

OPINION UNDER SECTION 74A

Patent	EP(UK) 1408284
Proprietor(s)	Mr Mike Donnelly
Exclusive Licensee	
Requester	Mr Mike Donnelly, on 11 June 2008
Observer(s)	Mr Richard Wragg
Date Opinion issued	9 September 2008

The request

1. The comptroller has been asked by Mr. Mike Donnelly via his agent Murgitroyd and Company to issue an opinion as to whether claims 1-3, 8, 15, 18, 19 and 21 of EP 1408284 B1 (which designates GB) is infringed by the importation and distribution of a pipe cowl (hereinafter referred to as the Flowflex Pipe Cowl). It is stated that the Flowflex Pipe Cowl was invented by Mr. Richard Wragg and imported into the UK and distributed to plumbers' merchants by Flowflex Holdings Limited. In support of the request the following has been provided.

A sample of the Flowflex Pipe Cowl

A copy of a leaflet describing the features and advantages of the Flowflex Pipe Cowl

A Copy of a notice published on the website of Eaga Partnership Charitable Trust on 16 May 2008 endorsing the use of the Flow Flex Pipe Cowl in their installations.

A screenshot of the Eaga's installers portal showing the link to the above notice

Copies of two written quotations for retail and trade prices for the Flowflex Pipe Cowl supplied by Plumbing Trade Supplies

A copy of an email from Flowflex Holdings Limited confirming that it imports the pipe cowl from China.

2. The leaflet describing the features and advantages of the Flowflex Pipe Cowl is shown below, the pipe cowl itself being shown just below the installation drawings.

NEW PIPE COWL FROM FLOWFLEX

THE QUICKEST, NEATEST, SIMPLEST AND CHEAPEST WAY TO FIT THE PRESSURE RELIEF VALVE TERMINATION

Only one soldered connection to make.

Just solder the cowl onto a short length of copper pipe and push through the pre-drilled hole in the brickwork. From the inside simply pull inwards until the cowl is a loose fit against the brickwork and cut to length.

There's no fabricating to make outside, particularly useful at higher levels. The new Pipe Cowl is manufactured to EN 1254 and fully complies with all current legislation.


It has passed the stringent requirements and is in use with British Gas and also conforms to the requirements of the NHBC.

Architects choose the Pipe Cowl because it has a neat installed finish that is guaranteed to be consistent on every installation, no matter which contractor is used. It is unobtrusive and does not offend the look of the building or create an obstruction, no matter where it is fitted.

15mm and 22mm available

Patent No. 2429000 - EP 1429 076A
 Britpat - GB 2 396 20-4A

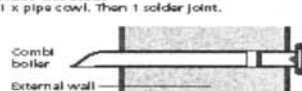
Compare the difference

 <p>Only one soldered connection</p> <p>Faster to fit</p> <p>Neat finish every time</p> <p style="text-align: right;">✓</p>	 <p>2 bends</p> <p>1 length of tube</p> <p>3 solder joints</p> <p>every installation is different</p> <p style="text-align: right;">✗</p>
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Save 30-40 minutes when fitting a combi boiler with the new pipe cowl


NEW method:
1 x pipe cowl, then 1 solder joint.

Current method:
2 x 90 bends, 1 x length tube, then 3 x solder joints.



Combi boiler

External wall



Combi boiler

External wall

New Pipe Cowl
15mm and 22mm available

The New Pipe Cowl is available from leading Plumbers Merchants.

For further details contact:
 Telephone: +44 (0) 1298 727211
 Fax: +44 (0) 1298 72362
 e-mail: sales@flowflex.com



FLOWFLEX

Flowflex Group of Companies, Samuel Blaser Works, Dove Pond Lane, Tongue Lane Industrial Estate, Buxton SK17 7LR England.

05/06/2008

Observations

3. Observations were received by means of an email from Mr. Richard Wragg on July 14th 2008 which dispute the allegation of infringement.

