

04 January 2013

PATENTS ACT 1977

BETWEEN

MotoCaddy Limited

Proprietor

and

Andrew Barry Bridle

Opponent

PROCEEDINGS

Review of Opinion 02/12 – whether patent GB2473845 is infringed

HEARING OFFICER

A C Howard

DECISION

Introduction

- 1 This is a partial review of opinion 02/12 (“the opinion”), under section 74B of the Patents Act 1977 (“the Act”). The opinion, which was requested by Andrew Barry Bridle, concluded that patent number GB2473845 (“the patent”) was not infringed by a certain electrically powered golf trolley as identified in the request. The opinion also considered the validity of the patent but I have not been asked to review that aspect.
- 2 The proprietor of the patent (MotoCaddy Ltd) has applied for a review under section 74B of the Act, requesting that the part of the opinion relating to infringement be set aside. This request is resisted by Mr Bridle. It has been agreed that I should issue a decision on the basis of the papers on file.
- 3 I should note here the existence of another review which relates to a different opinion (04/12) in respect of the same patent. That also considered the question of possible infringement, albeit by a different apparatus, and is the subject of a separate decision (BL O/003/13).

What this review will do and what it will not do

- 4 Relevant is rule 98 of the Patents Rules 2007, which states:

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

(a)

(b) *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.*

5 The purpose of a review under section 74B has been explained in several previous reviews but has also been the subject of appeal¹. In judgment on that case Kitchen J stated, at paragraph 22:

In the case of an appeal under rule 77K, 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. Of course this court must give a reasoned decision in relation to the grounds of appeal but I think it is undesirable to go further. 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 Consequently, I am not providing a second opinion on the subject of the original request; I am reviewing the opinion with a view to determining whether the examiner had made an error of principle or reached a conclusion that was clearly wrong. This means that even if it is possible to come to a different view on the substance of the question addressed, I can only set the opinion aside if I decide that an error of principle has been made or a clearly wrong conclusion reached.

The Patent and the matter at issue

7 The invention of GB2473845 relates to an electrically powered golf trolley having a USB socket which can be used to power an electrical component (e.g. a portable music player), and means to support such a component. For the sake of completeness I recite Claim 1 of the granted patent in full below:

An electrically powered golf trolley having 3 wheels, a handle by which the trolley may be steered by a person walking behind; means to support a golf bag but not a person on the trolley; a battery supplying electrical current powering one or more wheel of the trolley; an electrical connection interface in the form of a USB socket through which a separate portable electrical component is electrically coupled to the

¹ *DLP Limited* [2007] EWHC 2669

battery to be powered for normal use and/or to be charged; and, in the handle, means to support the portable electrical component whilst connected to the USB electrical connection interface.

- 8 The original request asked for an opinion on whether the trolley illustrated in the images below (the “EziCaddy Ezi5”) infringed the patent:



- 9 The examiner found that the EziCaddy trolley has most of the features in the patent claim. The key issue which led to the opinion of non-infringement was the interpretation of the expression “on the handle, means to support [the component]”. The examiner concluded that the EziCaddy trolley could not be said to have a feature falling within the scope of this element of the claim.
- 10 At the time when the opinion was being prepared there was an unresolved issue over whether the end of claim 1 should be corrected to read “**on** the handle” rather than “**in** the handle”. The opinion examiner considered both possible wordings and came to the conclusion that the requested correction would make no material difference to the outcome. The correction has now been allowed and the claim I quote above reflects the amended wording, although it is not an issue in this review.

The Grounds of the Review

- 11 The proprietor argues that the examiner reached the wrong conclusion on

infringement because he erred in his construction of the claim in respect of the expression “on the handle, means to support ...” in claim 1. Specifically it is argued that this wording must be construed to include “a surface upon which [a portable electrical component] can be placed or secured to” in contrast to the construction adopted by the examiner which “limits the scope of protection to a specific feature or component of the trolley that is provided with the explicit purpose of supporting an electrical device”. It is also argued that the examiner construed the scope of claim 1 too narrowly by assuming that the means [to support] must be suitable and adapted for providing ongoing support of a portable electric component *whilst the trolley is in motion*.

