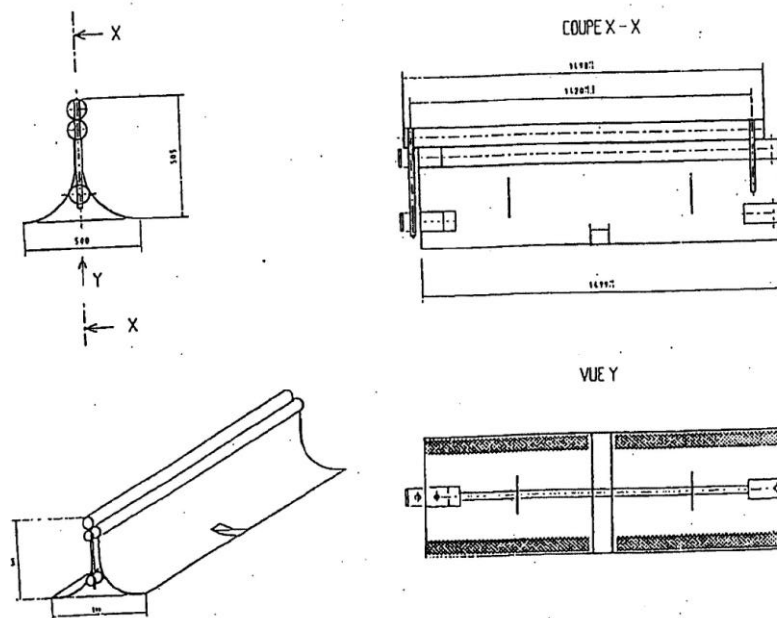
21. There would appear to be potentially two inventive concepts to the claim, namely that the barrier elements carry a spigot at one end and a socket at the other for connection of the barrier elements end-to-end. The second potential inventive concept would appear to be the provision of sets of upper elements having different formats to provide different types of delineation between regions.

22. The state of the art would appear to be elongate barrier structures that are connected end- to-end to form a barrier. It is also stated in the patent that the state of the art includes a wall upstanding from a base, the base being flared outwardly. The difference between the state of the art and claim 1 would therefore in essence be the inclusion of upper elements of different form to provide different types of delineation and the use of a spigot and socket connection.

23. The question which therefore has to be answered is whether these differences would have been obvious steps for the person skilled in the art.

24. As indicated earlier and given the knowledge I have assumed the person skilled in the art to have I am of the opinion that the skilled person would be aware of documents, D2, D3, D6 and D7.

25. I will deal with the question of the spigot and socket connection first. The "Mini-Guard System" of documents D6 and D7 is illustrated in the following figure. It shows a barrier portion which has a spigot on when end and a socket on the other end for complimentary connection to other barrier portions to form a barrier.



26. As indicated earlier, I am of the opinion documents D6 and D7 would be available to the public and the person skilled in the art would be aware of the "Mini-Guard" system. As a consequence I do not think it would involve any ingenuity for the person skilled in the art to connect barriers, which form the state of the art, by use of a spigot and socket.

27. Turning now to the question of whether it is inventive to provide upper elements having different formats to provide different types of delineation I will first consider document D2, two figures of which are shown below.

FIG 1.

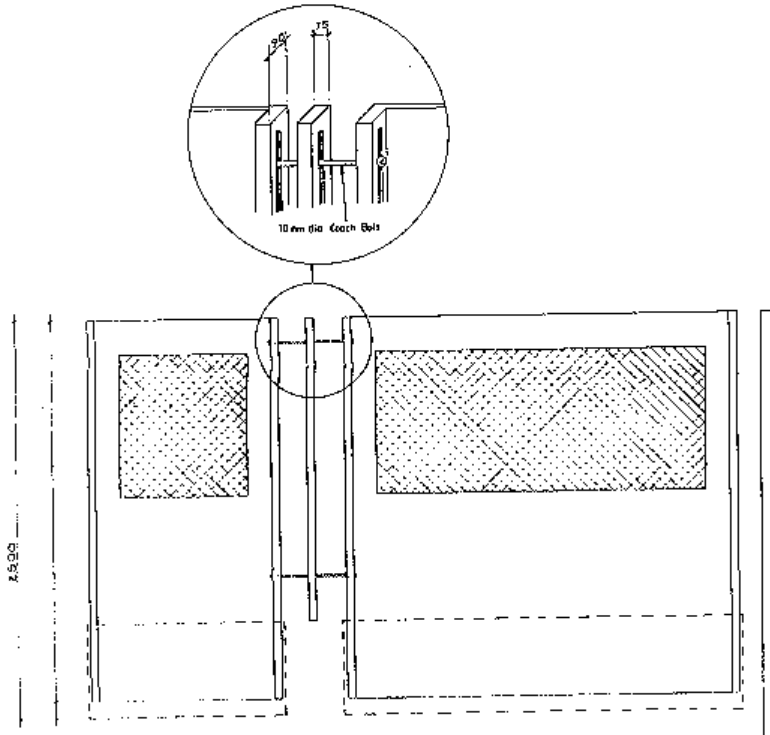
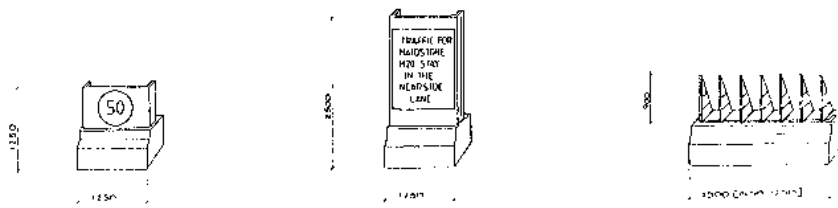


FIG 4



ROAD HOARDINGS

28. Document D2 shows a barrier system to secure the perimeter of a construction site and I therefore consider it to be a safety barrier as construed earlier, in that it has the inherent feature of protecting people from the construction area. It would seem to disclose a barrier having a lower base portion and upper elements in the form of hoarding panels that can be attached to the lower base portion.

