

OPINION UNDER SECTION 74A

Patent	GB 2339667
Proprietor(s)	Mr John Hadleigh
Exclusive Licensee	
Requester	Mr John Hadleigh, on 26 October 2007
Observer(s)	Anonymous
Date Opinion issued	28 January 2008

The request

1. This opinion relates to a request as to whether or not the invention defined in claim 1 of GB 2339667 (hereinafter “the patent”) is infringed by two products alleged to have been imported into the United Kingdom and sold by HHS Trading (UK) Ltd.
2. The request is accompanied by a pair of colour advertisements obtained from the HHS website showing the two articles that are alleged to infringe. The advertisements appear to have been printed on 25 October 2007; the first (**D1**) bears the legend, ‘Bird Bath and Table’, whilst the second (**D2**) is entitled, ‘Bird Feeder, Bath and Planter’.

Observations; observations in reply

3. Observations were filed by an unidentified third party, which asserted that neither of the products infringed the patent. No observations were received from HHS Trading (UK) Limited.
4. Observations in reply have also been received from the requester. Whilst the requester disagreed with the observer’s conclusions, he supported the right of the third party to file observations anonymously. There are no provisions in section 74A nor rule 96 (formerly rule 77F) that prohibit anonymous observations. Accordingly, I intend to fully consider the observer’s comments in this opinion.

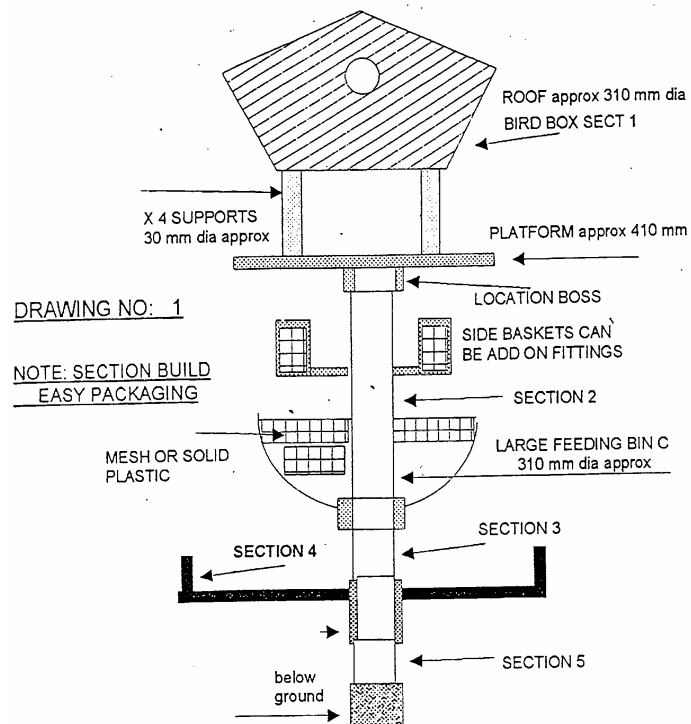
The patent

5. The invention disclosed in GB 2339667 relates to a bird feeding table comprising a plurality of feeding elements supported on a pole at different heights. The patent was filed on 22 July 1998 and has remained in force since being granted on 19 July 2000. Therefore, the patent was in force when the products were offered for sale.

6. There is only one claim, which reads as follows:

“A bird feeding table having more than one feeding container or tray each being supported centrally on a pole, each container or tray being at a different level on the pole, there being at the lowest level, a plastics tray having an upstanding peripheral lip, the plastics tray having a horizontal area larger than the horizontal area(s) of the or each tray or container above.”

7. Although extremely brief, the description of the patent indicates that the large plastics tray at the lowest level (also referred to as the “base lid” in the patent) is intended to prevent cats from jumping onto the table and from seeing birds that are feeding within the tray. The lower tray also has the advantage of catching bird feed from any upper container so as to avoid floor spillage and consequential ground feeding. A preferred embodiment of the invention is shown in Drawing 1 below:



Claim construction

8. My first task in considering possible infringement is to decide on how to interpret the claim of the patent. Only then, am I able to form an opinion as to whether or not the products of **D1** and/or **D2** fall within the scope of the claim so construed.

