

PATENTS ACT 1977

CLAIMANT	Source Vagabond Systems Ltd
DEFENDANTS	Excel-Eucan Ltd & Robert Maclean
ISSUE	Application under section 72 for revocation of patents GB2489116, GB2523562 and EP(UK)3111159
HEARING OFFICER	H Jones

DECISION

Background

- 1 Applications for revocation of GB patents GB2489116 and GB2523562 registered in the name of Excel-Eucan Ltd (“Excel”) were filed by Source Vagabond Systems Ltd (“Source”) in December 2017 and February 2018 respectively. A further application for revocation of EP patent EP(UK)3111159, in the name of Robert Maclean (the founder and director of Excel and the sole inventor in all three patents), was made in February 2018, and it was agreed soon afterwards to consolidate all three proceedings.
- 2 In January 2018, Excel commenced separate proceedings in the High Court concerning a dispute about a licensing agreement with Source in respect of GB’116. Excel’s request to stay the IPO proceedings pending determination of the proceedings before the Court was refused on the basis that the validity of the patents was not in issue before the Court. The hearing officer dealing with the matter at the time agreed to issue a preliminary evaluation of the claims advanced by the two sides without the benefit of hearing arguments and before any evidence had been filed, which led eventually to Excel applying to amend the patents under section 75 on an unconditional basis.
- 3 The unconditional amendments to GB2489116, GB2523562 and EP(UK)3111159 (annexed to this decision) were considered by an examiner to be prima facie allowable and were advertised for opposition in Patents Journal PDJ 6810 on 27 November 2019. No notice of opposition was filed in the two-week opposition period that expired on 11 December 2019.
- 4 Excel informed the Office on 18 December 2019 that judgment in the High Court case had been handed down on 21 November 2019 under neutral citation [2019] EWHC 3175 (Pat) (“the judgment”). It made further submissions as to why the IPO proceedings should be stayed and asked that the patents should be allowed to be

amended as soon as possible. This led to Source informing the IPO that it no longer wished to continue with the revocation proceedings, such that the only matter remaining to be decided prior to termination of proceedings was that of costs. The hearing officer dealing with the matter at the time considered that the comptroller was not in a position to make a decision on costs as the matter appeared to be still before the Court. The hearing officer referred to HHJ Melissa Clarke's comments at paragraph 115 of the judgment:

"..., I note Source's submission in relation to the costs of the IPO proceedings that Excel has also indicated it wishes this court to order: namely that those are entirely separate proceedings in respect of which this court should not make any order, and furthermore they not within the scope of the indemnity contained in Clause 10 of the Licence Agreement. I make no finding on these issues at this stage, which are consequential matters which I will consider once this judgment is handed down."

- 5 The hearing officer wrote to both sides in April 2020 saying that until the Court had confirmed its position on the matter of costs of the IPO proceedings, it would be inappropriate for the comptroller to make a decision in relation to those costs. The issue has remained undecided until now because of the time it has taken to obtain transcripts of judgments approved by the Court that are said to address the matter of costs of the IPO proceedings. I deal with the detailed submissions on costs below.
- 6 I am satisfied that the unconditional amendments proposed by Excel are such that may lawfully be made in these proceedings. Having considered the claims made by Source in their application for revocation, I do not consider there to be a public interest reason not to accept the notice of withdrawal. I will allow the specification of each of the three patents to be amended in the manner shown in the Annexes to this decision. I make no order for revocation of the patents.

Costs

- 7 The question of costs has been complicated by the fact that it was not clear to the comptroller to what extent the Court would account for costs incurred by the parties in relation to the IPO proceedings (the Judge having said in the judgment (paragraph 4 above) that she would make no finding "at this stage" and would "consider the issue once judgment is handed down". In the transcripts of the judgments submitted by Excel on 4 August 2021, in particular paragraph 1 of the second attachment dated 21 November 2019, HHJ Melissa Clarke is noted as saying:

"I am satisfied that the costs that I am able to order here today relate to these proceedings. The IPO proceedings are separate, and of course the IPO proceedings are ongoing. I have had no information about their extent etc, so I will not deal with them."