- 12 The original requester, Mr Bridle, resists the grounds for review, arguing that the examiner adopted the correct approach to claim construction and reached a conclusion that was not wrong.

Discussion

- 13 In construing the claim, the examiner applied the standard principles of claim construction were set out by Lord Hoffman in *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9 (see paragraphs 32-52). The key point in that judgment being that the approach in construing a claim should be to establish “what a person skilled in the art would have thought the patentee was using the language of the claim to mean”. He also referred to *Mayne Pharma v Pharmacia Italia SpA* [2005] EWCA Civ 137, in which Jacob LJ further summarised the principles of claim construction, and the further guidance provided by Pumfrey J in *Halliburton v Smith* [2006] RPC 2. The approach to be taken is that, as outlined in Section 125(1) of the Patents 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.”
- 14 The proprietor accepts, and I agree, that this approach is the correct one to take. The proprietor however highlights where the examiner says, in paragraph 17 of the opinion, that
- “the skilled person would construe that the scope of claim 1 is the trolley in combination with a support device which is connected to and/or integral with the handle and which is substantially external to the handle”.*
- 15 The proprietor points out that the expression “support device” does not appear in the patent. He also points to several places in the opinion where the examiner uses the expressions “support means” and “means to support” apparently interchangeably. These, it is argued, demonstrate a propensity on the part of the examiner to construe too narrowly the words “means to support”.
- 16 The examiner has indeed used the terms “support means”, “means to support” and “support device” to some extent interchangeably at various points in the opinion, which is probably not helpful. However, as pointed out by Mr Bridle, at the very beginning of paragraph 19 the examiner introduces his construction of the term

“means to support” in the exact language of the claim:

“I have construed where the ‘means to support’ are provided. I now need to construe the ‘means to support’ itself.”

- 17 It is true that he goes on in the same paragraph to use the term “support means”, but my reading of this in the context both here and elsewhere in the opinion leads me to the view that this is simply a matter of drafting style. The construction actually placed on this term is set out very clearly:

“it would be evident to the skilled person considering claim 1 in the light of the description that the support means would have to be suitable and adapted for providing ongoing support for an electrical component whilst the trolley is in motion, even if the support means is substantially formed of a surface upon which the item can be placed. A random surface of the handle would not be taken as being suitable and adapted for use as support means if such use is inconsistent with the obvious intended role of the surface”.

- 18 Clarification of what the examiner understands by “suitable and adapted” for use as support means can be found in paragraph 32 of the opinion, where it is stated that

“It is clear from claim 1 considered in the light of the description, that the means must be suitable and adapted for providing ongoing support of a portable electric component whilst the trolley is in motion.”

- 19 The proprietor argues that this indicates the examiner has unjustifiably limited the scope of the claim to a preferred embodiment. He refers to a passage in the patent at page 2 lines 18-23 which states that in preferred embodiments the support means might comprise a bracket or recess to locate and hold securely a component while the trolley is “moving over potentially uneven terrain”. While I accept that this passage of the description does clearly relate to a preferred embodiment, it also refers to two specific possible configurations of the support, and there is no suggestion that the examiner has limited his consideration to these. Moreover the examiner refers to support “whilst the trolley is in motion”, which is not the same as “moving over potentially uneven terrain”.

- 20 What I draw from the above passages quoted from the opinion is that the examiner has excluded neither the possibility that the “means to support” may be integral with the handle, nor that it may comprise a surface on which a component may be placed *per se*; although he does clearly consider that more is needed than merely some part of the handle on which an electrical component may theoretically be balanced but which would fall off as soon as the trolley is moved.