Observations in reply

4. Observations in reply were received from Murgitroyd and Company on behalf of Mr. Mike Donnelly on 25th July 2008, which were largely concerned with disputing the interpretation of claim 1 made by Mr. Richard Wragg.

Allowance of the request

5. The patent has been granted and is still in force in the UK. In light of the evidence supplied by the requestor there is no doubt that the Flowflex Pipe Cowl has been imported into the UK and has been made available for use in the UK by Flowflex Holdings Limited. It also seems clear that it has been used in the UK. It is of note that none of this has been disputed by the observer.

The patent

6. The patent was granted on 29.1.2006 and designates GB. It is still in force.

7. There is one independent claim and one semi-independent claim, which reads:

Claim 1: Apparatus for expelling fluid to the external environment from a boiler (10) situated internally of a building, the apparatus comprising a conduit (16) connectable at its first end to a pressure relief valve on said boiler (10) and having its second end open, in use, to the external environment, the conduit (16) having an end portion (20) connected to its second open end, said end portion (20) being adapted to intercept fluid expelled from the second open end of the conduit (16), characterized in that the end portion (20) is substantially cup-shaped and has its concave inner surface facing the open end of the conduit (16).

8. Claim 21 is also of particular interest and that reads:

Claim 21: A method of installing the apparatus according to any of claims 1 to 20, said method comprising the steps of i) forming an aperture (12) through an external wall (14) of sufficient dimensions to allow passage of the apparatus (1) therethrough; ii) inserting the apparatus (1) with the pre-attached end portion (20) into the aperture

(12); iii) positioning the apparatus (1) such that the end portion (20) lies beyond the external surface of the wall (14); and (iv) connecting the first end of the conduit (16) to the boiler (10).

9. The following drawings help to understand the patent. A boiler is illustrated at 10 and in the event of the pressure of the water in the boiler exceeding a safe threshold, a safety valve opens to allow fluid from the boiler 10 to travel through conduit 16 and to be directed back towards the wall 14 by the cup-shaped end portion 20.

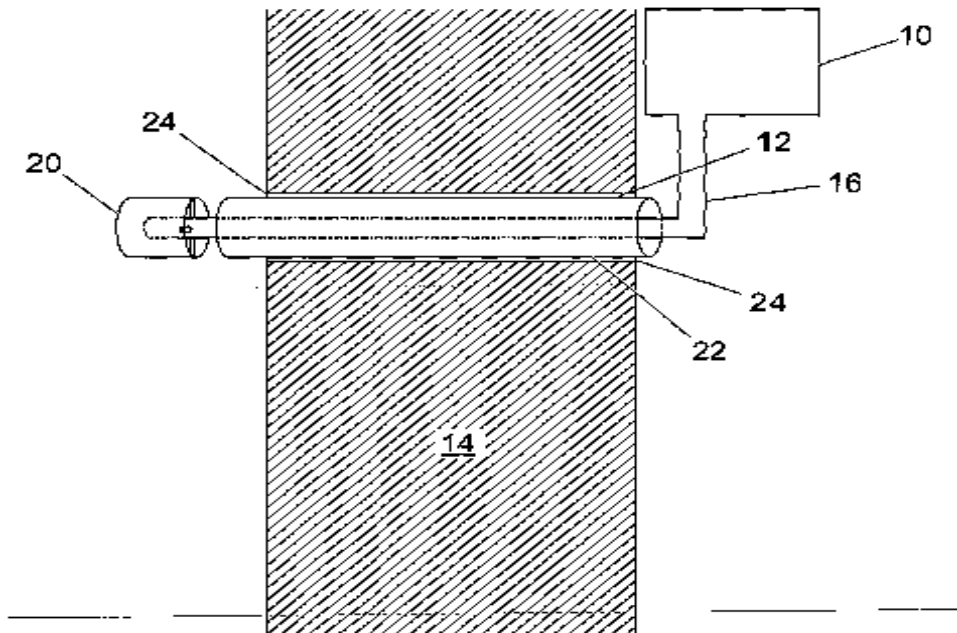
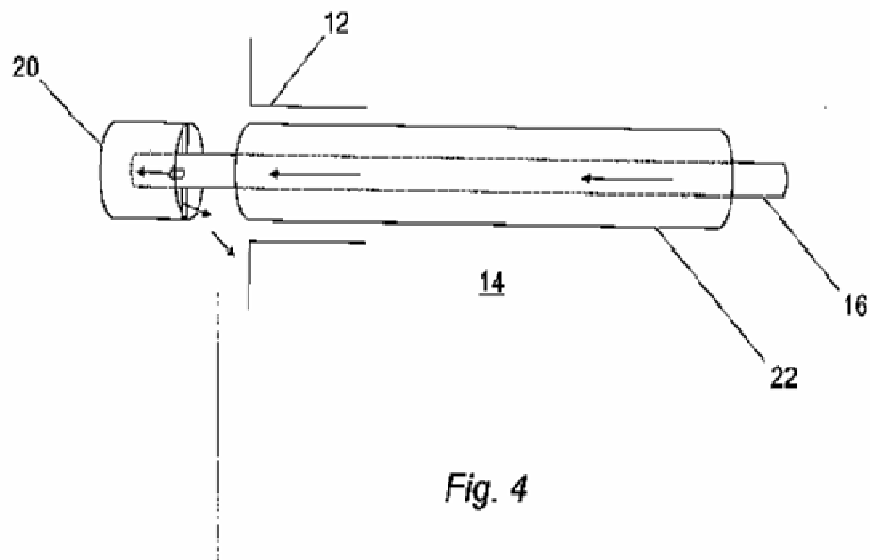


