Intellectual Property Office

BL O/620/18

5th October 2018

PATENTS ACT 1977

PROCEEDINGS

Application under Section 72 of the Patents Act 1977
to revoke Patent EP(UK) 1 059 899 B
&
Application under Section 71 of the Patents Act 1977 for a declaration of non-infringement in respect of Patent EP(UK) 1 059 899 B

BETWEEN

Haddenham Healthcare Ltd	Claimant
and	
Pawel Sawlewicz	Proprietor/ Defendant

HEARING OFFICER Stephen Probert

For the claimant: Mr Michael Hicks instructed by Roger Moore & Associates
For the defendant: Ms Izabela Sokolowska-Kulas of Praecedo Law Office

Hearing date: 25 September 2018

DECISION

1. This decision concerns two consolidated applications by Haddenham Healthcare Ltd ("Haddenham") in respect of a granted patent EP(UK) 1 059 899 B ("the patent") standing in the name of Pawel Sawlewicz (the proprietor/defendant). One application is under Section 72(1)(a) of the Patents Act, and seeks revocation of the patent on the grounds of lack of novelty and/or inventive step. The other application is a request for a declaration of non-infringement under Section 71 of the Act.

2. The patent relates to an auxiliary device for putting on therapeutic compression garments — especially tights, knee-length socks and full-length stockings. Similar devices have commonly been used to put on therapeutic compression garments with an open-toe tip. They allow the compression garment to be easily slid over the foot and leg, and the device can then be removed through the hole in the toe part of the sock or stocking. The device described and claimed in this patent allows the compression garment to be slid over the foot and leg in the same way as the prior art, but the device can be removed through the other (inward facing) end of the compression garment. This means that it can be used to fit compression garments that do not have an open toe.

The patent

3. The patent has an earliest date of 6 March 1998. It has two claims — the second being dependent on the first. Both claims were discussed during the hearing, and for convenience I will reproduce both of them here:-

> 1. An auxiliary device for putting on therapeutic compression garments, especially tights, knee-length socks and full-length stockings which is made from low friction factor fabric **characterised in that** it has the shape of a plane figure with a beneficial catch element (1) in the form of a pocket for inserting the toes at its one end; at the opposite end there is a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well known fasteners.
>
> 2. The device described in Claim 1 characterises of the fact that the catch element (1) beneficially has a fastener (3) in the form of a press stud or Velcro®.

4. The drawings included in the patent show the location of the pocket (1) at the toe end of the device.

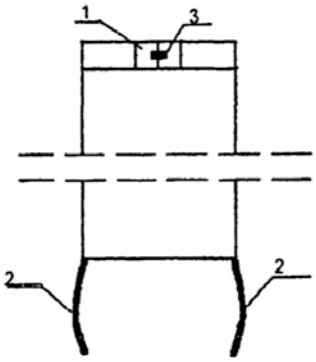

fig. 1

fig. 2

5. The patent specification describes three embodiments of the invention. Example 1 is described thus:-

> **[0008]** The device is made from material which is smooth on both sides and of low friction factor of its surface. The device is rectangular in shape and is 60 centimetres long and 40 centimetres wide. At one end of the device there is a pocket 1, which is 2 centimetres deep. At the opposite end, there is a tape 2 attached. The device is used in the following manner: The toes are inserted into the pocket 1, the cloth of the device is put around the leg so that it covers the whole of the leg surface smoothly, possibly without any folds or wrinkles. The top part of the device is attached to the leg with the tape 2 by tying it around the leg. Once that is done, a compression stocking is pulled up on the leg in a usual way. Then, by using a hand, (through the stocking) the toes are freed from the pocket 1, the tape is undone, and having been pulled by its top the device is removed from under the stocking.

6. Example 2 is described as being "*made just like in example 1*", except that pocket (1) is closed with a fastener (3) in the form of Velcro®. In this embodiment, the device is used in the same way as example 1, except that instead of freeing the toes from the

pocket by using a hand through the stocking, the device is *“energetically pulled”* at the top, causing the Velcro® to come undone thus freeing the toes from the pocket, and finally the device can be removed from under the stocking by being pulled by its top.

