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Case No: CC12P02985

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice
Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 07/11/2013

Before :

MR JUSTICE MANN

- -

Between :

(1) Manvers Engineering Limited	**Claimants**
(2) Colin Ibbotson	
- and -	
(1) Lubetech Industries Limited	
(2) Mayflower (UK) Limited	
(3) Richard William Ghinn	**Defendants**

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- -

Mr Alastair Wilson QC (instructed by **Virtuoso Legal**) for the **Claimants**
Mr Mark Vanhegan QC (instructed by **HGF Law**) for the **Defendants**

Hearing dates: 7th October 2013

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Judgment

Mr Justice Mann :

1. This is a patent action in which the claimants claim infringement of UK Patent GB 2 428 032 ("the patent") and the defendants deny infringement and challenge the patent on the grounds of anticipation, obviousness and added matter. The second claimant is the current proprietor of the patent and is said to have given an exclusive licence to the first claimant. The three defendants are all said to have infringed the patent by importing and selling an infringing product. It is unnecessary for the purposes of this judgment to distinguish between the various plaintiffs and the various defendants inter se, and I shall not do so. The claimants were represented by Mr Alastair Wilson QC, and the defendants by Mr Mark Vanhegan QC.

2. The subject matter of the patent is equipment for catching oil leakages from equipment, preventing such oil leaks from leaking out into the environment as a result of rainwater intrusion and enabling the oil to be disposed of safely and efficiently. The invention also applies to substances similar to oil, but for ease of exposition I shall focus on oil.

3. Machines which use oil leak oil from time to time. That oil needs to be caught lest it leak into the ground and damage the environment, or damage whatever is below the leak. The most straightforward way of catching it is to use a drip tray. That has the disadvantage that one ends up with a tray of oil which sloshes around, and, more importantly for the purposes of the invention, it may not stay in the tray if rainwater gets into the tray and fills it (many applications will be outside), causing the oil (which will be lighter than the water) to run off with the water once the tray is full. One answer to the problem is to put an oleophilic mat (a mat whose fibres absorb or adsorb oil) in the bottom of the tray, but there remains the problem of the tray filling up with water in many situations in which it will be used, and oily water still floating off. The purpose of the invention is to allow the capture and retention of oil while allowing clean, oil-free water to run off.

4. The patent seeks to facilitate that by providing for oleophilic substances to form both the bottom and the side of what can be viewed as a large tray (a "collector"). Below the bottom layer there is an impermeable layer. When oil falls on to the bottom layer the oil cannot go further downwards and is absorbed in the oleophilic layer. When rainwater is added neither the water nor the oil can penetrate further downwards. If the article begins to fill with water, the water is able to escape through the side-walls which, whilst being oleophilic, are nonetheless water-permeable. The oil cannot escape because it becomes trapped in the oleophilic substance. Thus only clean water escapes through the walls. Because this filtered water is escaping, the point of overflow (which may be completely avoided) is at least postponed until such time as the oleophilic walls are themselves saturated with oil. At that point the article can be taken up and the oil can be removed by such means as pressing or washing in detergent. It can then be used again.

5. The relevant claims in the patent are as follows. I have broken up claim 1 into its integers for ease of reference later on.

> "1. (*1*) A portable collector for machine fluids, comprising
>
> (*2*) a mat having
>
> (a) a self-supporting perimeter wall upstanding from

(b) an impermeable base layer,

(*3*) the mat and wall comprising a layer of oleophilic material and

(*4*) the wall being permeable,

(*5*) whereby water falling on the mat can escape therefrom, while oily fluids are retained by said oleophilic material.

…

6. Claims 2 to 4 are collectors according to Claim 1, wherein various types of oleophilic material are specified, and Claims 5 and 6 are:

"5. A collector according to any preceding claim, wherein the fibres are contained within a permeable fabric cover.

6. A collector according to Claim 5, wherein the fabric is a woven or non-woven fabric formed from a plastics material."

7. Claim 8 deals with portability:
"8. A collector according to any preceding claim, which is flexible so as to be capable of being rolled up."

8. Claims 1 and 8 are the claims about which the debate at the trial revolved.

9. The specification refers to a preferred embodiment in which the oleophilic material comprises fibres of oily plastic material such as a polyolefin, with a special reference to polypropylene fibres being especially suitable.