As one might have expected, this makes categorically clear that the issue of IPO costs has not been considered by the Court and that it is for me to decide the matter. Both sides have confirmed that they are content for me to do so based on their written submissions, which I set out briefly below.

- 8 Excel seek an off-scale award of costs in their favour. They say that Source made a contractual bargain that Excel be able to recover all costs of enforcing their patent license agreement, and that by making enforceability of the license contingent on validity, i.e. that the license was unenforceable absent a valid patent, all costs associated with defending validity (including costs of amendment) are prima facie

recoverable under clause 10.2 of the license agreement. They seek an off-scale award in the sum of £23,173.12 to cover counsel and patent attorney fees in the IPO up to date of re-amendment.

- 9 Source say that Excel's application for costs is both unprecedented and exorbitant and should be rejected outright. They say that they are the winner in these proceedings by virtue of their acknowledgement that the patents as granted could not be defended and were invalid. They say that costs should be awarded to whichever party was successful in proceedings, and refer to paragraph 5.40 of the Patents Hearing Manual, which states that "in actions for revocation of a patent where the proprietor has to make amendments under section 75 of the 1977 Act to avoid revocation, the claimant has in principle succeeded (by showing that the patent was indeed invalid), and is therefore entitled to costs". The only caveat to this guidance is that once the patentee has unconditionally offered amendments which cure the invalidity, "any subsequent unreasonable behaviour by the claimant may reduce the costs which would otherwise have been awarded".
- 10 Source also refer to paragraph 5.47 of the Patents Hearings Manual which refers to the powers a hearing officer has to award costs off the normal scale where circumstances warrant it. It says that in extreme cases, it may be increased to the extent of approaching full compensation, or be awarded to the side that has formally lost the issue being tried. All of the circumstances set out in the Manual relate to unreasonable behaviour by one of the parties in the course of the proceedings, none of which Source say apply in the present case. They say that Excel has raised no complaint with respect to Source's behaviour during these proceedings and so there is simply no basis for a cost award being made in favour of Excel, the unsuccessful party.
- 11 Section 107(1) of the Patents Act states that the comptroller may award to any party such costs as he may consider reasonable and to direct how and by what parties they are to be paid. It is clear to me that Source are the successful party in these revocation proceedings, in that they have succeeded in having the scope of the patent narrowed to such an extent that revocation was no longer necessary. They also requested termination of proceedings as soon as the patentee conceded to the unconditional amendments, so there has been no unreasonable behaviour on their part to justify a reduction of costs that might otherwise have been awarded. I do not need to decide whether the comptroller can depart from the standard scale when both parties have contractually agreed to full cost recovery in IPO proceedings because that was a case advanced by Excel, although it seems clear that the Court in this case believed that it was open for the comptroller to do so.
- 12 Source have not provided any detailed submissions in relation to the quantum of costs I should award in their favour. Absent such detailed submissions, I find no reason to depart from the standard published scale of costs as set out at Annex A of Tribunal Practice Notice 2/2016¹, and determine the amount of the award in favour of Source as follows:
 - Preparing a statement and considering Excel's statement: £400
 - Considering and commenting on Excel's amendment under section 75: £600
- 13 I hereby order Excel-Eucan Ltd to pay Source Vagabond Systems Ltd the sum of

¹ [Tribunal practice notice \(2/2016\): Costs in proceedings before the Comptroller - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/54112/tribunal-practice-notice-2-2016.pdf)

£1000 as a contribution towards their costs in these revocation proceedings, this sum to be paid within seven days of the expiry of the appeal period specified below.

Appeal

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

Huw Jones

Deputy Director, acting for the Comptroller

Annex 1 (GB2489116)

improved means should allow a linked round to be used without the need to completely remove the round before starting firing in order to prevent dirt or dust impregnating the round.