7. Example 3 is a very slight variation on example 1, in which the pocket (1) is curved to follow the shape of toes.

Prior Art

8. The claimant relies on one earlier patent specification, WO97/08981A1 (“Arion”). Arion was published on 13 March 1997 — before the earliest date of the patent. The claimant’s statement of case also refers to common general knowledge, presumably in relation to the inventive step challenge, but this ground was not pursued at the hearing and is not mentioned in the claimant’s skeleton argument.

9. Arion describes two devices to be used for putting on compression stockings. Both are intended for use with stockings that do not have an open toe. The first (shown in figures 3 & 4a) is described as a ‘known aid’ and is said to be “*rather complicated and expensive*”. The second device (shown in figures 7a & 7b) is according to the invention in Arion, and is said to be “*manufactured relatively inexpensively, is particularly reliable in operation, and can be used very easily*”. Mr Hicks submitted that both Arion devices anticipated Mr Sawlewicz’s patent.

10. The device described as the ‘known aid’ in Arion is shown below.

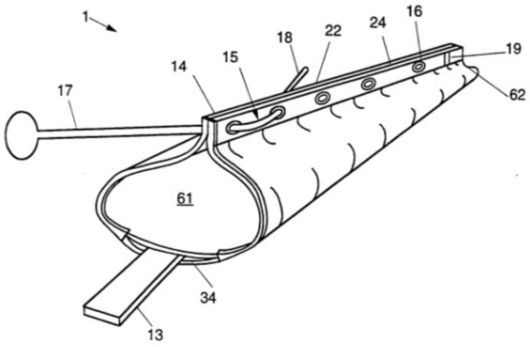

Fig. 3

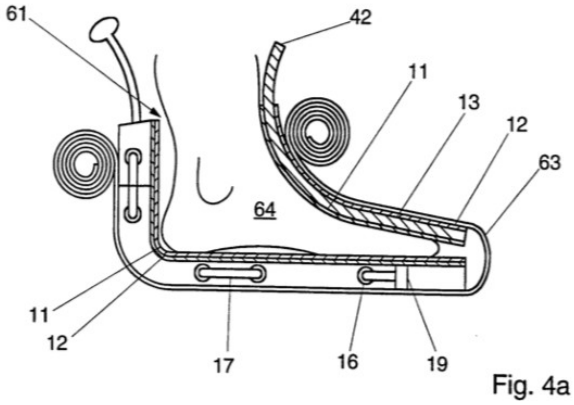

Fig. 4a

11. In use, this device is described as having a “tubular configuration”, the transverse dimension of which tapers from one end to the other. The user’s foot is inserted into the broader end of the tube, until it almost reaches the other end. The compression stocking is pulled over the device, and then the ‘coupling rod’ (17) is drawn out. The device can then be withdrawn from under the compression stocking by pulling the tab (13 in figure 3).

12. The device according to the invention in Arion is shown on the right. It works in a similar way to the previous device. But it does not use a coupling rod to hold the seam of the tube together; instead it uses an alternative joining means, such as eg. Velcro®. As with the previous device, it is described in Arion as having, in operation, the form of a '*tapering tube*'.

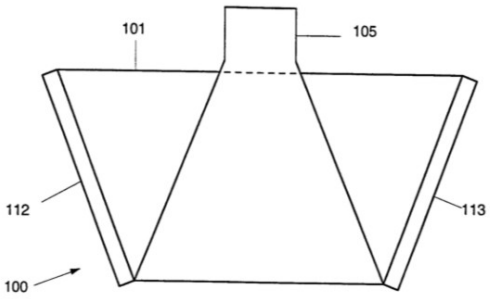

Fig. 7a

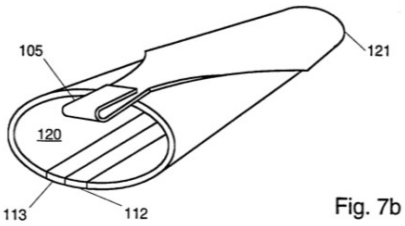

Fig. 7b

13. The double skin, or folded back, formation of the tapering tube allows it to be removed from under the stocking by peeling it back over itself, rather than simply dragging it out between the skin and the compression stocking. A similar concept is used to separate the seams (112 & 113) while they are under the compression stocking. A simple arrangement of Velcro® having the hooks on one seam (eg. 112) and the loops on the other seam (ie. 113) would require considerable force to separate the seams in order to remove the device from under the compression stocking. So the two seams are provided with hooks (132 & 133), and a separate coupling band (134) provided with loops runs the length of the seams, and is broad enough to cover both seams 132 & 133. The cross sectional view in figure 8a gives the idea.