> "The fibres are preferably contained within a permeable fabric cover, for example a woven or non-woven fabric formed from polypropylene or the like."

The mechanism by which it works is described thus:

> "The collector of the invention is light in weight and therefore easy to deploy and to remove when no longer required. It retains all oil fluids falling on to it, while allowing rainwater to pass through it to drain away, thereby ensuring that oil is never washed out of the collector by rainfall, however heavy. Since the waste oil can be readily extracted by simple physical or chemical means, the cost of regenerating the collector for further use is relatively small."

10. The basic shape can be seen from Figure 1 in the patent, and the construction from Figure 2 in the patent, which are reproduced in Appendix 1. The walls are shown numbered 2 and the bottom impermeable layer is 5. The fibrous polypropylene material is 6, retained by a layer of permeable fabric 7. The oil layer is 9 and the water on which it is shown floating is 11. According to the invention, none of the liquid can penetrate through the base but oil (provided water has not arrived to form a

barrier) can be absorbed by the lower absorbent layer. When rain falls the oil and the water seek to pass through the walls, where the oil is absorbed by the oleophilic material in the wall but the water passes on through and drains away, with the oil filtered out. This carries on until the entire height of the wall is saturated with the oil, at which the point the water no longer passes, but the collector can be taken up and replaced and/or have the oil removed and be re-used.

The alleged infringing product

11. The defendants import and sell a "Site Mat" which is intended to catch oil and similar products whilst allowing for "the rapid release of filtered water, eliminating the requirement of regular decanting of secondary containment trays when deployed outdoors" (according to its publicity material). Its purpose is very similar to the purpose underlying the invention. It consists of two parts – a sort of frame (largely rectangular, in various sizes) intended to receive a separate inner oleophilic liner. The base of the frame is made of an impermeable plastic substance, and there are sewn on to it walls comprising non-porous polyethylene foam rods held in place by vinyl-coated polyester woven mesh sleeves. The walls are flexible to a degree, but only to a degree. Water and other fluid can escape under and round the walls. It is the sleeves which are attached to the base unit. Within the tray area a liner of an oleophilic substance is inserted. The defendants call the liner a "Smart Liner" and there are two versions – first, what I will call the "basic" version, and second, the "Plus" version. The basic version is shaped (generally) to cover the base area and is capable of being tucked in under the walls (more or less). The Plus version covers the base and then rises up around the sides so that it has "walls" which are the same height as the polyethylene foam rod walls of the tray. Both are made of a fibrous material which is flexible as a thick fabric is flexible. Each has little internal rigidity. The Plus version thus provides a complete lining for the interior surfaces of the collector. The two configurations can be seen from the sales brochure page at Appendix 2. Oil falling on to the liner is absorbed by the liner. Water falling passes under or round the side walls in the basic liner, and through the liner and thence under or round the walls in the Plus version.

12. There is an issue in the case as to whether or not the normal version is capable of riding at least part-way up the walls of the underlying mat so as to form a lining for the walls. Mr Alastair Wilson QC, who appeared for the claimant, submitted that it did, and that the defendants' literature taught the user to achieve that, with the result that it, like the Plus version, infringed, for reasons which appear below.

Witnesses

13. I heard oral evidence from two experts**.**

    i) **Mr Nigel Finney**, an engineer, gave evidence for the claimant. I am quite satisfied that he had his duties as an expert firmly in mind, not least because his report did not support the infringement claim in relation to the basic version. He was, however, not as experienced in products in the field in 2005 (the filing date for the patent application) as was the defendants' expert. His expertise lies in research into and application of advanced polymer composite materials, and while he has an awareness of the sort of materials involved in this case, it was not apparent that he had as wide an experience of day to day

deployment of the sort of equipment that is in issue in this case, or of the availability of such equipment, particularly in 2005, as the defendants' expert. His lack of experience made him a very cautious witness.

ii) **Mr Andy Martin** gave evidence for the Defendants. He is an independent consultant to oil and gas companies with a lot of experience of, inter alia, oil spill and waste disposal and of the sort of products relevant to this case. I thought he was an impressive and fair witness.

14. I also received a witness statement from the third defendant, Mr Richard Ghinn. This statement amplified and explained various aspects of the Product Description in this case ("the PPD"). It had been Mr Wilson's intention to cross-examine him, but in the end the time constraints of the trial, and probably the course the trial was taking, led Mr Wilson to abandon his attempt to do so.

