

Patent	<b>EP(UK) 0801532</b>
Proprietor(s)	JEREMY DAVID LENIGHAN
Exclusive Licensee	NONE
Requester	JEREMY DAVID LENIGHAN, on 20 October 2005
Observer(s)	HERITAGE BATHROOMS
Date Opinion issued	20 January 2006

### **The request**

1. This request is directed to the question of whether EP(UK) 0801532 (“the patent”) is infringed by a product manufactured and offered for sale in the UK under the name “Showerbath”, by Heritage Bathrooms of Princess Street, Bedminster, Bristol, BS3 4AG (hereafter “Heritage”). The request has been submitted on behalf of the proprietor of the patent by patent attorneys Bailey Walsh & Co..

2. The request contains six appendices comprising a copy of the patent (Appendix 1), a printout from Heritage’s website (Appendix 2), pages from Heritage’s product catalogue (Appendix 3), photographs of the Showerbath product (Appendix 4), and copies of the International Search Report and the International Preliminary Examination report (Appendices 5 and 6).

3. There is also a request for an opinion as to whether the patent is valid should new evidence cause validity of the patent to be considered. This has not occurred and no opinion is offered.

### **Stay**

4. A stay in proceedings of one month, from 01 December 2005, was agreed by the requester and Heritage to enable them to enter into negotiations.

5. Although a further stay was actively considered whilst negotiations were continuing, an impasse in those negotiations resulted in a further stay being declined by the requester.

### **Observations; observations in reply**

6. Observations were filed on behalf of Heritage by solicitors Osborne Clarke, dated 21 December 2005, to be considered in the event that a further stay in proceedings was not agreed. Heritage deny infringement on the grounds that the Showerbath product does not fall within the scope of claims 1 or 2, and/or that the requester is estopped from claiming infringement.

7. On 29 December 2005, the requester indicated that it did not accept Heritage's latest settlement offer, proceedings resumed and on 13 January 2006 observations in reply were filed by the requester, disputing Heritage's interpretation of claims 1 and 2 and its argument on estoppel. The observations also include a technical drawing showing a cross-section of the Showerbath product (appendix 7) and further photographs of the Showerbath product (Appendices 8 and 9).

8. Heritage filed a further response on 17 January 2006. This falls outside the procedure under rule 77F, and I take no account of it. In any case I do not think this affects the conclusions I come to below.

### **The patent**

9. The patent relates to a bath with a screen assembly which can be swung into position to enable a user to take a shower whilst standing in the bath. As described, the screen comprises at least one panel with a sealing strip attached to the lower edge of the panel, which sealing strip engages the edge of the bath when the screen is swung into position.

10. Claim 1 is the only independent claim. It reads:

*A bath and shower screen assembly wherein the shower screen 22 comprises a single front panel or two or more front panels hinged together, and wherein the shower screen 28 is pivotally mounted relative to the bath 10, so that the screen can be swung from an in use position in which it is over the front side 22 of the bath 10 but is prevented from being swung outwards over said front side 22, and prevents water from a shower from spilling over said front side 22 of the bath 10, and a stowed position in which the screen is clear of said front side 22, and wherein the front side of the bath 10, at least in the location of the bottom of the screen 28 when it is in its use position, is internally stepped and defines a shoulder 36, characterised in that the shoulder is engaged by the bottom edge of the screen 28 in the in use position, so as to hold the screen in said use position.*

11. Claim 2 is also discussed by the parties. It reads:

*An assembly according to claim 1, characterised in that the lower edge or lower edges of the panel or panels is or are provided with sealing strip means 34 which engages the shoulder 36.*

