

PATENTS ACT 1977

APPLICANT	Siltbuster Limited
OPPONENT	Kelly Tanks Limited
ISSUE	Application under section 74B for review of Opinion 07/19 in respect of GB2467005B
HEARING OFFICER	H Jones

DECISION

Introduction

- 1 In Opinion 07/19, the examiner was asked to address the question of whether the Hydrodem pH Control System ("the HpC System") produced by Kelly Tanks Limited infringes Siltbuster Limited's patent number GB2467005B ("the patent"). It was the examiner's opinion that it did not. Siltbuster have requested a review of the Opinion and ask for it to be set aside. Kelly Tanks, who requested the original Opinion through its director Kelly Bryant, oppose the application for review.
- 2 Both sides have agreed that I should decide the matter on the basis of their written submissions. The submissions I have considered are the statement of grounds dated 7 October 2019 prepared by Williams Powell LLP and submitted by Abel & Imray, the counter-statement dated 22 November 2019 prepared by Mathys & Squire LLP and the further brief comments provided by Abel & Imray on behalf of Siltbuster on 19 December 2019.

Grounds for review

- 3 The grounds for a review under section 74B are set out in rule 98(5) of the Patents Rules 2007 (as amended):

98(5). The application may be made on the following grounds only -

(a) that the opinion wrongly concluded that the patent in suit was invalid, or was invalid to a limited extent; or

(b) that, by reason of its interpretation of the specification of the patent in suit, the opinion wrongly concluded that a particular act did not or would not constitute an infringement of the patent.
- 4 The nature of a review under section 74B was considered by the Patents Court in

*DLP Limited*¹, in which Kitchen J said:

"22.....I believe a Hearing Officer should only decide an opinion was wrong if the examiner has made an error of principle or reached a conclusion that is clearly wrong."

- 5 Both sides appear to agree that the examiner directed himself correctly as to the appropriate law on claim construction and infringement.
- 6 Siltbuster say that the examiner wrongly concluded that Kelly Tanks Limited's HpC System did not fall within claims 1 and 5 of the patent and therefore did not infringe. In particular, the examiner incorrectly construed the claims of the patent by construing "portable unit" to mean a "single portable apparatus comprising three regions", leading to the wrong conclusion that there was no infringement. In addition, or alternatively, the examiner incorrectly defined the inventive concept of the patent as "a single complete piece of apparatus for the receiving, separating and treatment of washout, which can be transported between sites" such that the examiner wrongly concluded there was no infringement pursuant to the doctrine of equivalents. They request that the Opinion be set aside.
- 7 Kelly Tanks say that there is no evidence to show that the examiner was not perfectly justified in reaching the conclusion that he did, let alone anything to say that his conclusion was "clearly wrong". They request that the Opinion be upheld.

Argument & analysis

- 8 The examiner provides a general overview of the invention at paragraph 3 of the Opinion and sets out the wording of claims 1 and 5 of the patent at paragraphs 4 and 5. At paragraph 10 of the Opinion, he says that there are a number of points of construction that need to be addressed in respect of these claims, in particular the construction of the term "portable unit" in claim 1 and the term "unit" in claim 5, both of which comprise a washout receiving region, a region for storing untreated/treated washout and a region for accommodating the neutralising agent used for treating the washout. His conclusion at paragraph 11 is that the person skilled in the art would construe a portable unit to be a singular portable apparatus comprising three regions, noting that the description at page 12, lines 2-3 refers to the unit as being a conventional "skip" shape and that the description at lines 6-9 of the same page refer to the unit as being conceptually divided into three regions.
- 9 Siltbuster say that the examiner was wrong to conclude that the portable unit was a singular portable apparatus comprising three regions. They say that the word "unit" in the claims is not a term of art and should be given its normal meaning; for example, the Compact Oxford English Dictionary (Second Edition) defines the term "unit" as "A piece of ... equipment which may be fitted with other pieces to form a larger system, or which is itself composed of smaller complementary parts". They say that on a normal reading of the term, a "portable unit" should be understood to mean a portable apparatus which can be composed of smaller complementary parts. They say that there is no requirement that the apparatus be "singular", as was construed by the examiner, and that there is no reason for the skilled person to import such a meaning.