- 21 The proprietor also refers to comments made in the original request for an opinion regarding the display screen of the EziCaddy. These are referred to in paragraph 32 of the opinion, where the examiner concluded that this element does not meet the support requirements of claim 1 and therefore does not infringe. The proprietor argues that there is no display screen in the patent therefore this is not relevant; it is said that that the EziCaddy has other portions which form part of the handle and fall within the scope of “means to support”. However I do not read this part of the opinion as indicative of the examiner being unduly limited in his analysis; it appears simply to

be dealing with a point made in the request.

- 22 What the proprietor is proposing is an interpretation according to which the claim encompasses a situation where, with effectively no adaptation at all, there is a location on which the component can be supported, seemingly however precariously. Although I can see how this might be argued, I would point out that it is an inherent feature of the trolley that it is moved about in use, so it is not unreasonable to expect that a supported electrical component as envisaged by the patent should not be liable to fall off at the slightest movement. I am therefore of the view that in this regard the construction placed upon the term “means to support...” by the examiner is a reasonable one and not clearly wrong.
- 23 A further argument advanced by the proprietor draws on a part of the opinion that is not challenged, namely the finding that a separate accessory holder clipped to the handle of the EziCaddy and suitable for holding an electrical component would infringe the patent (a “handle” being defined as any part that can be grasped). Essentially the reasoning is that, in the case of the accessory holder, it is the handle itself which is the “means to support” to which the accessory is attached. Thus, it is argued, a portable electrical component which is placed on, hung from or even taped to the handle would infringe. The logical end point of this line of reasoning is that any trolley having a graspable part on which an electrical component could be hung or clipped would fall within the scope of this part of the claim. The examiner, through his conclusion that a trolley with an accessory holder would infringe but otherwise would not, implicitly rejected this interpretation. This is consistent with construing the requirement for the “means to support” being “suitable and adapted” for supporting a component.
- 24 I note that the trolley illustrated in the patent has a handle from which an article could be hung by means of straps or similar attachments, but it is stated in terms in the description (page 4 lines 23-24) that the “support means to hold the electrical component” are not shown. This arguably sends a message to the reader that an unadapted handle is not envisaged to fall within the scope of this element of the claim. It is therefore my view that the examiner was entitled to come to the conclusion he did.
- 25 Overall, therefore, I believe that the construction placed by the examiner on the claim was not clearly wrong.
- 26 Having construed the claim, the examiner turned to the question of possible infringement. He considered whether the display screen or the tubular sections of the handle could fall within the scope of the “means to support” as he had construed the term, and his conclusion was that they could not. In support of this conclusion he comments, in agreeing with the submissions of Mr Bridle, that:

“merely using a display screen as a place for resting a portable electric component on does not mean that the display screen meets the support requirement of claim 1. Indeed, use as a support would negate the screen’s intended display function. The requestor also proposes that curved tubular sections of the EziCaddy trolley do not meet the support requirement of claim 1. [...] The display screen and the tubular sections of the EziCaddy appear to be configured in ways which militate against the provision of ongoing support

whilst the EziCaddy is in motion.”

- 27 As regards the examiner’s analysis of whether the display screen comprises “means to support” within the parameters of his construction of this term, I find his conclusion reasonable.
- 28 At this point I should recall the proprietor’s submissions, referred to above, on how “handle” should be construed, the implication being that the examiner construed “handle” too narrowly. I agree that the proprietor’s proposed interpretation of “handle” as extending to any part that may be grasped, including the shaft, is defensible. However I see nothing in the above quoted section or elsewhere in the opinion to suggest that the examiner might have taken a view that was clearly wrong in this regard.
- 29 Taking the above into account, and bearing in mind that it is not my role to offer a second opinion, I have looked at the drawings and it is my view that the examiner’s conclusion that the EziCaddy trolley does not have “means to support” an electrical component within the meaning of the construction he placed on this term, is not clearly wrong.

Conclusion

- 30 I conclude that the examiner in his opinion did not make any error of principle or reach a conclusion that is clearly wrong. I therefore refuse the proprietor’s request for the opinion to be set aside in part.

Costs

- 31 The question of costs does not arise and I make no order in this regard.

Appeal

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

A.C. Howard

Divisional Director acting for the Comptroller