Common general knowledge

15. This has to be taken mostly from the evidence of Mr Martin because of Mr Finney's lower level of experience. The common general knowledge at the time would have included drip trays, sorbent materials (pads, mats, pillows and granules), drip trays with sorbent materials and absorbent booms and socks to surround a spill. Drip trays could include holes or perforations in the bottom and/or sides to allow water to drain off.

The skilled addressee

16. There was no material dispute as to this. The skilled addressee would be a person with knowledge and experience of oil spill control gained in industry. He would be the type of person responsible for ensuring the environmental protection of sites and interested in the design and purchase of the means of protecting the ground beneath machinery or would have been involved in the design and development of commercially available spill control products. He would be aware of the properties of the fluids that are being dealt with (primary oil and water), the techniques deployed to prevent pollution of the ground from leakages and the materials used in that field, together with the properties of those materials.

Points of construction

17. The following points of construction arise in relation to the claims in the patent.

"Portable collector."

This point arises in relation to the sole piece of prior art relied on, and in relation to the added matter claim. There was originally an issue as to some of the nuances of this, but by the end of the trial there was agreement between the parties to the effect that portable meant "can be moved from place to place". I need therefore say no more about it than that.

18. Mr Vanhegan for the defendant submitted that in integer 1 the expression "for machine fluids" meant "suitable for machine fluids". Nothing seems to me to turn on this point.

19. While at one stage it appeared there might have been a dispute as to the meaning of "impermeable" in relation to the base layer, by the end of the trial it was apparent that both parties gave it the same meaning, namely that it was impermeable to anything, and that nothing could get through.

20. There was a certain amount of debate at the trial about the construction of the claims in terms of whether the "mat" included the wall or whether "mat" was a "mat plus wall". In the end I do not think that that particular analysis helps the debate, but in considering infringement and the prior art it is necessary to consider what the drafting relationship is between those two parts of the invention.

21. In my view the patent treats the mat and the wall as being two separate components of the overall product, the "collector". There are a number of pointers to this:

(i) Integer 3 expresses them in terms which suggests that they are different.

(ii) The overall item is described as a "collector" not a mat.

(iii) Figure 1 of the patent with its designating numbers indicates the flat component is the mat and the vertical components are the wall. It does not distinguish between the various layers of the horizontal component, but it does distinguish the mat from the wall.

(iv) Figure 2 of the patent (mistakenly cross-referred in the patent as Figure 3), with cross-references in the specification, describes the "mat 1" as having "an impermeable base layer 5, on which is provided a layer 6 of fibrous polypropylene material retained by a permeable fabric layer 7". The "mat" is therefore apparently the horizontal component.

(v) The specification goes on to state that:

> "The wall or walls 2 may be attached to the mat 1 by stitching, by adhesive, for example a hot-melt adhesive, or by welding … Similar methods may be employed to secure the different layers of the mat together."

This suggests the wall and the mat are different components.

(vi) The specification deals with what happens when water falls into the collector.

> "The liquids tend to flow into the walls 2, where the oil is attracted to and retained by the polypropylene fibres, while the water is repelled by the hydrophobic fibres and escapes outwardly of the collector to drain away. In the absence of

> water, the oil soaks into the fibrous material in the mat and is retained there."

That again suggests that it is the horizontal component that is the mat.

22. There are references that suggest that the overall component is the "mat". That might be one interpretation of integer (2), but that is equivocal. The specification is a little clearer at one point where it says:

> "When the mat is saturated with oil, it can be regenerated by squeezing the collector, for example between rollers."

The point about saturation must be intended to apply to the walls as well, but I do not think that that reference requires one to view the whole thing as the "mat".

23. Accordingly, in my view the invention should be taken as describing a product which has a horizontal component comprising a mat which is made up of several layers, including an impermeable layer, to which is fixed a wall which includes oleophilic material.

24. One question relating to the word "comprising" potentially arises. Mr Wilson submitted that it meant "includes" and not "consists solely of", at least in this context, and pointed to the EPO Guidelines for Patent Examiners, and the decision of Arnold J in *Abbott v Medinol* [2010] EWHC 2865 (Pat) as supporting the proposition that the word, in a patent context, was capable of bearing the former submission. I accept his submissions as to the meanings that the word is capable of bearing, but I am not altogether sure that they apply to this case. Claim 5 is a claim to:

> "5. A collector according to any preceding claim, wherein the [oleophilic] fibres are contained within a permeable fabric cover."