5 Summary of Invention

The present invention provides a linked round carrying bag consisting of a flexible sleeve within which is carried a linked round, the flexible sleeve being sealed at a first end, having an opening at a second end that extends across the width of the carrying bag, and having an openable closure extending substantially from the first end to the second end, wherein a
10 width of the sleeve is greater than 120% of the length of an individual round of the linked round but is less than 150% the length of an individual round, and wherein when in use the end of the linked round can be fed into a firearm and the linked round is pulled out of the sleeve through the opening such that the firearm can be used without the need to further remove the linked round from the sleeve.

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The bag of the present invention is advantageous as it allows a linked round to be both easily carried and to be used in a simple and straightforward manner when needed. This is achieved by placing the linked round in the carrying bag such that the individual rounds extend parallel to the width of the sleeve and a length of the linked round extends in a direction substantially
20 from the first end of the sleeve to the second end. The linked round will be generally be folded such that a linked round that is longer than the sleeve can be contained within the sleeve. When folded, the individual rounds of the linked round will remain in the same orientation and an end of the linked round will be positioned at the opening at the second end of the sleeve. The openable closure allows a linked round to be positioned in the sleeve in a
25 simple manner. When positioned in the sleeve an end of the linked round will be positioned substantially at the opening at the second end of the sleeve.

The bag may be carried in any manner apparent to a person skilled in the art. For example, it may be folded and strapped to a standard pack. When it is required to use the linked round,
30 the bag is placed in an appropriate position, including being removed from any pack it has been strapped to, the opening at the second end of the sleeve is opened and the end of the

linked round is fed into the firearm. After the end of the linked round has been fed into the firearm the firearm can be used without the need to further remove the linked round from the sleeve. This is possible due to the shape of the sleeve and the positioning of the linked round within the sleeve. In particular, as the linked round is fed into the firearm it will be pulled out of the sleeve from the opening. As all of the bullets in the linked round are parallel to the width of

The width of the sleeve of a bag according to the present invention is greater than 120% of the length of an individual round of the linked round but is less than 150% the length of an individual round. This prevents a linked round that is stored in the bag from getting tangled and allows the round to be stored in a manner that allows it to be easily slid out of the sleeve
5 from the opening at the second end of the sleeve. This also allows a linked round to be easily but securely stored in the bag and allows it to be easily removed from the opening at the second end of the sleeve when necessary.

10 In accordance with the above, in preferred embodiments of the invention the width of the sleeve is approximately 133% of the length of an individual round.

Standard linked rounds consist of a specific number of individual rounds. For example standard linked rounds generally consist of fifty, one hundred or two hundred individual rounds. The number of individual rounds that make up a linked round define the length of
15 the linked round. In preferred embodiments of the invention the length of the bag from the first end to the second end is approximately a quarter of the length of the linked round that the bag carries when in use. That is, if the bag is intended for use with linked rounds that consist of two hundred individual rounds the length of the bag would be approximately the length of fifty individual rounds. This is preferable as it allows the linked round to be folded
20 in the bag to a length that is easy to carry but that still allows the linked round to be pulled from the bag in a simple manner when required. As will be appreciated, bags that are the same length or half the length of the linked round that the bag is intended to be used with may also be preferred.

If the sleeve comprises a closing flap then it is advantageous that the bag additionally comprises fastening means for securing the closing flap against an outer surface of the bag. Any suitable fastening means may be used. However, it may be preferable that the sleeve comprises hook and loop fastening means for securing the closing flap against an outer
5 surface of the bag. Hook and loop fastening means are preferred as it allows the closing flap to be securely held in position but also allows the flap to be opened in a quick and simple manner when necessary. If the sleeve comprises a closing flap it is preferable that it is formed such that when folded over it is positioned against the same side of the sleeve as the openable closure and any fastening means for holding the closing flap in position is
10 substantially formed on an inner side of the closing flap and an outer side of the sleeve.

If the bag comprises a closing flap for closing the opening it may be preferable that closing flap has a grab strap attached at an outer end to allow the closing flap to be opened rapidly. Specifically, by including a grab strap it may be possible to open the closing flap simply by
15 pulling on the grab strap. This may be particularly advantageous if the closing flap has fastening means that allow it to be opened by simply pulling firmly on a grab strap, for example if the fastening means is a hook and loop fastening means.