9. The latest authority on claim construction is presented in *Kirin-Amgen Inc v Hoechst Marion Roussel Limited* [2005] RPC 9. This decision directs that I should put a purposive construction on the claim and 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. To put it simply, 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. I will proceed on the assumption that the skilled person will be a manufacturer or vendor of structural garden products used in the care of animal wildlife.

10. Both the requester and the observer appear to agree that the majority of the wording used in the claim is clear. The requester acknowledges that the phrase, “a horizontal area [of the lowest plastics tray is] larger than the horizontal area(s) of the or each tray or container above” may require clarification. Meanwhile, the observer has identified some additional terms that could be considered further to ensure they are interpreted correctly. These will now be discussed below.

A. “bird feeding table”

11. The observer comments that the description of the patent as well as the title refers to the bird table of the invention as being “cat-free”. The observer also points out that the specification states that the construction of the table is such as to “mak[e] it *impossible* for cats to climb” as well as “to jump onto the table, or see birds that are feeding from within the base lid”. The observer further notes that there are no qualifications in the description to suggest that this is anything other than an essential requirement of the invention. Thus, the observer is of the view that the term, “bird feeding table” should be construed specifically as a “cat-free bird feeding table”.

12. Contrastingly, the requester has replied that it would be unrealistic to expect the protection against cats to be absolute and I believe that the skilled reader would take a similar view. Like all animals, cats can vary significantly in size and may even use garden or topographical features, such as a fence or elevated ground, to assist in their efforts to reach birds feeding at the table. I agree with the requester, therefore, that the claim should not be construed in the narrow fashion proposed by the observer.

B. “upstanding peripheral lip”

13. The observer states that the upstanding peripheral lip of the lowest plastics tray must be one which encompasses a lip that is substantially vertically disposed relative to a planar base. I note that the requester has agreed with this interpretation in his observations in reply and I believe he is right to do so.

14. However, I decline to accept the observer’s assertion that the lip should be construed as being formed so as to make it *impossible* for a cat to jump onto a higher container or tray or to see birds feeding within the lowermost tray. For the reasons set out above, I agree with the requester that it is unrealistic to expect the lip to completely exclude cats or their view of the birds. Indeed, I note the patent indicates that the lowest tray is also intended to collect food spillage from any upper containers. It is implicit, therefore, that the peripheral lip serves to minimise escape of this food onto the ground and as such, its purpose is not solely to protect against cats.

15. Although not discussed by the requester or the observer, I do not think that the word, “lip” should necessarily be understood as relating only to an outer rim. Whilst the description discloses “a lower plastic base lid [i.e. the lowermost tray] with raised outer lip”, it also refers to the base lid and its “sidewall”. When read in this context, it seems that the skilled person is being directed to interpret the “lip” as encompassing the sidewall of the tray. I shall therefore construe the term accordingly.

16. To summarise, I take the view that the skilled addressee would understand the “upstanding peripheral lip” to embrace a sidewall or rim disposed substantially vertically with respect to a planar, horizontal base.

C. “having a horizontal area larger than the horizontal area(s) of the or each tray or container above”

17. Despite the patentee’s concerns in his initial request regarding this part of the claim, I concur with the observer that this feature appears to be clear. The observer has emphasised that the wording specifically applies to the receptacle at the lowermost level and I think this is quite plain from the context of the claim.

18. Although the requester has agreed with the observer’s interpretation in his observations in reply, the original request suggested that the words, “horizontal area”, should be construed as “diameter”. However, I do not feel this interpretation is necessarily appropriate. There is no indication in the patent that the invention should be limited to the use of circular receptacles. In my opinion, I believe that the skilled person would understand “a horizontal

area” to be a horizontal footprint, i.e. the surface space occupied by the outline of an object.