That covers the situation where the walls are not made entirely and exclusively of the oleophilic material, suggesting that claim 1 covers the case of entire construction. However, at the end of the day I do not think that resolving this point will affect the outcome of the case, and I will assume for these purposes that Mr Wilson is right on the point.

Infringement

25. It is now necessary to apply that analysis to the allegedly infringing products. There are various versions of the defendants' products, distinguishable by their having different numbers and configurations of holes in the base layer, which goes to the question of permeability. For the moment I shall ignore the question of permeability and treat all versions as being identical.

26. One first has to eliminate what cannot be said to infringe. The two types of liner by themselves certainly cannot be said to infringe. The basic Smart Liner has no walls at all, and while the Smart Liner Plus has walls they are not self-supporting. Without the support of the side walls of the rest of the unit they would flop and not stand up at all. Nor does the Plus liner (which could probably fairly be described as a mat) have an impermeable base layer. Accordingly those integers of the patent are not matched by the liners and there is no infringement in respect of them by themselves.

27. Accordingly the only infringing product could be the assembled unit. The defendants do not take any point based on the product being merely an incomplete kit of parts which might be assembled in various manners. They meet head on the case that the assembled unit is said to infringe.

28. There is now one further thing which can be got out of the way as not infringing. The assembled product with the basic Smart Liner does not have walls "comprising a layer of oleophilic material". The Smart Liner is intended to lie flat within the base of the overall collector. It does not go up the sides. The walls of the collector do not contain oleophilic material. Integer 3 is therefore not matched.

29. In his "faint" (his word) argument in favour of infringement for this product Mr Wilson relied on a picture in the defendants' brochure which suggested that part of the long side of the liner would ride partly up the wall of the collector, and he suggested that he had a case for secondary infringement by selling the product with some sort of guidance as to its use in an infringing way. This argument is hopeless. The picture in question appears in Appendix 2 to this judgment. It is apparent enough from the picture that the liner fits over the base and does not come up to the wall to any material extent even on one side. There is no suggestion from the photograph that it is intended that the liner should be extended upwards in that particular way, in contrast with the picture of the Plus product above it positively suggests that it is not. The wording "Designed to fit snugly within the Site Mat base unit" is also inconsistent with an attempt to instruct the creation of walls comprising an oleophilic material. There is no question of this configuration infringing.

30. I would go further in relation to this argument. This court (IPEC, as it now is) exists to provide quicker and cheaper determination of IP disputes. Speed and economy of hearings are at the heart of the procedure. That objective is frustrated if "faint" points, in which there is obviously no real hope, let alone any real prospect, of success take up the time of the court. Parties to proceedings in this court really should bring to it only the main points that are capable of making a difference. Judgment must be exercised as to which points it is worth putting before the court.

31. I therefore turn to the combination of the "base unit" with the Smart Liner Plus. This liner undoubtedly does come up to the full height of the walls of the base unit. Mr Wilson submits that this infringes. He submits that there is nothing which limits the wall to a single component (his "comprising" point) and the claim does not exclude the possibility of a wall which has an oleophilic layer and some additional supporting component. Given that, one can read the claims on to the product and produce an infringement.

32. I consider that this argument fails. On my analysis of the claims, one starts by looking for the mat. In the invention that is the horizontal element. It has two layers – the oleophilic layer and the impermeable base layer. Rising from the impermeable base layer there are self-supporting walls. If one looks at the defendants' products there is no corresponding horizontal mat. I assume for the moment that the bottom of the defendants' products is an impermeable layer (though there is an issue as to that which I address below), so there is at least that. However, that is not part of a mat with an oleophilic layer. It is a base to the unit. Nor, in my view, does it become a mat when the Smart Liner Plus is inserted. If anything is the mat, it is the liner, but by itself that cannot infringe (see above). So if one looks for the mat in the defendants' products, it is either not there, or it is not there in the form of a horizontal component with oleophilic and impermeable layers.