The opening at the second end of the sleeve may be substantially any shape and size that
20 allows the linked round to be pulled out of the bag from the second end of the sleeve in a quick and easy manner. Therefore, as will be understood by a person skilled in the art, the opening should extend across the width of the sleeve. In preferred embodiments of the invention the opening may be substantially triangular or a similar shape and may extend partially along a side of the sleeve. Having the opening extend partially along a side of the
25 sleeve from the first end towards the second end may be preferable as when the opening is opened it allows a user to quickly and easily grasp the end of the linked round. Having an opening extend partially along a side of the sleeve may be particularly preferable if the bag comprises a closing flap, as discussed above.

30 In order to hold a linked round in the proper position within the sleeve the bag may comprise means for holding an end round of the linked round in a position adjacent to

CLAIMS

1. A linked round carrying bag consisting of a flexible sleeve within which is carried a linked round, the flexible sleeve being sealed at a first end, having an opening at a second end that extends across the width of the carrying bag, and having an openable closure extending substantially from the first end to the second end, wherein a width of the sleeve is greater than 120% of the length of an individual round of the linked round but is less than 150% the length of an individual round, and wherein when in use the end of the linked round can be fed into a firearm and the linked round is pulled out of the sleeve through the opening such that the firearm can be used without the need to further remove the linked round from the sleeve.
2. A bag according to claim 1 wherein the sleeve is formed of fabric.
3. A bag according to claim 2 wherein the sleeve is formed of Cordura® fabric.
4. A bag according to any preceding claim, wherein the openable closure comprises a zip.
5. A bag according to any preceding claim, wherein the openable closure is positioned substantially centrally along the width of the sleeve.
6. A bag according to any preceding claim, wherein the length of the bag from the first end to the second end is approximately a quarter of the length of linked rounds that the bag carries when in use.
7. A bag according to any preceding claim, wherein the length of the individual round is 68mm.
8. A bag according to any one of claim 1 to 6, wherein the width of the sleeve is greater than 81.6mm but less than 102mm.
9. A bag according to claim 1 or 7, wherein the width of the sleeve is approximately 133% of the length of an individual round.
10. A bag according to any preceding claim, comprising closure means for openably closing the opening.

11. A bag according to claim 10, wherein the sleeve comprises a closing flap formed at the second end of the sleeve.
12. A bag according to claim 11, wherein the sleeve comprises hook and loop fastening means for securing the closing flap against an outer surface of the bag.
13. A bag according to claim 12, wherein hook and flap fastening means is positioned on the same side of the sleeve as the openable closure and the closing flap is formed on the opposite side of the sleeve from the openable closure.
14. A bag according to any of claims 11-13, wherein the closing flap has a grab strap attached at an outer end.
15. A bag according to any preceding claim, wherein the opening is triangular.
16. A bag according to any preceding claim, wherein the sleeve is formed as a triangular prism with the openable closure formed along an edge of the prism.
17. A bag according to any preceding claim, wherein the sleeve comprises fastening means substantially at the first end and/or second end for securely fastening the first end of the bag to the second end of the bag when the bag is folded in half between the first end and the second end.
18. A bag according to claim 17, wherein the fastening means comprises a strap and buckle.
19. A bag substantially as shown in the Figures and as described herein.

Annex 2 (GB2523562)

GB2489116, filed by the current applicant, discloses a linked round carrying bag that provided an improved means for carrying linked rounds. In particular this patent discloses a linked round carrying bag consisting of a flexible sleeve that is sealed at a first end, has an opening at a second end and has an openable closure extending substantially from the first
5 end to the second end, wherein a width of the sleeve is greater than the length of an individual round but is less than twice the length of an individual round.

Through use, some issues have become apparent with the linked round carrying bag of GB2489116. In particular, it has been found that when the bag is not kept horizontal when
10 carried any link rounds stored within the bag can move around within the bag. This can cause rounds to pool at or near the first end of the bag, away from the opening, thereby making it difficult to access the rounds when a user wishes to do so. This is a particular problem when the bag is carried as a bandolier, which has become the preferred method of carrying the bag.