D. “more than one feeding container or tray”

19. The meaning of the words, “container” and “tray” should be self-evident and there is no indication in the patent that these terms should be afforded anything other than their normal interpretation. Neither the requester nor the observer have discussed this part of the claim. However, I think it appropriate to record that, in my view, for an article to constitute a container, sidewalls must be provided so as to substantially enclose any contents therein. In the case of a tray, the article should be generally shallow and flat with a raised peripheral edge. I believe that the skilled addressee would take the reference to “feeding” to mean that the receptacles must be capable of accommodating food.

E. “there being at the lowest level, a plastics tray”

20. Whilst there is no real debate of this feature between the parties, I think it is important to make clear how the wording would be construed by the skilled person. In particular, I need to establish whether or not the requester is right when he refers to the “lowest level tray *or container*” in his submissions. In the first instance, it is necessary to establish whether or not the plastics tray is encompassed by the phrase, “more than one feeding container or tray”. If it is separate from this requirement, I have to conclude that at least three different receptacles must be present. On the other hand, if the plastics tray is embraced by this wording, a minimum of two receptacles would be envisaged.

21. In deciding upon the correct interpretation, I notice that the final part of the claim states that the lower plastics tray has a horizontal area larger than “*the or each tray or container above*”. As this wording suggests that only one upper receptacle may be present above the lowermost tray, I have to conclude that the invention comprises a minimum of two feeding elements. Therefore, the lower tray must be included in the reference to the “more than one feeding container *or tray*”. The skilled person would also understand from this that only two feeding containers may be present in the absence of any trays. Since I have already construed the quoted phrase as encompassing the lower plastics tray, I agree with the requester’s subtle point that the lowest tray should be interpreted as a “tray or container”.

Infringement

22. Having construed the claim, it is now necessary for me to determine whether or not the patent is infringed by the products of **D1** and/or **D2**. I shall adopt the approach of taking each feature of the claim in turn and assessing whether the respective products possess that feature. If either of the products

meet all of the requirements of the claim, I must conclude that the patent has been infringed.

23. I should take this opportunity to point out that the print-outs supplied by the requester are of rather poor quality and whilst some of the writing can be discerned, much is illegible. Although each print comprises a set of photographs which are generally clear enough for me to consider, I may not be able to reach a definitive conclusion in respect of some parts of the claim without introducing a suitable caveat.

Document 1

24. The advertisement of **D1** is entitled 'Bird Bath and Table' and contains a photograph showing a structure with a first upright post projecting from a round stand. A circular bird bath with a circumferential lip appears to be supported centrally on this post. A second shorter upright post extends upwardly from the bird bath. The uppermost portion of the second post appears to diverge into a number of equally spaced arms, which support the underside of a bird table. The bird table comprises a flat, circular base having a smaller horizontal footprint than the bird bath and a roof supported by four uprights projecting from the uppermost surface of the flat base. **D1** also lists a number of seemingly advantageous features to the effect that the product is *inter alia* "weatherproof", "rot proof", "easy to assemble", "won't rust or corrode", and has "all the looks of a cast iron table". I will now compare each part of the claim with the features disclosed in **D1**.

25. The first section of the claim refers to "*A bird feeding table having more than one feeding container or tray each being supported centrally on a pole*". **D1** provides a bird feeding structure with two feeding portions in the form of a bird bath and a bird table. The bird bath is capable of holding food and I agree with the requester that it qualifies as a feed container though not a tray. However, the main question I need to ask in connection with this part of the claim, is whether or not I should accept the requester's assertion that the bird table portion constitutes a tray or container.

26. The bird table of **D1** appears to comprise a flat, circular base or platform having a low level, inner circular fence located away from the periphery of the platform. The fence itself comprises a pair of horizontal rails supported above the base by a series of spaced posts, there being sizeable gaps between adjacent posts. Whilst the platform would be able to support bird food, I do not believe that the large spaces within the fence would particularly assist the retention of feed. It seems to me, therefore, that the fence is intended to be either ornamental or to act as a perching area for feeding birds.

