



PATENTS ACT 1977

BETWEEN

Lundberg & Son VVS-Produckter AE

Proprietor

and

ZGP Limited

Opponent

PROCEEDINGS

Request under section 74B of the Patents Act 1977
for a Review of Opinion 11/09 issued
on patent number EP0566635

HEARING OFFICER

P Thorpe

Decision

Introduction

- 1 This decision relates to a request for a review of opinion 11/09 (“the Opinion”) under section 74B of the Patents Act. The Opinion was requested by ZGP Limited in relation to whether a product infringed patent EP 0566635. The Opinion, which was issued on 6 July 2009, concluded that there was no infringement of the patent.
- 2 The proprietor of the patent, Lundberg & Son VVS-Produckter AE (“Lundberg”), has now requested a review of the Opinion under section 74B.

The Law

- 3 The law governing reviews of opinions is set out, so far as is relevant here, in section 74B and Rule 98.

Section 74B Reviews of opinions under section 74A

(1) Rules may make provision for a review before the comptroller, on an application by the proprietor or an exclusive licensee of the patent in question, of an opinion under section 74A above.

(2) The rules may, in particular-

(a) prescribe the circumstances in which, and the period within which, an application may be made;

(b) provide that, in prescribed circumstances, proceedings for a review may not be brought or continued where other proceedings have been brought;

....

Rule 98.

(1) The patent holder may, before the end of the period of three months beginning with the date on which the opinion is issued, apply to the comptroller for a review of the opinion.

(2) However, such proceedings for a review may not be brought (or if brought may not be continued) if the issue raised by the review has been decided in other relevant proceedings.

(3) The application must be made on Patents Form 2 and be accompanied by a copy and a statement in duplicate setting out the grounds on which the review is sought.

(4) The statement must contain particulars of any relevant proceedings of which the applicant is aware which may be relevant to the question whether the proceedings for a review may be brought or continued.

(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.** (Emphasis added)

4 It is important to note that the grounds on which an opinion on infringement can be reviewed are quite narrowly prescribed in Rule 98(5)(b). The reason for this is that in most circumstances where a party feels aggrieved by an opinion, there will be a clear route for addressing that grievance. For example a party who is deemed by an opinion to be infringing a patent can seek a declaration of non-infringement. Equally where an opinion has concluded that no infringement is taking place and the patent proprietor disagrees, he may sue for infringement. This could include the circumstances where the patent proprietor disagrees with the way that the claims have been construed. But suing for infringement is not possible if the opinion was sought on a potential or hypothetical act, and in such circumstances it would be unfair to deny the patent proprietor a chance to overturn an infringement opinion based on a construction of the claims which is adverse to him. Thus the rules allow a review of an infringement opinion but only if the opinion came to a wrong conclusion on infringement as a result of how it interpreted the specification of the patent in suit.

5 It is also I believe worthwhile for me to briefly say something here about the

nature of reviews under S74B. This was considered in DLP¹ where Kitchen J noted:

“In the case of an appeal under rule 77K [now Rule 100], the decision the subject of the appeal is itself a review of the opinion of the examiner. More specifically, it is a decision by the Hearing Officer as to whether or not the opinion of the examiner was wrong. I believe that a Hearing Officer, on review, and this court, on appeal, should be sensitive to the nature of this starting point. It was only an expression of an opinion, and one almost certainly reached on incomplete information. Upon considering any particular request, two different examiners may quite reasonably have different opinions. So also, there well may be opinions with which a Hearing Officer or a court would not agree but which cannot be characterised as wrong. Such opinions merely represent different views within a range within which reasonable people can differ. For these reasons 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. Likewise, on appeal, this court should only reverse a decision of a Hearing Officer if he failed to recognise such an error or wrong conclusion in the opinion and so declined to set it aside. It is not the function of this court (nor is it that of the Hearing Officer) to express an opinion on the question the subject of the original request.”

- 6 It follows that the remit of any review is quite narrow. It is not a rehearing that would necessarily allow for example for new evidence not available to the examiner to be considered. Rather it is simply a review of whether the original opinion reached a conclusion that is clearly wrong on the basis of the material available at the time. And as I have discussed above, the grounds on which a review can consider whether it is wrong are themselves very limited.

The request for a review

- 7 In this case Lundberg is arguing that the opinion wrongly concluded that the patent was not infringed, not because of how the opinion interpreted the patent, but rather because of how the opinion misinterpreted how the alleged infringing product works. This is clear from the statement accompanying the request for a review. For example the statement raises no concerns about paragraphs 10-17 of the opinion which relate to how the opinion construed the patent. Rather it argues that it erred in paragraph 24 when it sought to determine whether the alleged infringing product fell within the scope of the patent as it had been previously construed. To support its case, the proprietor has submitted test results to demonstrate how the alleged infringing product works.
- 8 In its counterstatement, ZGP puts forward a number of arguments relating to these test results. It also however suggests that Lundberg has failed to demonstrate how the opinion misinterpreted the scope of the patent.
- 9 Following the filing of the statements by both sides, I issued a preliminary evaluation on 30th December 2009 in which I noted that:

“having carefully considered the statements of case filed by both the patent proprietor and by ZGP, I can see no valid basis on which to conduct a review.”

¹ [2007] EWHC 2669 (Pat)

- 10 I allowed both sides a short period in which to make submissions should they wish to on the matters raised in this preliminary evaluation or to request a hearing. In its subsequent submission Lundberg has continued to focus on how the opinion considered the alleged infringing product (known as “the Ecocamel Shower Head”) to work. For example it concludes its submission with the following:

“Since the test results might be questioned, at least we request a review of the opinion stating in addition that if the assertions put forward by the proprietor are turned out to be correct, then the patent in dispute would be infringed by the Ecocamel shower head”.

- 11 As I sought to explain in the preliminary evaluation, such assertions do not go to how the Opinion interpreted the patent and as such cannot form the basis for a review of the Opinion. Lundberg is of course free to raise these issues in infringement proceedings either before the courts or, with the agreement of the other side, before the comptroller.

Conclusion

- 12 I have carefully considered all the submissions and have concluded that the request for the review does not relate to the ground for review provided by Rule 98(5)(b). I therefore dismiss the request.

Costs

- 13 The Opponent has asked for its costs if the request is dismissed. I see no reason to depart from the published scale of costs for proceedings before the comptroller² and so order Lundberg to pay the sum of £300 to ZGP.

Appeal

- 14 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

P THORPE

Divisional Director acting for the Comptroller

² <http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-tpn/p-tpn-2007/p-tpn-42007.htm>