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In the light of the above there is a need for an improved linked round carrying bag that solves the problem of the linked rounds pooling at the first end of the bag when the bag is carried.

Summary of Invention

20 The present invention provides a linked round carrying bag consisting of:

a flexible sleeve within which is carried a linked round, the flexible sleeve being sealed at a first end, having an opening at a second end extending substantially across the width of the sleeve and having an openable closure extending substantially from the first end to the second end, wherein the width of the sleeve is greater than 120% of the length of an
25 individual round of the linked round but is less than 150% of the length of an individual round, and wherein when in use the end of the linked round can be fed into a firearm and the linked round is pulled out of the sleeve through the opening such that the firearm can be used without the need to further remove the linked round from the sleeve; and

a fastening means adjacent a closable side of the opening arranged to be tightly fastenable around the closable side of the opening of the bag and the linked rounds carried in the bag to thereby hold the linked round in position adjacent the opening when the bag is carried as a bandolier.

and easy manufacture whilst providing suitable strength and flexibility. Suitable fabrics will be immediately apparent to the person skilled in the art. In a preferred embodiment of the invention the sleeve is formed from Cordura fabric.

5 The openable closure can be formed in any manner apparent to a person skilled in the art. Advantageously, the openable closure will be able to be opened in a quick and simple manner when it is required to do so but will be resilient enough to prevent accidental opening when the bag is in use. In particular, it is important that the openable closure remains closed when the linked round is being used and thereby being pulled out of the bag from the opening at the
10 second end of the sleeve. In preferred embodiments of the invention, the openable closure consists of a zip.

Alternative closures that may form the openable closure include closures formed by buttons, poppers or hook and loop fastening means. An openable closure of a bag according to the
15 present invention may be formed by one or more of these fastening means. For example, an openable closure may comprise a zip that may be covered by a flap that is secured using a hook and loop fastening means. Utilising more than one fastening means to form the openable closure may be advantageous as it can prevent dirt and/or dust entering the bag and can provide the openable closure with added resilience. However, it is to be understood that
20 it is not an essential feature of the invention that the openable closure consists of more than one fastening means.

In order for the operation of the bag to be as simple as possible and in order that the bag is as secure as possible, it may be preferable that the openable closure is positioned substantially
25 centrally along the width of the sleeve. Additionally, it is preferable that the openable closure is substantially straight. Having a straight and centrally positioned openable closure allows the closure to be easily opened when necessary but also allows the closure to be easily hidden when if the bag is folded in half, for example when it is being carried on a standard pack.

30 The width of the sleeve of a bag according to the present invention is greater than 120% of the length of an individual round of the linked round but is less than 150% of the length of an individual round.

This prevents a linked round that is stored in the bag from getting tangled and allows the round to be stored in a manner that allows it to be easily slid out of the sleeve from the opening at the second end of the sleeve. This also allows a linked round to be easily but
5 securely stored in the bag and allows it to be easily removed from the opening at the second end of the sleeve when necessary.

In accordance with the above, in preferred embodiments of the invention the width of the sleeve is approximately 133% of the length of an individual round.

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Standard linked rounds consist of a specific number of individual rounds. For example standard linked rounds generally consist of fifty, one hundred or two hundred individual rounds. The number of individual rounds that make up a linked round define the length of the linked round. In preferred embodiments of the invention the length of the bag from the
15 first end to the second end is approximately a quarter of the length of the linked round that the bag carries when in use. That is, if the bag is intended for use with linked rounds that consist of two hundred individual rounds the length of the bag would be approximately the length of fifty individual rounds. This is preferable as it allows the linked round to be folded in the bag to a length that is easy to carry but that still allows the linked round to be pulled
20 from the bag in a simple manner when required. As will be appreciated, bags that are the same length or half the length of the linked round that the bag is intended to be used with may also be preferred.