33. Nor do the defendants' products fulfil integers (2) and (3) in terms of its wall. Without the liner the wall (which is self-supporting) does not have an oleophilic layer. Once the mat is inserted there is, on analysis, still no self-supporting wall comprising a layer of oleophilic material. There is a self-supporting wall against which a layer of oleophilic material is placed, but in my view it is not part of the wall. The layer is supported by a self-supporting wall. It is not a layer of the wall.

34. These are not over-forced technical objections without any merit. They articulate what is said to be different about this invention. The state of the art referred to in the specification refers to the known properties of oleophilic mats, and the possibility of using those mats in trays. Such use is also common general knowledge. The invention is an all-in-one product with its own built in vertical rigidity (sufficient to

self-support the walls). The defendants' products are two part products in which the filtering of oil is done by a separate unit put within something that can be regarded as a frame. That analysis, of course, does not of itself demonstrate non-infringement. One has to look to the terms of the patent for that. But it does support the analysis to which I have referred.

35. Another reason for finding non-infringement was put forward in relation to most of the versions of the defendants' products. The invention has an "impermeable base layer". The various versions (1 to 5 and 4a) of the defendants' products have holes in their bases. The holes vary in size and position. All of the versions have holes towards the edges, with grommets. These holes are outside the perimeter where the mesh sleeves of the walls are sewn on. It is suggested that they were to enable the unit to be hung up, among other purposes. Version 2 seems to have 4 more holes towards the corners; these are 6mm holes. Version 3 has two 1mm holes which were intended to be punched near the centre, but which were in fact punched towards two opposing corners. Version 4 has 4 x 5mm holes in the base, towards, but not in, the corners. Versions 1 and 4a apparently have no additional holes, save for the holes with grommets. There is a version 5 (marketed but never sold) which has a mesh base.

36. It was not apparently disputed that the material of which the defendants made their base layer was, as material, impermeable. However, Mr Vanhegan submitted that this meant that the defendants' products, save for versions 1 and 4a, do not have an "impermeable base layer". The holes prevent that, and there can be no question of one with a mesh bottom having any such thing. Mr Wilson accepted that holes which let oil through a base mat (and therefore, I would, assume water) meant that the mat was not impermeable. However, he said there was no complete dichotomy of permeable and impermeable – there was some middle ground between the two. To be permeable a material had to be capable of letting water through over substantially all its surface area, and he instanced the side wall of a house, painted with water impermeable paint, which had an open window in it.

37. I put Mr Wilson's probably over-refined arguments on this on one side. The patent requires the base to be "impermeable". The Shorter Oxford English Dictionary defines "impermeable" as:

> "Unable to be penetrated through; not permitting the passage of water, or of other liquids or gases".

38. I can adopt that definition. For these purposes anything which makes the base not impermeable means that the integer is not matched. Mr Wilson's written reply accepted that a hole which let oil (and by inference water) through meant that the base

was not impermeable. That is enough. So the question becomes whether the holes have that quality. The evidence on this was not entirely satisfactory even though the answer might be thought to be fairly obvious. Mr Finney carried out some (unauthorised) experiments which he said indicated that if one applied water around the holes in the corners of version 4, surface tension prevented the water running through the hole. Tests showed that that the base holes "are impermeable to small volumes of water". That is not saying much. Presumably (and not surprisingly) large quantities would have a different effect. Surface tension around the hole would be reduced by large volumes, or by agitation, and liquid would pass through it. There was some limited evidence that a re-seller had observed oil passing through holes in version 3. Layers with such holes in cannot, in my view, be regarded as "impermeable", which is the question. Even Mr Finney's report, in relation to the use of the defendants' holed products, expressed the "provisional" view that the Site Mat in conjunction with the basic Smart Liner "should not be considered impermeable". I am sure he is right about that, and the same applies to use with the Smart Liner Plus.

39. Accordingly, save in relation to versions 1 and 4a, and save in relation to Site Mats sold between 26th November 2012 and 4th January 2013, which were sold with a subliner which achieved impermeability, the defendants' products did not have the quality of impermeability in their base layers, and so for that reason too do not infringe.

40. There is one further infringement point relating to Claim 8. That claim is a claim to the article "which is flexible so as to be capable of being rolled up". The claimants maintained that the defendants' products were all capable of being rolled up. This point has no practical significance now that I have decided that none of them infringe claim 1, but I will deal with it briefly.

