

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2008

Before :

MR JUSTICE MANN

Between :

(1) ROLAWN LIMITED	<u>Claimants</u>
(2) ROLAWN (TURF GROWERS) LIMITED	
- and -	
TURFMECH MACHINERY LIMITED	<u>Defendant</u>

MR. D ALEXANDER Q.C. and MR. R. ONSLOW (instructed by **DLA Piper UK LLP,**
Manchester) for the **Claimants**.

MR. A. LYKIARDOPOULOS (instructed by **Messrs. Knight & Sons, Newcastle under**
Lyme) for the **Defendant**.

Hearing dates: 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th January 2008

Judgment

Mr Justice Mann :

Introduction

1. This is a dispute about wide area mowers – grass mowers designed to cut the grass in wide spaces such as playing fields, municipal parks and (particularly relevant to this case) vast areas of turf grown by the turf-providing industry. The two claimants are related companies; the first claimant is the successor to the second’s business and design rights. It is common ground that there is no need to distinguish between them and I shall treat them as one henceforth and call them “Rolawn”. Rolawn is a turf-grower and seller. It occupies a large area of land (3,500 acres) in Yorkshire on which it grows turf which it supplies to customers. It claims to be the market leader. The turf needs frequent cutting. In 2002 it designed and built its own wide area mower, with 21 cylinder cutting heads. It registered what it says is its design. The machine was not built for sale to anyone else; it was for its own use. The first machine was an immediate success, and several more were built. All are used on Rolawn’s own land. The defendant (“Turfmech”) supplies agricultural machinery, including grass-cutting machinery. In 2005-06 it built and supplied first one, then another (and bigger), wide area mower. The first had 13 cutting cylinders (the Maximow 13); the second had 17 (the Maximow 17). Rolawn claims that the designers of those machines copied aspects of the design of its machine and thereby infringed its unregistered design rights. It also claims that the Turfmech’s design infringes its registered design rights because, whether copied or not, it is sufficiently similar to do so.

The two designs

2. It will be useful to approach the rest of this judgment with the two designs in mind, so in this section of the judgment I will describe them reasonably fully. Because of their complexity it will be helpful (and indeed, for the purposes of registered design rights, necessary) to do so by reference to a significant number of photographs. In this section all references to photographs are references to those in appendix 1. I also record here that I saw the two physical machines, and some other manufacturers’ machines, at a view on the day preceding the start of the hearing, and each machine was operated so that I could see the realities of how it worked.
3. First, Rolawn’s machine. In its fully deployed mode (for mowing) it appears as shown in photographs 1 and 2 (a front and rear view respectively). It is towed behind a tractor, as appears in the photograph. There are 21 cylinders (“gangs”) distributed along the width of the machine. 9 are on each “wing” or “arm”, and three more are under the centre section. They are in two rows, staggered so that there is some 10cm of lateral overlap between them; this is so that no grass is missed, particularly on turns or uneven ground. They are powered by hydraulics; the tank for the hydraulic oil (about 270 litres of it) is between the two legs of the support structure that can be seen at the rear of the machine. Each cutting cylinder is hung from a hinged support arm that is

attached to the underside of the machine in a partially horizontal (as opposed to vertical) fashion so that the cylinder can rise and fall with undulations in the ground. The outer arm is supported at each end by a wheel. The outer part of the arm can float so as to cope with undulating ground.

4. The machine needs to be folded up in some way in order to store it, to move it from field to field, and sometimes for the purpose of road transport. The Rolawn machine achieves that in the following manner:
 - i) The outer half of each arm folds at roughly the half-way point over on to the inner half (photograph 3). The cutters underneath the arm and body are raised up clear of the ground.
 - ii) The combined arms then tilt forward on a horizontal axis (photograph 4).
 - iii) The combined arms then sweep backwards and inwards and, because of the angle, upwards. Each arm of the rear support structure passes through the framework of the arms as they sweep in, and in the last phase the arms drop slightly so that they rest on the (as it were) inserted arms (photograph 5). Those of the cutters which are upside down are supported on built-in stops.
5. Turfmech's first machine was a 13 gang machine. Its deployed form appears in photographs 6 and 7 (again, front and rear). Again, each cylinder is able to float on a support arm, and the supporting arms are in two parts with a hinge in the centre. The outer part can float, as in the Rolawn machine. However, the inner part of the arm is also hinged so that it can float, unlike the Rolawn machine.
6. Turfmech's machine folds as well, for transport and storage. It does so in the following steps:
 - i) Its outer arms fold inwards over the inner arms - photograph 8. The cutters underneath the arm and body rise up.
 - ii) The arm assembly then folds vertically - photograph 9.
 - iii) The combined arms then tilt backwards so that they come to rest against the rear support structure apparent from the photographs. The cylinder heads rest against a stop or stops in this position. See photograph 10.
7. Turfmech's second machine is a 17 gang machine. It looks similar (though of course bigger). It is unnecessary to focus on differences in construction - they are not material to this action. It operates in a broadly similar way to the 13 gang.