For any specific bag the volume of the sleeve will be designed to be able to carry a linked
25 round that is folded in the manner intended. For example, if a bag is intended for use with a linked round comprising two hundred individual rounds and is approximately a quarter of the length of that linked round, then the volume of the sleeve will be suitable

CLAIMS

1. A linked round carrying bag consisting of:
 - a flexible sleeve within which is carried a linked round, the flexible sleeve being sealed at a first end, having an opening at a second end extending substantially across the width of the sleeve and having an openable closure extending substantially from the first end to the second end, wherein the width of the sleeve is greater than 120% of the length of an individual round of the linked round but is less than 150% of the length of an individual round, and wherein when in use the end of the linked round can be fed into a firearm and the linked round is pulled out of the sleeve through the opening such that the firearm can be used without the need to further remove the linked round from the sleeve; and
 - a fastening means adjacent a closable side of the opening arranged to be fastenable around the closable side of the opening of the bag and the linked rounds carried in the bag to thereby hold the linked rounds in position adjacent the opening when the bag is carried as a bandolier.
2. A bag according to claim 1, wherein the fastening means comprises a quick release fastening.
3. A bag according to claim 2, wherein the quick release fastening comprises a hook and loop fastened.
4. A bag according to claim 2 or claim 3, wherein the quick release fastening comprises press studs.
5. A bag according to any preceding claim, wherein the fastening comprises a fabric strap that is fixed at a first end to the bag.
6. A bag according to any preceding claim, wherein the length of the individual round is 68mm.
7. A bag according to any one of claims 1 to 5, wherein the width of the sleeve is more than 81.6mm but less than 102mm.
8. A bag according to claim 7, wherein the sleeve has a width of 90mm and is 750mm long from the first end to the second end.

9. A method of using a linked round carrying bag, the bag consisting of:
- a flexible sleeve that is sealed at a first end, has an opening at a second end, and has an openable closure extending substantially from the first end to the second end, wherein the width of the sleeve is greater than the length of an individual round of the linked round but is less than twice the length of an individual round; and
 - a fastening means adjacent a closable side of the opening arranged to be fastenable around the closable side of the opening of the bag and any linked rounds in the bag;
- the method comprising the steps of:
- positioning a linked round in the bag such that the linked round is folded over upon itself;
 - closing the openable closure to contain the linked round in the bag; and,
 - tightly fastening the fastening means around the bag to thereby hold the linked rounds in position adjacent the opening when the bag is carried as a bandolier.

Annex 3 (EP(UK)3111159)

CLAIMS

1. A linked round carrying bag (11) consisting of:
a flexible sleeve within which is carried a linked round, the flexible sleeve being sealed at a first end (12), having an opening at a second end extending substantially across the width of the sleeve (9) and having an openable closure extending substantially from the first end to the second end, wherein the width of the sleeve is greater than 120% of the length of an individual round of the linked round but is less than 150% of the length of an individual round, and wherein when in use the end of the linked round can be fed into a firearm and the linked round is pulled out of the sleeve through the opening such that the firearm can be used without the need to further remove the linked round from the sleeve;
characterised in that it further consists of:
a fastening means (20) adjacent a closable side of the opening arranged to be fastenable around the closable side of the opening of the bag and the linked rounds carried in the bag to thereby hold the linked rounds in position adjacent the opening when the bag is carried as a bandolier.
2. A bag according to claim 1, wherein the fastening means comprises a quick release fastening.
3. A bag according to claim 2, wherein the quick release fastening comprises a hook and loop fastened.
4. A bag according to claim 2 or claim 3, wherein the quick release fastening comprises press studs.
5. A bag according to any preceding claim, wherein the fastening comprises a fabric strap that is fixed at a first end to the bag.
6. A bag according to any preceding claim, wherein the length of the individual round is 68mm.
7. A bag according to any one of claims 1 to 5, wherein the width of the sleeve is more than 81.6mm but less than 102mm.

8. A bag according to claim 7, wherein the sleeve has a width of 90mm and is 750mm long from the first end to the second end.