41. Briefly, the defendants' products cannot be rolled up. Mr Finney was invited to try, and could produce no more than a clumsy, squashed fold. The reason that it is not possible is because the walls of the main unit are not sufficiently flexible. They resist rolling because they are insufficiently flexible to deform equally along their length by rolling. Some of the products have a break in the rods on the long side of the rectangle (which they all are) but even that is not going to make them rollable. In practical terms they cannot be rolled. It is interesting that the defendants' publicity material sells them as being capable of being folded. I am sure that that is as far as they can go.

42. It follows, therefore, that no version of the defendants' product infringes.

Validity – anticipation and obviousness

43. These attacks assume less importance in the light of my finding of non-infringement, but they were argued so I will decide them, albeit more briefly than might otherwise have been the case. I will deal with anticipation first.

44. Both these attacks proceed from US Patent No US 6,558, 769 – "Chwala". This is a device for catching oil and other vehicular drips, primarily for the purpose of stopping those drips from damaging (and interfering with the appearance of) pavements over which vehicles pass and rest. The abstract reads:

> "In accordance with the present invention a receptacle for the collection of fluids is provided. The receptacle includes a frame with an opening defined between a pair of sidewalls and the front and rear wall is supported by the frame. The receptacle also includes a lower grate, a sorbent pad and an upper grate, all of which is received in the basin of the frame. The sorbent pad sandwiched between the upper and lower grate is prevented from moving and kept substantially flat, such that the sorbent pad may cover the entire opening. The front and rear walls further include tapered sections to secure the receptacle to the ground. In addition, the upper grate may also be hinged to the frame, providing an easier means to access the sorbent pad for periodic maintenance purposes. The preferred sorbent pad has properties that absorb various petroleum-based fluids while at the same time allowing water-based fluid to drain or seep through. The water may thereafter drain out of the frame through drain holes provided along the sidewalls or through the opening."

In that description the product is open-bottomed, so there is no impermeable layer below the pad. If it had stopped there, there could be no question of anticipation because of the absence of such a layer, but one of the disclosed embodiments has a base extending inwardly from the side walls such that "the base is fluid tight thereby prohibiting any fluid from seeping therethrough, except through the drain holes." Claim 2 provides:

> "2. The receptacle of claim 1 further comprising a fluid tight base extending between the bottom portion of the walls such that the water may only drain through the drain holes in the sidewalls".

It is only that product that might anticipate. The specification provides that "having an opening in the frame is preferred" in order to permit the circulation of air.

45. In fact it is clear that it does not anticipate. There was a certain amount of debate as to where the drain holes in the side wall were. They might have been above the level of the mat, below the level of the mat, level with the mat or partially covered by the edge of the mat, though in the end it seemed that the holes had to be at least level with the absorbent pad and not above it. There was debate as to whether the walls with the drain holes in were "water permeable" for the purposes of integer 4. However, none of this extended debate really matters. One of the integers of the patent in suit (indeed, the integer which underpins the whole inventive concept) is that the wall should "comprise a layer of oleophilic material". I fail to see how that can be said of Chwala. The material for the walls is not specified in the claims, but the body provides:

> "The frame is also preferably made from aluminium for cost effectiveness reasons but may be made from other stronger or lighter materials".

There is nothing to suggest that the walls should be made from, or should include, oleophilic material, and it was not suggested in the expert evidence that any such material would be suitable.

46. That, in my view, is an end of the anticipation claim and I do not need to consider all the other integers that may not be covered, or the respects in which they may not be covered. I will mention just one more. On its proper construction the patent requires the mat to be made of the oleophilic layer and the impermeable layer – see above. That requires contiguity. Mr Vanhegan and his expert said that Chwala disclosed an embodiment in which the absorbent pad lay on the impenetrable base, with the drain holes being level with the pad, and (on one view) with the sorbent pad filling the entire void above. Having considered the patent carefully, with the benefit of Mr Martin's views on the point, I find it impossible to extract that analysis from it. It does not disclose the pad in such close contiguity to an impervious bottom layer. Only a contrived reading can get one there. I will not set out all the material which leads to that conclusion, because to do so would involve setting out virtually the whole patent specification, and there is no point in doing that in the circumstances. Suffice it to say that this reading is just not plausible.