Rolawn's registered design

8. Rolawn's registered design is registered under the category of mowers and is registered by reference to a number of photographs appearing in appendix 5 to this judgment. On each photograph there is an apparently hand-drawn black line, which is presumably intended to designate the limits of the design and to exclude extraneous matter. Since I have described the Rolawn machine in the preceding section the photographs become self-explanatory in terms of the aspects of the machine shown.

Rolawn's allegations – unregistered design right

9. Rolawn's pleaded case is that design right exists in the following aspects of the shape and configuration of the Rolawn mower ("illustrated", according to the Particulars of Claim, by annexed photographs)
- i) "The whole, when in the extended position.
 - ii) The whole, when in the semi-retracted position. [The photographs identify this as being the mower when the outer halves of the arms have been folded over the inner halves, but before any further tilting.]
 - iii) The whole, when in the fully retracted position (ie as in Appx 1 photograph 5).
 - iv) The rear assembly, comprising a pair of wheels with a tank in between and a forward leaning frame on top.
 - v) The side assembly comprising, in the extended position, a box framework structure, having two rows of mowing gangs mounted there on in a staggered arrangement, and a wheel on the outside edge of the structure."
10. The annexed photographs are attached to this judgment as Appendix 2.
11. That is how the matter was strictly pleaded. However, the pleading contains an appendix (Appendix F) which contains 17 heads of what are said to be indicia of copying. The first 7 are described thus:
- "1. Arms fold back on themselves at the mid-way point.
 2. Folded arms lean back onto the support frame.
 3. Support frame leans forwards and has two uprights.
 4. Staggered arrangements of heads.
 5. Linear framework extending laterally.
 6. Oil tank between the wheels.
 7. End "runner" wheel, located at rear."

12. To these, for present purposes, Mr Daniel Alexander QC, who appeared for Rolawn, added a different formulation by Mr Brouwer (his expert), in a schedule to his report in which he was considering similarities:

“The rear assembly, comprising a pair of wheels with a tank in between and a forward leaning frame on top.

The side assembly, comprising, in the extended position, a ... framework structure, having two rows of mowing gangs mounted thereon in a staggered arrangement, and a wheel on the outside edge of the structure.”

13. These verbally described features formed part of a more generalised way of putting the case in final speeches. They are described as “the most important parts which contribute to the particular value of this design as a design” (Mr Alexander’s words). They are a combination of features which can be described as unique. In his reply this developed even further. He said that what was sought to be protected were the actual designs (the physical machine) which itself embodied what he called a “specific approach to constructing a mower which gives rise to this specific shape, a specific way in which the elements are disposed relative to one another”. His clients were entitled to protect not only the actual designs as they appeared in the photographs in question, but also aspects of the overall shape and configuration as they appear there. There was a more generalised level of abstraction behind the actual designs that his clients were entitled to protect, just as, in the field of copyright, a playwright is entitled to protect not merely the actual words of the play but also the plot. He went on (at my invitation) to articulate a generalised description in words of what he was entitled to which picked out the central features as a combination in respect of which design right was claimed. He articulated it thus:

“A wide area mower, involving two wings, in an extended position involving two wings of a substantially framework construction from which a number of cutter heads are suspended in two rows staggered forward and backward so as to give an overall appearance of wide wings, effectively, which have a visible folding point at or about the centre of the wings, which can fold back in on themselves through 180 degrees, so that when folded in that way the cutter heads on the bottom inner part on the bottom and the cutter heads on the outer part are on the top with a structure supporting them in between, which then fold further in such a way that they lie in a diagonal position with the rear pointing backwards, supported by a support frame which itself has two uprights and some bar going across it ... Where the support frame is disposed above the wheels, the wheel being very prominent size, all rearwards of the framework to which I just referred. So that the framework is forward and goes all the way across in front of those wheels where between those wheels and a little bit above there is a tank sitting at the bottom of

the support frame. That at the end of each of the wings there is a wheel at the back behind the first cutter head on the outside at the outermost extremity of the wings, so that when one looks at it end from the rear end, rear end, the design looks like two big wheels with a tank in the middle and an upright tail or cross bar, with the wings forward of that with the cutter head suspended at the wheel visible. But side on you see the end wheels, the wings on the end, going toward the middle where the framework somewhat in front of the rear wheel on the back of the chassis.”