27. I also note that Drawing 1 of the patent depicts a bird table section comprising a feeding platform located beneath what appears to be a nesting box. I can find no statement in the specification to the effect that the platform should be construed as a container or tray and the embodiment shown in the particular drawing fully meets the requirements of the claim without having to interpret it as such.

28. The bird table platform shown in Drawing 1 also comprises a footprint larger than the two containers immediately beneath, although it covers a smaller area than the lowest container. Nevertheless, the description of the patent makes clear “each lower feed container [is] larger than the ones above”. I believe a person skilled in the art would interpret this to mean that the lowest container has a larger footprint than the container above, which has a larger footprint than the next container above, and so on, as shown in Drawing 1. Since the feeding platform of the uppermost part of the unit shown in the patent has a larger footprint than the two containers directly below, it seems reasonable to assume that the patentee did not consider the platform to constitute a tray or container. This conclusion suggests that I should take a similar view in respect of the platform of **D1**.

29. Although I believe the platform shown in **D1** would be capable of accommodating bird food on its upper surface, the platform does not appear to fall within either of the previous definitions I afforded to the terms, “tray” and “container”. I do not consider the fence portion to constitute a suitable retaining sidewall or a raised peripheral edge. Furthermore, the roof of the bird table slopes downwards from a central apex and could in no way constitute a suitable receptacle.

30. Claim 1 also requires that “each container or tray [is] at a different level on the pole”. Inspection of **D1** shows the bird bath to be located beneath the bird table and thus, they are at different heights on the post. This aspect has not been commented upon by the observer and I assume there is no dispute in the matter.

31. The next part of the claim refers to “there being at the lowest level, a plastics tray having an upstanding peripheral lip”. The lowest receptacle of the unit shown in **D1** is a bird bath with an outer circumferential lip. However, due to the illegible writing in **D1**, I am unable to conclude with any certainty whether the bath is formed from a plastics material. The observer has not made any comment in this respect. The advantages listed in **D1**, i.e. “weatherproof”, “rot proof”, “won’t rust or corrode”, “all the looks of a cast iron table” may suggest that a polymer resin has been used in the construction of the article but this is by no means conclusive. Nevertheless, I shall assume, for the time being, that this is the case.

32. Both the observations and the requester's observations in reply seem to agree that the upstanding lip should be interpreted as one "that extends substantially vertically relative to the feeding container or tray". However, the observer contends that the bird bath of **D1** does not comprise this feature. Certainly the main photograph in **D1** appears to show that the circumferential sidewall of the bird bath extends upwardly from the base of the bath at an angle of around 45 degrees before terminating at a substantially horizontal, outer rim. Therefore, I think that the observer is correct in the assertion that the lower receptacle of **D1** does not comprise an *upstanding* peripheral lip when the claim is properly construed.

33. The final clause in claim 1 refers to "*the plastics tray having a horizontal area larger than the horizontal area(s) of the or each tray or container above*". Whilst the lower bird bath of **D1** appears to have a horizontal footprint larger than that of the bird table portion, I have already decided that the feeding platform of **D1** is not a container or tray. Accordingly, it must follow that this part of the claim is not disclosed by **D1**.

34. It is unfortunate that the evidence provided by the requester is not sufficient for me to be certain that the article of **D1** comprises a lower *plastics* receptacle. Ultimately, I do not believe the outcome of the opinion hinges on the presence or absence of this particular feature. It is my view that the product lacks an upper container or tray but even if I am wrong about this, the lowest container does not comprise an upstanding peripheral lip. Therefore, the article of **D1** does not infringe the claim of the patent.