¹ DLP Limited [2007] EWHC 2669

- 10 Siltbuster acknowledge that although reference is made in the description to the unit being "conceptually divided into three regions", they say that it is clear that there are, in fact, at least two distinct, or separate sub-units in the preferred embodiment: the area containing liquid (i.e. the washout receiving region and the liquid chamber) and the chamber containing the neutralising agent which is contained and attached to the liquid chamber, but physically separated. Further, as is explained in the description at page 8, lines 4-12, the unit may further include a removable permeable sack accommodated in the washout receiving region. This sack, which is used for retaining solids from the washout, can be removed to enable simple removal of the solid materials from the unit, which Siltbuster say provides for removable and separate sub-units within the unit.
- 11 In respect of the examiner's statement that the unit is a "conventional skip shape", Siltbuster say that this provides no more than a general indication of the shape of the unit. The reference to "skip shape" would be understood by the skilled person to mean, capable of being transported, preferably on traditional skip transporting vehicles, and it is clearly not meant intentionally to exclude a unit which is, for example, square in shape as opposed to rectangular, or, which, as is the case in the preferred embodiment, contains a cut-out of a corner of a conventional skip shape. In any case, Siltbuster say that the drawings and parts of the specification relied upon by the examiner when construing the claims, are stated to be an example of the invention; the skilled person would not, therefore, see them as a proscriptive list of features that must be present in the claims.
- 12 The question I must answer is not a whether I disagree with the examiner's construction of the claims but whether the examiner's construction was wrong, i.e. that it was an entirely unreasonable construction. In my view, there is nothing in what Siltbuster say that shows the examiner's construction was clearly wrong. Claims 1 and 5 define a unit comprising distinct regions for i) receiving washout, ii) for storing the untreated and treated washout and iii) for housing the neutralising agent used in treating the washout. The patent describes how the unit can be transported between sites, for example by lorry, once it is no longer needed at the first site. Hence the need for the unit to be portable. The benefit provided by the invention appears to be that all the elements required for the treatment of washout are contained in a single unit that can be transported easily between construction sites. This is entirely consistent with the examiner's view of what the skilled person would understand the claims to mean.
- 13 On the question of infringement as a matter of normal interpretation, the examiner was of the view that the HpC System did not comprise the three regions needed for treating washout in a single, self-contained unit. Instead, he considered the HpC System to be a modular arrangement comprising a water treatment system and separate dosing unit connected to it. Siltbuster say that the examiner was led to this wrong conclusion on infringement because of his incorrect construction of claims 1 and 5. I have already found that the examiner was not clearly wrong in his construction of these claims, and his conclusion of non-infringement by the HpC System naturally follows. The examiner was not clearly wrong in his assessment of infringement as a matter of normal interpretation.
- 14 On the question of infringement by an immaterial variation, the examiner concluded that the inventive concept revealed by the patent is a single complete piece of

apparatus for the receiving, separating and treatment of washout, which can be transported between sites. This is consistent with his finding on construction of claims 1 and 5, and here again he is led to the conclusion that the HpC System, which is a modular arrangement, is not an immaterial variant. I do not find that his conclusion was clearly wrong despite the contrary view of Siltbuster.

Conclusion

- 15 I conclude that the examiner did not make an error in principle or reach a conclusion that is clearly wrong. I therefore make no order to set the opinion aside.

Costs

- 16 Neither side has asked for their costs. Given the nature of these proceedings, I make no order in this regard.

Appeal

- 17 Any appeal must be lodged within 28 days after the date of this decision.

H Jones

Deputy Director, acting for the Comptroller