Fig. 3



Claim construction

10. The claims are clear but there has been discussion by both the requestor and the observer as to what constitutes “cup-shaped”. The requestor asserts that the phrase “that the end portion is substantially cup-shaped” should not be interpreted literally. The observer has argued that the end portion on the allegedly infringing article is not cup-shaped and is better described as “dish shaped” having typically “less than a 30 degree fold”. In order to decide the proper construction to put upon this aspect of the claim I shall follow the standard principles of claim construction as set out in *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. I must put a purposive construction on the claims; interpret them 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. In simpler language 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.

11. The observer argues that a dish shape is materially different to a cup shape and for this reason the article does not infringe. I am not convinced by this for a number of reasons. It is clear that both designs achieve the same

aim and that is to direct vented fluid back in the direction it has come and towards a wall. Both designs aim to simplify the prior art arrangement of having to attach an unsightly U-bend of pipes which require a number of solder joints. This is accomplished in the patent by use of a cup-shaped end portion and in the allegedly infringing article by what the observer defines as a dish shaped end portion. The observer is asking me to apply a literal interpretation of the phrase “cup-shaped” which is contrary to the guidance in *Kirin-Amgen*. From reading the patent, taking in to account the description and drawings I am not of the opinion that the skilled man would construe “cup-shaped” so narrowly. Firstly in the description and the claims it is stated that the end portion is “*substantially* cup-shaped”. Secondly, paragraph 0055 states that “The end portion 20 may be any shape that directs the fluid back towards the wall 14 effectively”. Cups come in various shapes and I do not think the skilled reader would understand the claims to be restricted to a certain form of cup, say for example, one with parallel sides.

12. With regard to slight variations in shape, this was considered by the Court of Appeal in *Dyson Appliances Ltd v Hoover Ltd [2002] RPC22* where the claim described a feature as “frusto-conical”. The judge held that the term was not to be interpreted precisely as required by a mathematical definition but rather to be construed purposely so as to encompass a shape, generally frusto-conical which achieves the desired concentration and separation of fine particles (i.e the desired result). I feel this is consistent with interpreting the substantially cup-shaped end portion of the patent to encompass the, as the observer put it, the dish shaped portion of the allegedly infringing article and it also consistent with *Kirin- Amgen*.