47. Therefore Chwala does not anticipate. I do not need to deal with the portability of Chwala.

48. I turn now to obviousness over Chwala, which is the only obviousness case raised.

49. The argument in favour of obviousness depends on the following process of reasoning and development:

(a) Claim 1 of Chwala does not assist on this point. It does not specify an impermeable bottom.

(b) Claim 2 of Chwala is a claim to the frame as in claim 1, but with a fluid tight base – see above. This provides an impermeable base.

(c) In a claim 2 construction the holes would, or could, be level with the edge of the mat so that that would be an escape route for the water out of which the oil has been filtered.

(d) One could actually effectively drop the mat to the bottom of the unit, so that the impermeable floor substituted for the lower grid of claim 1.

(e) One would then expand the pad (so far as necessary) so that it effectively filled the void between the top grate and the bottom impermeable layer. It would become, in the parlance of Mr Martin, a pillow.

(f) Or, in lieu of a pillow, you could have a mat with a bottom and sides which covered the holes, so that there was a partial void between the top grate and the surface of the mat. This would accommodate the water, and the water would seep out through the holes.

Thus one is said to arrive at the invention in the patent.

50. In dealing with this point I have in mind, and apply, the guidelines in *Pozzoli v BDMO* [2007] FSR 37. It is not necessary to set them out here.

51. There are a number of problems with this. Not the least of them is the fact that one has not arrived at the invention in the patent. The invention in the patent requires that the wall "comprises a layer of oleophilic material". This wall does not do so. The wall is a solid material, albeit water-permeable, and it has a lining. However, to be fair to the defendants, this obviousness argument really is advanced only in the event that it is found that their product infringes. In that event they say there is a squeeze – their product is a frame with a liner, and so is this evolution of Chwala. It is said that if their product infringes, then it is an obvious development of Chwala.

52. Next, I do not consider that the chain of obviousness works. First, I do not accept that it is clear that Chwala teaches that the holes should be adjacent to mat material in all

configurations. Neither did Mr Martin, in his cross-examination. Second, it does not clearly teach that the holes have to be next to the edge of the lining in the claim 2 embodiment either. Claim 2 is itself silent on the point, and I do not accept that in engineering terms it is inevitable that that is what it means. It would be possible to have a void below the mat, vented by the holes in the walls. If that is right, then the first step in arriving at the purportedly obvious equivalent would be to drop the grate-mat unit into that void, and the second would be to remove the lower grate as an additional sheet, and the third would be to consider filling the void with material, or to line the void. Having considered Chwala, and having heard Mr Martin, I do not consider that those steps would be anything like obvious. They would require a serious degree of invention, to use the terminology of the 4th step in *Pozzoli*. They have moved Chwala on a significant way from its apparent configuration.

53. That being the only route of the obviousness attack, the attack fails.

Validity – added matter

54. Claim 2 refers to a "portable collector". The defendants say that the application did not disclose this limitation, and thus the patent is revocable for added matter within section 72(1)(d) of the Patents Act 1977, which provides that a patent may be revoked if:

> "the matter disclosed in the specification of the patent extends beyond that disclosed in the application for the patent as filed."

55. For these purposes I adopt the approach of Aldous J in *Bonzel v Intervention (No 3)* [1991] RPC 22:

> "The decision as to whether there was extension of disclosure must be made on a comparison of the two documents read through the eyes of a skilled addressee. The task of the court is threefold:

(1) To ascertain through the eyes of the skilled addressee what is disclosed, both explicitly and implicitly in the application.

(2) To do the same in relation to the patent as granted.

(3) To compare the two disclosures and decide whether any subject matter relevant to the invention has been added whether by deletion or addition. The comparison is strict in the sense that subject matter will be added unless such

> matter is clearly and unambiguously disclosed in the application either explicitly or implicitly."

56. I am also assisted by the following features extracted from the judgment of Kitchin J in *European Central Bank v Document Security Systems* [2007] EWHC 600 (Pat):

> "97…[the exercise] requires the court to construe both the original application and specification to determine what they disclose…
>
> 98…It is the court which must carry out the exercise and it must do so through the eyes of the skilled addressee. Such a person will approach the documents with the benefit of common general knowledge…
>
> 99…The two disclosures must be compared to see whether any subject matter relevant to the invention has been added. The comparison is a strict one. Subject matter will be added unless it is clearly and unambiguously disclosed in the application as filed.
>
> 100…It is appropriate to consider what has been disclosed both expressly and implicitly…
>
> 102…It is important to avoid hindsight."