## Estoppel

12. It is convenient to address the issue of estoppel before moving on to the substantive issues.

13. Heritage submits that, if the opinion finds that the product would infringe, then an issue of estoppel arises. Its argument runs as follows. Representatives of the two parties met in July 2003 and the requester confirmed that “provided the seal on .. the screen was deeper than the lip on the bath, there would be no conflict.” In support, the requester has filed a copy of a letter from Mr John Knowles of Heritage to Mr Peter Lenighan of the requester dated 4 July 2004, which includes a sentence to that effect. It follows that the requester has confirmed that Heritage’s product does not infringe the patent. Further or alternatively Heritage has marketed its Showerbath product in reliance on the requester’s statement and the requester is therefore estopped from pursuing any claim. Whether there is an effective estoppel is an issue of fact and law and if the requester disputes the estoppel, then the submission of evidence and cross-examination of witnesses would be required. Moreover the comptroller has no jurisdiction under section 74A or otherwise to give an opinion on the issue of estoppel. The comptroller should therefore hold, under section 74A(3)(b) that it is inappropriate to issue an opinion on infringement.

14. In its response the requester agrees that section 74A does not specifically provide directions for proceedings in connection with the determination of the question of estoppel, but submits that the question is in any case irrelevant in the context of the present proceedings. It argues that this view “appears to be in line with section 74A(2) .. under which an opinion can be issued under circumstances where the patent may not be in force, and not a frivolous or vexatious request subject to refusal”. The requester goes on to refer to the letter of 4 July 2004, noting that no reply was made to that letter by the requester, and that Mr Knowles has subsequently indicated that in fact it was agreed that there would be no infringement if “the seal on the bottom of the screen was big enough (deeper than the lip on the bath) such that the seal was flexible enough for the screen to be able to pass over the edge of the shoulder of the bath”.

15. I agree with Heritage that it is not appropriate for the comptroller to give an opinion on the existence or extent of any alleged estoppel. Certainly there is no provision for this in section 74A, but quite apart from that, the opinion process is an unsuitable mechanism for exploring the issue. As pointed out by Heritage, assessing claims of estoppel nearly always requires cross examination of witnesses to establish exactly what went on, and the opinions process does not provide for this.

16. Equally I agree with the requester that an allegation of estoppel should not normally prevent the comptroller from issuing an opinion on the substantive issues. The comptroller is being asked to give no more than an opinion as to whether a particular act would infringe. That is a matter of fact.

Whether or not a representation by the patentee precludes a successful outcome for him in infringement proceedings, even though the act might infringe, is a separate matter. It only becomes a material issue if such proceedings are launched. Indeed, I also observe that it would become far too easy for third parties to block a request for an opinion if an allegation of estoppel were enough to do so.

17. I conclude that I need take no further account of the allegation of estoppel in this opinion. I note that Heritage has the option of seeking a declaration under section 71 if it wishes the issue of estoppel to be considered.

### **The substantive issues**

18. The requester refers in its original request to the photographs in Appendix 4 and explains that they show a shower screen assembly comprising a panel with a sealing strip attached to the lower edge of the panel, with the bottom edge of the screen engaging a shoulder of a bath. The seal – being relatively inflexible – does not bend enough to allow the screen to pass over the edge of the bath.

19. Heritage, in its observations, accepts that it offers for sale the product shown in Appendices 2, 3 and 4, but argues that:

(i) the Showerbath screen is intended to swing out past the edge of the bath, and although the sealing strip offers some limited resistance, it has never prevented the screen from swinging out. Under a recent development rising hinges have been included to facilitate this.

(ii) the Showerbath screen does not contain all of the elements of claims 1 and 2 under a proper construction of those claims

20. In its observations in reply, the requester argues that Heritage are now manufacturing a new product which can pass over the edge of the bath, but that the original product, as illustrated in the requester's Appendices, does infringe. The requester goes on to note that Heritage admit that the screen engages the shoulder of the bath and that the sealing strip provides resistance to the screen passing over the shoulder of the bath and concludes that "even if the depth of the shoulder was reduced such that the screen could pass over the shoulder, assuming the seal was flexible enough to do so, if the seal engages the shoulder of the bath in the in-use position, the patent is still infringed."

21. There are two questions to decide here then: how claims 1 and 2 should be construed, and whether or not the Showerbath product infringes those claims.