13. A second aspect of the claims which also requires interpretation is what constitutes the “conduit”. The conduit in the patent is represented by the pipe labelled 16 that is shown to extend from the fluid deflecting end portion 20 to the boiler 10. The claims also state that the conduit 16 is connectable at its first end to a pressure relief valve on the boiler. The description is also consistent in this regard. In contrast, although the Flowflex Pipe Cowl includes a short length of tube which is connected to the deflecting end portion I do not consider the skilled person would consider this to be a conduit as set out in the claims of the patent. It is clear from the Flowflex installation leaflet that the Flowflex Pipe Cowl is meant to be connected to a conduit and it is this conduit which connects up with the boiler. I therefore consider the Flowflex Pipe Cowl, as supplied, to not include a conduit until it is connected to a further length of pipe.

14. Now that I have decided that the end portion of the infringing article falls within the scope of the cup-shaped end portion of the patent I will consider whether the article infringes the patent.

The law

15. Two aspects of the Act regarding infringement appear to be potentially relevant to this case, as follows.

16. Section 60(1) reads as follows:

“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.”

17. Section 60(2) reads as follows:

“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.”

Infringement

18. In order to determine possible infringement, I will break the claims down into convenient integers and consider each in turn.

19. Claim 1: Apparatus for expelling fluid to the external environment from a boiler (10) situated internally of a building,

20. It is clear from the supplied sample pipe cowl and the advertising literature that the alleged infringing article relates to an apparatus for expelling fluid from a boiler situated internally of a building.

21. the apparatus comprising a conduit (16) connectable at its first end to a pressure relief valve on said boiler (10) and having its second end open, in

use, to the external environment,

22. Neither the physical sample of the Flowflex Pipe Cowl which has been provided or any of the supporting literature shows the apparatus comprising a conduit. In fact, the Flowflex leaflet states “just solder the cowl onto a short length of pipe”. The requestor, when describing the Flowflex Pipe Cowl also states “The Flowflex Pipe Cowl is a pressure relief valve termination intended to be connected to a combi boiler by means of a short length of copper pipe”. For at least this reason there does not appear to be direct infringement under Section 60(1). However, turning to contributory infringement under 60(2), it is clear that in use (for the reasons just given) the apparatus is intended to be connected to a conduit (as shown in the Flowflex leaflet). Said conduit is connectable to a pressure relief valve on a boiler, as evidenced by the leaflet from EAGA titled “Pressure relief valve termination”. The terminating end outside the building is open to the environment.

23. the conduit (16) having an end portion (20) connected to its second open end, said end portion (20) being adapted to intercept fluid expelled from the second open end of the conduit (16),

24. In the Flowflex leaflet it is shown that when in use, the conduit is connected to an end portion and this end portion is adapted to intercept the fluid from the conduit.

25. characterized in that the end portion (20) is substantially cup-shaped and has its concave inner surface facing the open end of the conduit (16).

26. The end portion of the allegedly infringing article is “cup-shaped”, as construed above, and has an inner surface which faces the open end of the conduit.

27. For there to be contributory infringement the reasonable man must also have knowledge that the means is suitable for putting the invention into effect and also that it is intended to put the invention into effect in the UK. It seems clear from the Flowflex leaflet that the reasonable man would know from the instructions given how to put the pipe cowl into effect and it is also clear from the information supplied by the requestor that the pipe cowl has been put into effect in the UK.

28. I am therefore of the opinion claim 1 has potentially been infringed under Section 60(2) of the Act.

29. Turning to claim 21, which relates to the installing of the apparatus of

claim 1 and which I shall again break down into a number of integers. The method requires:

30. i) forming an aperture (12) through an external wall (14) of sufficient dimensions to allow passage of the apparatus (1) therethrough; ii) inserting the apparatus (1) with the pre-attached end portion (20) into the aperture (12);

31. In the installation instructions in the Flowflex leaflet, it states that “Just solder the cowl onto a short length of copper pipe and push through the pre-drilled hole in the brickwork.

32 iii) positioning the apparatus (1) such that the end portion (20) lies beyond the external surface of the wall

33. The leaflet goes on to say “From the inside simply pull the cowl inwards until the cowl is a loose fit against the brickwork and cut to length.