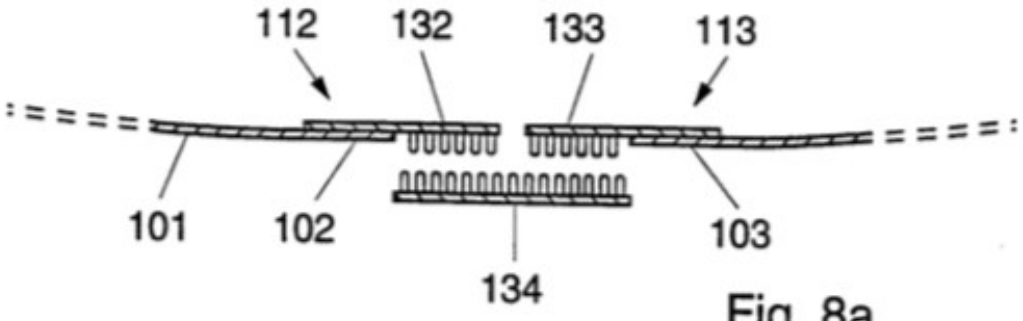

Fig. 8a

Evidence

14. The only 'evidence' in the case, apart from the Arion patent specification, is a sample of the claimant's product — the "Gus Comfort" — which was supplied with its packaging and instructions for use [1]. I was provided with a sample of the defendant's product, but I had no use for it. I have also disregarded a two page colour illustration of an Arion product called "Magnide". This was attached to the claimant's statement of case in the revocation action. The pages are not dated, and from what I could see, the Magnide device appears to be a much more recent development of the devices described in the former Arion patent. [2]

---

[1] See Annex A to this decision.

[2] The "Magnide" device appears to be described in a subsequent Arion patent specification, EP2478800A1, which has a priority date of 20 January 2011 — over a decade later than the earliest date of Mr Sawlewicz's patent.

Novelty & Obviousness

15. In order to anticipate the claims of the patent, one or other of the devices described in Arion must have all of the integers required in the claims. The claimant suggests that the characterising portion of claim 1 can conveniently be divided into four integers thus:-

> *(1) it has the shape of a plane figure*
>
> *(2) with a beneficial catch element (1) in the form of a pocket*
>
> *(3) for inserting the toes at its one end;*
>
> *(4) at the opposite end there is a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well known fasteners.*

16. I can see why the claimant prefers this division, since it separates the word *"pocket"* from the words *"at its one end"*, making it easier to map the four integers onto distinct features of the devices shown in Arion. For example, in relation to integer 2, the claimant argues that each of the tapering tubes shown above in figures 3 and 7b of Arion form a relatively large pocket into which the user's foot and part of the leg is inserted. The claimant further argues that since the devices in Arion are used by inserting the toes at one end of the device, then integer 3 is also present.

17. However, I can see no basis either in the description of the patent or the language of claim 1 to justify dividing the claim in this way. As I see it, the characterising portion of claim 1 has two integers:-

> *(1) it has the shape of a plane figure with a beneficial catch element (1) in the form of a pocket for inserting the toes at its one end;*
>
> *(2) at the opposite end there is a fastening element (2) for fastening around the leg in the form of a tape, press stud or some other well known fasteners.*

18. Not only does this division of the claim more naturally follow the punctuation in the claim, but it is also more consistent with the description in the patent. For example, paragraph [0004] of the patent says that the characterising feature is:-

> "… its shape, ie. of a plane figure in the form of **a pocket at its one end**; at the opposite end, beneficially, there is a fastening element in the form of a tape, press stud or some other well-known fasteners." (My emphasis)

19. Both Mr Hicks and Ms Kulas reminded me that the extent of the monopoly conferred by the patent must be that specified in the claim(s) as interpreted by the description and drawings [3]. I was also reminded that I should be guided by the protocol on the interpretation of Article 69 of the EPC, when construing the scope of the claim(s). Thus guided, I came to the conclusion that neither of the devices described in Arion

---

[3] Section 125(1) — For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.

have a pocket (for inserting the toes) at one end. Moreover, although the devices in Arion have a fastening element, it cannot be said to be *"at the opposite end"* to the pocket. Rather, the fastening element in the Arion devices runs substantially the whole length of the device. In my view, both the devices described in Arion do not have either of the integers specified in the characterising portion of the claim, and therefore the claims are novel.