### **How should claims 1 and 2 be construed?**

22. Heritage argues that

- (a) the Showerbath screen does not infringe claim 1 of the patent since the claim requires the screen – not the sealing strip – to engage the edge of the bath, and
- (b) the Showerbath screen does not infringe claim 2 of the patent since the claim requires both the screen *and* the sealing strip – to engage the edge of the bath.

23. Heritage base this conclusion on the argument that “When construing cumulative claims 1 and 2, claim 2 must be read as incorporating all of the features of claim 1 with the additional features of claim 2. Furthermore, claim 1 must be read as not possessing the additional features of claim 2”.

24. This argument seems to me to be fundamentally misconceived. Claim 1 requires that “*the shoulder is engaged by the bottom edge of the screen*”. Thus claim 1 includes within its scope a screen comprising a panel without a sealing strip along its lower edge, in which case it will be the bottom of the panel that engages the shoulder, and it also includes within its scope a screen comprising a panel with a sealing strip along its lower edge, in which case it will be the sealing strip that engages the shoulder. Claim 2 covers the second arrangement but not the first; that is to say it is more specific than claim 1, which is the function of a dependant claim. Thus, claims 1 and 2 both embrace the second arrangement and I conclude that the Showerbath product is not distinguished from the claims of the patent on these grounds.

25. That said however, claim1 requires that “*the shower screen 28 is pivotally mounted relative to the bath 10, so that the screen can be swung from an in use position in which it is over the front side 22 of the bath 10 but is prevented from being swung outwards over said front side 22*” and that “*the shoulder is engaged by the bottom edge of the screen 28 in the in use position, so as to hold the screen in said use position.*” The description is wholly consistent with this, for instance stating at column 5 paragraph 0039 that “the panels cannot be pushed outwardly at their lower edges beyond the top edge of the bath when they serve their screening function”.

26. It follows, without any doubt it seems to me, that I must reject the requester’s argument that “even if the depth of the shoulder was reduced such that the screen could pass over the shoulder, assuming the seal was flexible enough to do so, if the seal engages the shoulder of the bath in the in-use position, the patent is still infringed”.

27. Accordingly I do not accept the construction placed on claims 1 and 2 by Heritage, nor do I accept the requester’s submission that if the screen can pass over the shoulder of the bath, the patent is infringed.

**Does the Showerbath product infringe claims 1 and 2?**

28. Having regard to the above, it may well be that if Heritage is now manufacturing a product that incorporates rising hinges to facilitate movement of the screen over the shoulder of the bath, then that product does not infringe the patent.

29. However that product is not the subject of this request; rather it is the product shown in the Appendices to the request and to the observations in reply. The photographs in the Appendices are of relatively poor quality, being photocopies, and although the drawing in Appendix 7 is crystal clear, and shows that the spacing between the bottom of the panel and the top of the shoulder is small relative to the depth of the sealing strip, there is no indication in any of the material before me of the flexibility of the sealing strip.

30. The requester states that it has one of the products and can demonstrate that the screen does not pass the edge of the bath and also has witness statements from showroom staff to confirm that. However, those witness statements have not been provided, nor can I verify that the acquired product functions as outlined or is representative of the articles sold. In short, it is not possible from the material before me to determine whether or not the Showerbath screen can pass over the shoulder of the bath, and in consequence I am only in a position to give a conditional view on the question of infringement.

## **Opinion**

31. Given the construction I have placed on claims 1 and 2 as set out above, I conclude that if, in normal use of the Showerbath product, the screen is prevented from being swung outwards over the edge of the bath by the engagement of the sealing strip with the shoulder of the bath then that product infringes claims 1 and 2 of EP(UK) 0801532, but that if the screen can be swung outwards over the edge of the bath then the Showerbath product does not infringe the patent.

## **Application for review**

32. Under section 74B and rule 77H, the proprietor may within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.

33. Under rule 77H(5), such an application for review may be made only on the grounds 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.

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**NOTE**

*This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Patent Office*

John Rowlatt  
Examiner