

04 January 2013

PATENTS ACT 1977

BETWEEN

MotoCaddy Limited

Proprietor

and

Michael Stollery

Opponent

PROCEEDINGS

Review of Opinion 04/12 – whether patent GB2473845 is infringed

HEARING OFFICER

A C Howard

DECISION

Introduction

- 1 This is a review of opinion 04/12 (“the opinion”) under section 74B of the Patents Act 1977 (“the Act”). The opinion, which was requested by Michael Stollery, concluded that patent number GB2473845 (“the patent”) was not infringed by an electrically powered golf trolley identified in the request.
- 2 The proprietor of the patent (MotoCaddy Ltd) has applied for a review under section 74B of the Act, requesting that the opinion be set aside. The request is resisted by Mr Stollery. 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 (02/12) 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/002/13).

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 battery to be powered for normal use and/or to be charged; and, on the handle, means to support the portable electrical

¹ DLP Limited [2007] EWHC 2669

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 “Protrolley Ultra”) infringed the patent:



- 9 It is not in question that the Protrolley Ultra has a USB socket (as well as most of the other features in the patent claim). The key issue addressed in the opinion revolves around the interpretation of the expression “on the handle, means to support” the component, and whether the trolley in question could 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 As alluded to above, 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 [a] portable electrical component”. Specifically it is argued that this wording must be construed so as to include “a surface upon which the item can be placed or secured to” (including “hung or suspended”) in contrast to the construction adopted by the examiner which is said to limit the scope of protection by including a requirement for a separate holder or other specific feature or component of the trolley that is provided with the explicit purpose of supporting an electrical device.
- 12 The original requester Mr Stollery resists the grounds for review. He essentially argues that the “means to support...” should be construed as limited to means adapted to support an electrical component. In support of this argument he points

out that while an item could be placed on a surface such as the handle of a Protrolley, it would not be suitable for the purpose of providing support as the item would easily fall off.

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. 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 argues that the examiner has construed the claim too narrowly. Several passages of the opinion are cited in support of this position:
- In paragraph 16, the examiner has noted the wording bridging pages 2 and 3 of the description, which states, *inter alia*, that “a means to support might simply take the form of a surface *upon which the item can be placed...*” [emphasis added]
 - In paragraph 17, the examiner referred to a previously submitted example of an arrangement wherein an MP3 case could be used to secure an electrical device to a surface of a trolley
 - In paragraph 18 the examiner set out that in such an arrangement [as referred to in paragraph 17] the “means to support” would be considered to include the case that holds the device.
- 15 The proprietor argues that these passages demonstrate that the examiner has construed the claim to exclude a situation where an item is simply placed upon a surface or secured to a support surface by means such as a case, straps or cable ties. It is argued that the examiner mistakenly took as an essential feature of the claim a preferred embodiment where the “means to support” comprises an appropriately configured bracket or recess in which a component may be located. Moreover, it is pointed out that nowhere in the patent is it stated that the “means to support” must be secured to the surface.
- 16 The proprietor also points to the examiner’s use of the expression “support means” as an abbreviation for “on the handle, means to support the portable electrical component whilst connected to the USB electrical connection interface”, as well as

several places in the opinion where the expressions “support means” and means to support” are used apparently interchangeably. These, examples, it is argued, demonstrate a propensity on the part of the examiner to construe too narrowly the words “means to support”, the rationale being that “means to support” can define a characteristic such a surface on which an item can be placed or a feature from which an item can be hung, whereas “support means” defines an article itself such as a support device.

- 17 The proprietor further submits arguments about the term “handle”, with a view to demonstrating that the “handle” of claim 1 must extend to the stem or shaft by which the trolley may be grasped or manoeuvred.
- 18 The examiner did not set out explicitly how he construed the words “on the handle, means to support...”. This is unfortunate. However the passages referred to above and other parts of the opinion provide a window on his thinking in this regard. Thus, in quoting the passage bridging pages 2 and 3, I believe that he did implicitly accept that the “means to support” could be a surface upon which the item can be placed or a hook from which it may be hung. On the other hand, regarding the hypothetical example cited of an MP3 case secured to a handle of the trolley, it is clear from paragraph 18 that he has taken the combination of case and handle, rather than any part of the handle in isolation, as comprising the “means to support” the component.
- 19 Regarding the interchangeable use of the expressions “support means” and “means to support”, my reading of the opinion leads me to the view that this is simply a matter of drafting style.
- 20 It is accordingly my conclusion that the examiner did not construe “means to support ...” to exclude all possible surfaces on which a component may be placed or to which one may be secured. However, it is clear that he did regard this term as requiring a degree of suitability for the stated purpose; that is to say more was needed than merely some part of the handle on which an electrical component may theoretically be balanced or a feature to which a component may be secured with the aid of unspecified additional means such as a case, straps or cable ties. Moreover, while I agree that the proprietor’s proposed interpretation of “handle” (that is, extending to any part that may be grasped, including the shaft) is defensible, I can see nothing to suggest that the examiner unduly limited the scope of what he regarded as part of the “handle”.
- 21 The question is, having regard to the description and drawings of the patent, was it clearly wrong to construe the claim in this way? 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. As regards the possibility that the “means to support ...” could comprise a surface, the proprietor argues that the claim should not be construed as limiting this to means that are suitable for providing support while the trolley is in motion, because this is identified as an advantage of a preferred embodiment. However I do believe it is reasonable to interpret these words as requiring there to be at least some stability for the supported component, having regard to the use in practice to which a golf trolley is put.

- 22 Overall, therefore, I believe that the construction placed on the claim by the examiner was not clearly wrong.
- 23 Having construed the claim, the examiner turned to the question of possible infringement. I note that in the original observations on the request, beyond an assertion that the Protrolley Ultra includes several suitable surfaces on its handle which could act as “means to support”, and the discussion of the hypothetical MP3 player case referred to above, the proprietor did not identify any specific feature of the Protrolley Ultra which is considered to answer this element of the claim.
- 24 The examiner was thus left with the task of attempting to identify for himself possible features of the drawings which had been referred to him which could fall within the scope of the requirement in claim 1 that there is on or in the handle “means to support the portable electrical component whilst connected to the USB electrical connection” (paragraph 18 of the opinion). His conclusion was that there is none, and that there is accordingly no infringement.
- 25 Bearing in mind that the purpose of a review is not to provide a second opinion, I have looked at the drawings referred to in the original request, and while I can see that there are some locations where an electrical component could conceivably be balanced (for example in the vicinity of the handle grip), there is nowhere that appears to me obviously suitable for the purpose and I therefore believe that the examiner’s opinion to the effect that, within the terms of the construction he placed on claim 1, there are no “means to support” a component, is a reasonable one.

Conclusion

- 26 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.

Costs

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

Appeal

- 28 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