14. It was Rolawn’s case that these things were copied by Turfmech and that the copied designs were exposed for sale (and indeed sold, as the Turfmech machines were). It was said that Turfmech wished to design and produce a wide area mower, it knew about the Rolawn machine, and it set about reproducing the above features in its own machine. The precise circumstances of the copying were not identifiable by Rolawn. Turfmech certainly had two publicity photographs of the machines available to it when it came to design its own machines, but the Rolawn machines were not made available for purchase, or even inspection. They lived on the Rolawn farm, though they were from time to time visible from adjoining roads, or adjoining land, when they were in operation. Furthermore, they were sometimes left out in the fields overnight, which would facilitate a nefarious and unauthorised inspection. It was said that Turfmech’s representatives used one or more of those means of inspection to see the machines, observe their features and reproduce them. The evidence of copying relied on was an alleged opportunity to copy and the alleged similarity of the Rolawn and Turfmech machines.

Rolawn’s registered design case

15. I have indicated what the registered designs were. Rolawn says that the Turfmech machines do not produce a different overall impression to those designs and that they therefore infringe.

Turfmech’s case in outline

16. Turfmech does not dispute that, when the claim is properly framed, unregistered design right exists in significant parts or aspects of the Rolawn machine. There are certain challenges based on commonplace, but subject to that a lot of the design is accepted as original. It does, however, deny that the more generalised form of design right exists. Furthermore, copying is denied. The most that is said to have happened is that the Rolawn machine, along with a number of other machines, was used as a source of inspiration for the Turfmech design. The two principal designers or conceivers deny having seen anything of a Rolawn machine other than the two photographs referred to above at the time they were themselves designing, and say they did not see a physical machine until inspection during the course of this action. So far as

the registered designs are concerned, Turfmech says its machines differ from those designs, and in any event Turfmech counterclaims for a declaration that the registration is invalid because the design consists of features of appearance of the product which are dictated solely by the product's technical function, and/or that the appearance does not have individual character having regard to prior art.

Witnesses

17. I heard from the following witnesses for the claimant:

(i) Mr Paul Dawson.

For the last four years he has been the managing director of Rolawn. Prior to that he was its operations director, and before that its corporate development manager. He has been with the business for about seven years. He gave evidence of the nature and extent of Rolawn's business and the commercial environment in which it operates. He went on to give evidence of how it was that the Rolawn machine which is the subject of this action came to be designed, his limited dealings with Turfmech and his discovery of the existence of the Turfmech mower. He also gave evidence of the geographical position of his company's land, and the extent to which that situation permitted passers-by to see the Rolawn machine in operation and, if they were so minded, to enter the land in order to inspect it by trespassing on the land when there was no-one there. He was a careful and reliable witness.

(ii) Mr Mark Hatfield.

He is one of two fabrication foremen at Rolawn; he has worked for them for six and a half years. His job involves mending and repairing any equipment, and it also involves building new machinery to suit the requirements of the business. He is plainly an experienced and gifted man. He continues his fabrication activities in his own fully equipped workshop at home, where he builds autograss racing cars (which he also races). He described the process pursuant to which he physically built the Rolawn machine, as a result of trial and error. Again, he was a careful and reliable witness.

(iii) Mr Matthew Scott.

He is the other of Rolawn's fabrication foremen – he has had that role since June 2005. His job involves designing and constructing different types of machinery that are used by Rolawn. He first started to work for Rolawn in March 2002 as a workshop mechanic. His particular expertise is hydraulics, and he played a material part in the development of the hydraulics aspect of the Rolawn machine which is the subject of this action.

(iv) Mr Gerry Brouwer.

Mr Brouwer was an expert called by Rolawn. He is president of a company known as Kesmac Inc and Brouwer Turf Limited. He has considerable experience in the design and sale of lawnmowers, and has a good view of the shape of the industry. He gave expert evidence on designing cylinder mowers, buying such mowers and various aspects of the design, including commonplace. He also carried out a detailed comparison between the Rolawn mower and the Turfmech mower. He plainly understood his role as an expert and was not partisan in his approach. He was obviously doing what he could to assist the court.