34. (iv) connecting the first end of the conduit (16) to the boiler (10).

35. In the drawing on the Flowflex leaflet, the conduit is shown to be connected to a Combi boiler and is described as a “Pressure relief valve termination” in the EAGA leaflet. Furthermore for the pipe cowl to function, the conduit must be ultimately connected to the boiler.

36. I am therefore of the opinion that claim 21 is indirectly infringed by the Flowflex Pipe Cowl under Section 60(2) of the Act.

37. Turning now to the appendant claims.

38. Claim 2: Apparatus according to claim 1, wherein the conduit (16) and end portion (20) are of circular cross-section and the end portion (20) has a diameter greater than that of the conduit (16).

39. The Flowflex Pipe Cowl is clearly circular in cross-section and the end portion has a diameter greater than that of the conduit. I therefore find this claim to have been indirectly infringed.

40. Claim 3: Apparatus according to claim 2, wherein the end portion (20) is cup-shaped and has its concave inner surface facing the open end of the conduit (16).

41. As discussed earlier, the end portion of the Flowflex Pipe Cowl

is cup-shaped and it clearly has a concave inner surface to direct fluids in a desired direction (back towards the wall). I therefore find this claim to have been indirectly infringed.

42. Claim 8: Apparatus according to any preceding claim, wherein the conduit (16) is adapted to extend from a connection to said pressure relief valve on the internally situated boiler (10) to the external environment via an aperture (12) in an external wall (14) of said building.

43. As discussed earlier the Flowflex leaflet states “Just solder the cowl onto a short length of copper pipe and push through the pre-drilled hole in the brickwork. From the inside simply pull the cowl inwards until the cowl is a loose fit against the brickwork and cut to length.” As discussed earlier the conduit eventually connects to the boiler. I therefore find this claim to have been indirectly infringed.

44. Claim 15: Apparatus according to any preceding claim, wherein said end portion (20) is pre-fitted to the conduit (16) during manufacture.

45. The requester argues that “This is clear from the sample product. Moreover, the Flowflex leaflet emphasises that there “is no fabricating outside to make”. I cannot agree with this argument. As discussed earlier I have interpreted the conduit to mean the pipe which eventually connects to the boiler. I take the Flowflex Pipe Cowl as supplied to be the pipe cowl with no conduit attached (given the interpretation I have given to the term conduit). There has been no evidence supplied that the pipe cowl is pre-fitted to the conduit. Indeed, the Flowflex leaflet makes it clear that the pipe cowl has to be soldered on to a short length of pipe and this is then pushed through the brickwork to connect to the boiler. I do not think the skilled addressee would interpret this arrangement as being the same as having the conduit pre-fitted and as such I do not find this claim to have been infringed.

46. Claim 18: Apparatus according to any preceding claim, wherein said boiler (10) is a household combination boiler.

47. The Flowflex leaflet refers to a Combi boiler. There is nothing to indicate the Combi boiler is used in a household but that does seem to be a common use of Combi boilers, so that if it were used in a household the claim would be infringed.

48. Claim 19: Apparatus according to any preceding claim, wherein said end portion (20) is formed of copper.

49. It seems from the sample the Flowflex Pipe Cowl is made from copper, as is often the case with plumbing products, in my own experience. I therefore find this claim to have been indirectly infringed, if the Flowflex Pipe Cowl is made from copper.

Conclusion

50. I therefore conclude that import and making available of the pipe cowl, invented by Mr Richard Wragg, by Flowflex Holdings indirectly infringes claims 1, 2, 3, 8, (18, 19, subject to the caveats above), and 21 of the patent under Section 60 (2) of the Act.

Application for review

51. 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. Under rule 98(5), such an application for review may be made only on the grounds that, by reason of its interpretation of the specification of the patent, the opinion wrongly concluded that a particular act did not or would not constitute an infringement of the patent.

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.

Lyndon Ellis
Examiner