20. I was not addressed on the subject of inventive step at the hearing. The claimant's statement of case says: *"to the extent it is argued that any of such integers*[4] *is not disclosed by these aspects of the description in Arion, it is plainly obvious to include them."* However, I have rejected the claimant's division of the characterising portion of claim 1, and found that the devices described in Arion are lacking **all** of the integers of the characterising portion of claim 1. In the circumstances, I do not think it is necessary to set out the structured steps of the Windsurfing/Pozzoli approach before concluding that the invention claimed in the patent would not be obvious to a person skilled in the art having regard to anything disclosed in Arion and/or the common general knowledge. I am therefore satisfied that the invention in the claims does involve an inventive step. The application for revocation is refused.

Infringement

21. The claimant sells its own device for putting on compression garments; it is sold under the name "Gus Comfort". The claimant has sought a declaration from the registered proprietor of the patent, to the effect that its Gus Comfort device does not infringe the patent. This declaration was requested in a letter dated 24 August 2017. The registered proprietor declined to give such a declaration and therefore the claimant asks the comptroller (under Section 71) to make the appropriate declaration under Section 71.

22. There is no dispute between the parties that the Gus Comfort (pictured right) is an auxiliary device for putting on therapeutic compression garments. It is also common ground that the device is made from low friction factor fabric. So the Gus Comfort clearly falls within the scope of the pre-characterising portion of the claim.

23. Moreover, the claimant does not deny that the Gus Comfort has a fastening element at the top that fastens around the leg. The sample provided to me has such a fastening element, and the instructions for use clearly refer to one; therefore I conclude that the Gus Comfort also meets the requirements of integer 2 of the characterising portion of claim1. The issue that I have to decide is whether it also meets the requirement of integer 1; ie. does it have:-

> "*the shape of a plane figure with a beneficial catch element in the form of a pocket for inserting the toes at its one end*".

---

[4] Referring to the claimant's preferred division of the characterising portion of the claim into four integers.

24. As the above photograph shows, the Gus Comfort has a pocket at one end that is large enough to receive approximately half of the user's foot; and is therefore clearly suitable "for inserting the toes". The pocket is formed by two triangular flaps that meet in a line along the top centre of the user's foot, and are held together using a hook & loop type fastener (such as eg. Velcro®). In use, after the compression stocking has been pulled up over the Gus Comfort, the pocket is designed to burst open by pulling it up through the top of the compression stocking. This principle of operation (as explained in Annex A below) is extremely similar, if not identical, to the second example described in the patent.

25. Mr Hicks, for the claimant, complains that his client is in a 'squeeze' between validity and infringement, which he expresses in the following way:—

    i) *If, in order to distinguish the Patent from Arion, it is argued by the patentee that the "beneficial catch element in the form of a pocket" only covers embodiments in which the pocket is sufficiently small to be unhooked from the toes (and therefore removed without opening the pocket) then the GUS Comfort does not infringe.*

    ii) If, in order to distinguish the Patent from Arion, it is argued by the patentee that the "beneficial catch element in the form of a pocket" only covers embodiments in which the pocket covers the toes and nothing more, then the GUS Comfort does not infringe.

    iii) If, in order to distinguish the Patent from Arion, it is argued by the patentee that the "beneficial catch element in the form of a pocket" only covers embodiments in which the pocket is permanent then the GUS Comfort does not infringe.

26. I do not accept this argument. As I have explained in relation to the revocation action, the devices described in Arion do <u>not</u> have a catch element in the form of a pocket at one end. There is no squeeze here.