Document 2

35. The main photograph displayed in the advertisement of **D2** is very similar to that of **D1** although most noticeably, a circular plant container is provided near to the bottom of the unit between the bird bath and the round stand. The plant container has a smaller footprint than the bird bath and is supported centrally on the pole. I also note that the underside of the bird table roof comprises a solar-powered light and a smaller inset photograph appears to show a set of hooks attached to the edge of the roof. The roof itself comprises downwardly sloping surfaces extending from a central flat portion, which, if I were to speculate, may possibly be a solar panel. **D2** also gives a list of benefits similar to **D1**, such as "100% weather proof and rot proof", "won't rust or corrode", and "all the looks of a cast iron table".

36. I do not consider the presence of the solar-powered light and the hanging hooks to have any material effect on whether or not the product of **D2** infringes the patent and I intend to put these additional features to one side. As I have already done with **D1**, I will now assess **D2** on the basis of each part of the claim.

37. The first section of the claim refers to “*A bird feeding table having more than one feeding container or tray each being supported centrally on a pole*”. In my analysis of **D1**, I decided that the bird table portion did not qualify as a container or tray within the meaning of the claim. As the feeding platform of **D2** appears to be substantially similar to that depicted in **D1**, the same conclusion must apply. The roof is also constructed in such a way that it could not be described as a receptacle. However, **D2** comprises a planter towards the bottom of the product, which clearly qualifies as a container or tray. Thus, in combination with the bird bath, I consider the product of **D2** to comprise the plurality of receptacles required by the claim.

38. Claim 1 also specifies that “*each container or tray [is] at a different level on the pole*”. By inspecting **D2**, I can see that the planter is located beneath the bird bath and hence, they are clearly at different levels on the post. This matter seems to be accepted by the observer.

39. The next part of the claim refers to “*there being at the lowest level, a plastics tray having an upstanding peripheral lip*”. The planter is located lowermost on the product shown in **D2** as opposed to the bird bath in **D1**. The detailed text of **D2** is insufficiently legible for me to determine whether or not the planter is formed from a plastics material. Nevertheless, like **D1**, the advantages listed in terms of the product being “100% weather proof and rot proof”, “won’t rust or corrode”, and that it has “all the looks of a cast iron table” may imply the use of a polymeric resin. I shall therefore proceed, for the time being, on the assumption that a plastics material has been used.

40. The planter also comprises a circumferential sidewall that is substantially vertical. Accordingly, I believe the planter incorporates an upstanding peripheral lip or sidewall within the meaning of the claim when properly construed.

41. The final clause in claim 1 refers to “*the plastics tray having a horizontal area larger than the horizontal area(s) of the or each tray or container above*”. It is my opinion that the plant container of **D2** at the foot of the unit constitutes the lower container and the bird bath represents an upper container. As I have already stated, I do not think that the bird table portion of **D2** can be construed as a container or tray.

42. Despite the presence of upper and lower containers, it is plain that the planter of **D2** has a smaller footprint than the bird bath. The importance of the lower receptacle having the largest footprint is evident in the patent: it is required to ensure that spillage from the other container(s) above is captured and does not fall to the ground. Clearly, the planter would not fulfil this function.

Conclusion

43. I conclude that the article shown in **D1** does not infringe the patent. Despite the assumption that the lowest receptacle, in the form of the bird bath, is manufactured from a plastics material, I do not consider the bird table at the top of the product to constitute a feeding container or tray. Therefore, the product of **D1** comprises only one receptacle. Even if this conclusion is wrong, the lowest container does not comprise an upstanding peripheral lip because both the sidewall and the outer rim of the bird bath are not vertical or substantially vertical.

44. In addition, I conclude that the product shown in **D2** does not infringe the patent. Even if the lowermost container or tray in the form of the planter is produced from a plastics material, the planter does not have a horizontal area or footprint larger than the container above (i.e. the bird bath).

Opinion

45. Neither of the products shown in **D1** or **D2** infringe the patent

Application for review

46. Under section 74B and rule 98 (formerly rule 77H), the proprietor may within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.

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

Paul Minton
Examiner