57. The claims in the application omit the word "portable" from claim 1. The specification in the application also omits it in the summary of the invention though the word occurs in the corresponding passage in the patent specification (repeating the words of claim 1). The claimant's case relies on three parts of the application which are said to disclose the concept of portability sufficiently. They appear in paragraph 4 of the Reply. They are:

(i) Under "Field of Invention", the invention is described as one relating "to an absorbent collector for machine fluids for use in protecting the ground beneath machinery, for example portable plant used in civil engineering and the like". This is said to imply a portable collector for use with portable plant.

(ii) Under "Summary of the Invention", the specification provides:"The collector of the invention is light in weight and therefore easy to deploy and to remove when no longer required. It retains all oil fluids falling on to it, while allowing rainwater to pass through it to drain away, thereby ensuring that oil is never washed out of the collector by rainfall however heavy. Since the waste oil can be readily extracted by simple physical or chemical means, the cost of regenerating the collector for further use is relatively small." (I have already set this out in paragraph 9 above).

(iii) It is said that the Figures also disclose what is a portable device, albeit not expressly described as such.

58. This whole point was only lightly touched on in the trial. Mr Martin's evidence does not contain any material directed to it; neither does Mr Finney's. It is therefore left to me to do the best I can.

59. I am satisfied that the material in point (iii) does not assist the claimants. The Figures do not contain any idea of scale, and do not connote or imply portability. The material in point (i) does not quite imply it either. It is the machinery which is said to be portable, not the collector. However, the material in (ii) does, in my view, clearly imply portability. I have already referred to the agreed meaning of the word for the purposes of this action. Something which is light in weight and easily deployable and removable has the essence of portability. Portability is also a necessary part of a collector which can be regenerated. Looking at the matter fairly, and in the way in which I think the skilled man would look at it, I consider that those words import a sufficient element of the notion of portability to mean that the patent does not contain added matter.

Decision

60. Accordingly, in all the circumstances, I find that the patent in suit is valid but not infringed.

Appendix 1 – figures from patent

1/1

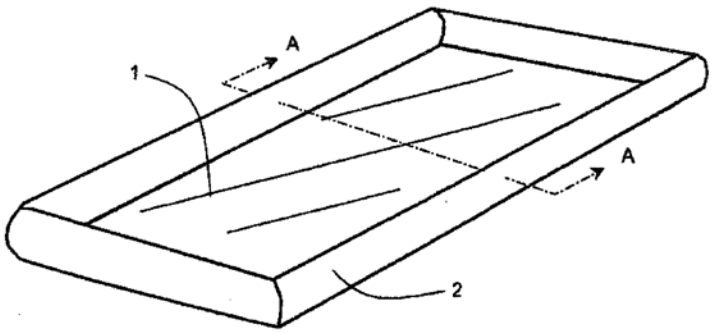

Fig 1

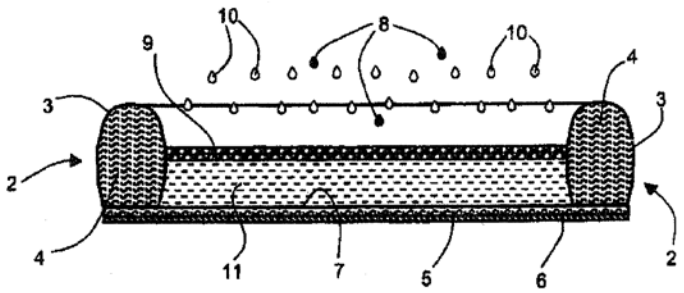

Fig 2

Appendix 2 – Smart Liner publicity material

FILTATECH
SMART LINER PLUS

TECH FEATURES **SMART LINER PLUS**

- Premium level of protection against fuel and oil release
- Full perimeter up-stand prevents contaminant release during extreme weather conditions
- Held into position using velcro tabs
- Manufactured using 80% recycled fibres

TECH FEATURES **SMART LINER**

- Basic level of protection against fuel and oil release
- High quality fibres form a strong tear resistant liner suited to demanding environments
- Designed to sit snugly within the Site Mat base unit

FILTATECH
SMART LINER