27. Mr Hicks also argued that the patent only discloses devices with pockets of 2cm depth. He drew my attention to the second example in the patent, which uses a Velcro® fastener to form the pocket, and which is described as being *"made just like in Example 1"* — ie. the pocket is still 2cm deep. On this basis, Mr Hicks observed that even though the device according to example 2 could be removed by 'bursting' open the Velcro® fastener, the size of the pocket (2cm) necessarily meant that it could also be removed by unhooking it from the toes in the same way as example 1. He submitted that I should construe claim 1 of the patent in precisely this way — ie. 'pocket' means a pocket that is capable of being unhooked over the toes, even if it could also be opened by bursting a Velcro® fastener. The Gus Comfort has a large (13cm deep) pocket at its end, and Mr Hicks argued that as it could not be unhooked over the toes, it would not fall within the definition of the term 'pocket' as it has been used in the patent.

28. Furthermore, Mr Hicks insisted that it is always necessary to interpret the claims in the light of the description and drawings — as required by Section 125(1) [3] — even when the language used in the claim is plain enough in its own right. Nevertheless, I am not convinced that Section 125(1) can properly be used to impose an altogether fresh limitation on the scope of a claim that is manifestly not found in the language of

the claim itself, especially when the limitation in question (ie. 'pocket' means a pocket that is capable of being unhooked over the toes, even if it could also be opened by bursting a Velcro® fastener) is not itself explicitly stated in the description, but has to be inferred from the choice of examples used to describe the invention.

29. Moreover, when I consider the effect of the Protocol on the Interpretation of Article 69 of the EPC [5], I find it impossible to suppose that the patentee was using the word 'pocket' in the way that Mr Hicks suggested. In truth, I do not think that I would ever have contemplated such an imaginative construction of claim 1 if Mr Hicks had not presented it to me.

30. From whichever of the extremes (contemplated in the protocol) I consider the matter, it is apparent that the Gus Comfort has all the elements required by claim 1. More specifically it has: "*the shape of a plane figure with a … pocket for inserting the toes at its one end"* and *"at the opposite end there is a fastening element for fastening around the leg …."*. I also think it is significant that the Gus Comfort works in precisely the same way as example 2 described in the patent. Consequently I do not believe it would be appropriate for the comptroller to make a declaration as to non-infringement under Section 71 in these proceedings.

Costs

31. The claimant's applications for revocation and a declaration of non-infringement have both been refused. Mr Sawlewicz is entitled to a contribution towards his costs in the action.

32. I am not aware of any circumstances in these proceedings that justify an award above the standard scale. The standard scale is set out in Tribunal Practice Notice (TPN) 2/2016. Bearing in mind that these proceedings were consolidated after statements and counter statements were filed in two separate sets of proceedings, and also that there has been no formal evidence in either set of proceedings, I would assess the various categories as follows:-

Preparing a statement and considering the other side's statement (£300 x 2)	£600
Preparing evidence and considering and commenting on the other side's evidence	-
Preparing for and attending a hearing (inc. a preliminary hearing)	£800
Expenses (ie. official fees)	-
Total	**£1,400**

[5] Protocol on the Interpretation of Article 69 of the EPC

"Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties."

33. Haddenham Healthcare Limited is ordered to pay Pawel Sawlewicz the sum of £1,400 as a contribution towards his costs in these consolidated proceedings. This sum is to be paid within seven days of the appeal period below.

Appeal

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

Stephen Probert
Deputy Director, acting for the Comptroller

Annex A

PUTTING ON YOUR GARMENT USING GUS COMFORT

⚠ **Caution:** Sharp fingernails, rings and bracelets can damage garments. Rings and bracelets should be removed before you apply/remove your garment.

1 Attach the Velcro at the toe end to form a triangle.

2 Place Gus on the floor in front of you and place your foot in the opening.

3 Attach the white fixing strap around the leg just above the calf

4 Pull your stocking on over your toes and then slowly roll it up your leg.

5 Unfasten the fastener at your toes. (This may not be necessary as Gus opens quite easily by itself.)

6 Undo the fixing strap. Slowly and gently, using the handle at the back pull Gus from under your stocking.

Note: The use of donning gloves and/or a non-slip mat can aid in the application of compression garments

MAINTENANCE / STORAGE

- Store your Gus in a cool, dry place
- After washing, make sure Gus is completely dry before further use
- When not in use keep the Velcro portions attached, to avoid build up of fluff
- Gus Comfort should not be used beyond the expiration date printed on the outside of the package.