29. Figure 4 of the document shows different types of panel that can be connected to a base but no explanation is given as to what exactly the figure shows, the description merely says the figure "shows the additional panel sizes and potential applications". It is possible in fig 4 that the saw-tooth arrangement would represent upper elements of different format when compared to the elements showing a speed sign etc but there is no detail in the document to explain this. In addition, the arrangements I have just referred to are not shown in a barrier form and there is no suggestion in the document to say they should be coupled together. Fig 4 does show three barrier sections coupled together to form a barrier but there is no detail on the upper element. I cannot therefore say that the upper elements shown are different to the hoarding elements otherwise disclosed. I also do not think it would be reasonable for the skilled man to understand this to show a barrier having upper elements of different form that provide different types of delineation, in the way I have construed the phrase to mean.

30. I am the opinion that the person skilled in the art would have to employ some inventive ingenuity to include elements of different form that provide different types of delineation even in light of this document.

31. Turning to document D3, a figure of which is shown below.

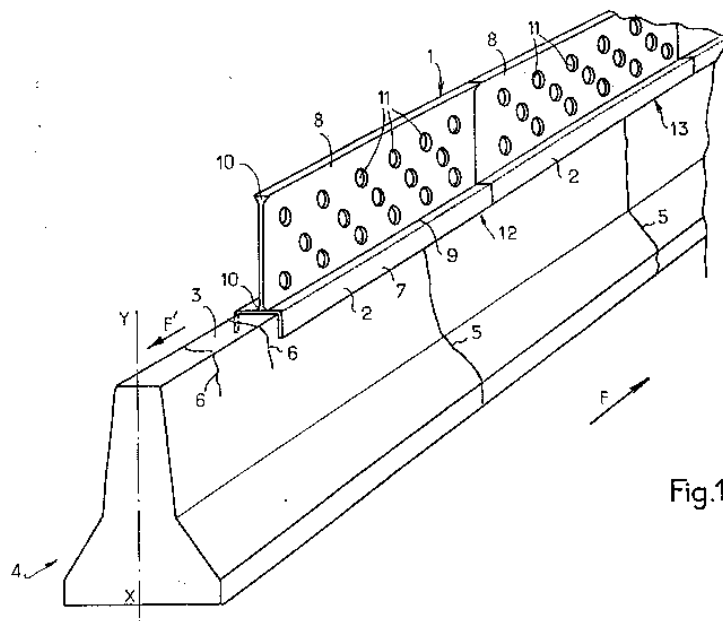


Fig.1

32. This document shows a barrier formed from adjacent concrete bases on top of which are attached elements which improve the visibility of the barrier. Figures 2 and 3 of the document show the upper elements can include different formations 15 and 17 of different shapes. These formations are said to allow wind and debris to pass through the element. Document D3 would also seem to say the form of the said formation can be varied to obtain the same goal as the invention of D3, said goal of D3 seemingly to be to provide a lane separating safety barrier with improved visibility. Therefore although it may be argued that it may show upper elements of different formats, it is my opinion the upper elements do not allow for different types of delineation.

33. In summary, as I do not consider D3 to show upper elements having different formats to provide different types of delineation. I am of the opinion that the skilled man would have to apply some inventive ingenuity to arrive at claim 1 in light of document D3.

34. Claims 2-16 are ultimately dependent on claim 1 therefore by this fact alone I am of the opinion they are inventive, as are the omnibus claims 17 and 18.

Infringement

35. I have been asked to give an opinion on infringement by a hypothetical barrier having all the features of claim 1 of the patent but only including upper elements of a single format to provide a single type of delineation. Such a barrier would in effect be the same as that shown in documents D2 and D3 with the inclusion of a spigot and socket connection. From the discussion on

inventive step it appears to me that the inclusion of upper elements of more than one form to provide different types of delineation is critical to the inventiveness of claim 1. I am also of the opinion that the inclusion of a spigot and socket would be an obvious adaption of common forms of safety barrier.

36. The requestor makes the point that the observer cannot argue that the barrier of claim 1 is novel and inventive and also that supply of the barrier of D2-D9 would infringe claim 1. I agree with this point and it is stated in *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd [1985] RPC 59 at page 77* that “it would be wrong to prevent a man from doing something which is merely an obvious extension of what he has been doing or of what was known in the art before the priority date of the patent granted”.

37. The observer argues that a supplier of the hypothetical barrier “would know, or it would be obvious from reading the patent, that those means being supplied would be suitable for putting the invention of the patent into effect in the United Kingdom by the simple addition of one or more further sets of upper elements” and there would consequently be infringement. If I were to accept this argument, then I would also have to conclude the patent was not valid. I do not however agree with the argument as it would not only be necessary to simply add more than one other additional sets of upper elements but those elements would have to allow for different type of delineation. As I have indicated earlier it is that aspect which I am of the opinion makes claim 1 inventive. It therefore follows that supply of a barrier having a single set of upper elements to provide a single form of delineation would not infringe the claim.

Conclusion

38. Based on the information I have been given it is my opinion that claim 1 is inventive over the documents supplied and that there would be no infringement of claim 1 by the hypothetical barrier described by the requestor.

Application for review

39. 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.

Lyndon Ellis
Examiner