18. The defendant called the following witnesses:

(i) Mr Lee Smith.

He received instructions in 2005 to design a concept poster showing the sort of mower that Turfmech were minded to design and produce. His evidence was short, good and clear.

(ii) Mr Jacob Harris.

At the material time he was on a placement year (or slightly more) in the middle of an engineering degree course, and was spending it in Turfmech. He designed the detail of parts of the Turfmech mower, and in particular the rear stand on which the mower assembly leans during road transport. His evidence was not materially challenged, and I accept it.

(iii) Mr Robin Wallader.

He is a design engineer who, at the relevant time, was employed by a third party design company known as Haughton Design Limited in Stafford. In October 2006 he was approached by Turfmech to assist in some of the design issues involved in modifying the Turfmech machine from a 13 gang mower to a 17 gang mower. He gave details of the activities involved, including strengthening the folding hinge (a five bar linkage mechanism) in the middle of each arm. In addition to giving evidence of fact, he provided various comments as to some of the alleged features of similarity between the Rolawn and the Turfmech machine. So far as admissible, I accept his evidence.

(iv) Mr Austin Jarrett.

He is and was at the material time the managing director of Turfmech. His evidence principally concerned the circumstances in which he and Turfmech came to consider designing, and then actually designed and produced, the Turfmech machines which are the allegedly infringing machines. The detail of

his evidence, so far as relevant, is set out below. He came over as a careful witness, but, as will appear below, I was unable to accept the totality of his evidence as to the reference to which he and Mr Archer made to the Rolawn machine when they came to devise the Turfmech machine. I think that his natural defensiveness led him to play down the impact of that machine on his consciousness. He denied, however, actually going to see the Rolawn machine during the course of this process, and I accept that denial. The qualification that I have just referred to, along with a similar qualification in respect of Mr Archer's evidence (see below) is the only significant respect in which any of the witnesses in this case (on either side) was not telling me the complete truth.

(v) Mr Jeremy Archer.

He is a chartered engineer and is Turfmech's director of engineering. He has a considerable background in agricultural mechanical engineering, and before joining Turfmech was employed, inter alia, by a company known as Hayter, which designs and sells commercial mowing machines. From 2003 to 2004 he was a freelance design engineer, before joining Turfmech in 2004. He was the principal designer of the Turfmech machine, and gave evidence of the design process. As will appear, he said that only very limited reference was made to the Rolawn machine during this process, but as with the evidence of Mr Jarrett, I think he – to a limited extent – downplayed that factor, again because of his natural defensiveness. He struck me as a witness who chose his words very carefully and, on occasions, came over as a man who, as it were, has an answer for everything. However, at the end of the day, he did not come over as a man who would, or did, lie to the court to the serious extent which would be necessary for the claimant's case of copying to be fully made in this case.

(vi) Mr Michael Wright.

He was an expert called by Turfmech. He is a chartered mechanical engineer with an honours degree in mechanical engineering who has 20 years' experience in the design, development and management of engineering teams involved in the design and development of grass cutting and other horticultural machinery. He gave expert evidence of design, including general design approach, and design considerations. I considered him to be a most impressive witness. He was careful to choose the right words, and not merely to accept suggestions from counsel that were put to him, but that did not arise from excessive wariness; it arose from paying proper attention to the matters that were put to him.

19. It will be apparent from the above that for the most part I am able to accept the history of this matter as it appeared in the oral evidence before me. The only qualification I have as to the quality or accuracy of any of the witnesses arises from the qualifications I have expressed about the evidence of Mr Archer and Mr Jarrett.

The central facts

20. In the account which follows, any recitation of fact should be taken as a finding of fact by me unless the contrary appears.
21. Prior to 2002-2003 Rolawn used various machines to cut its large area of grass - a 7 gang mower manufactured by Ransomes, modified to add 2 more gangs, and a Kesmac 11 gang mower which Mr Hatfield had modified to improve performance. These machines did not fully address the problems faced by the need to mow large areas. Other modifications of existing machines were considered and tried, but none was wholly satisfactory. Accordingly, the board of Rolawn instructed its design team to produce its own mower, and as a result the present Rolawn machine was developed by a process of trial and error in the workshop. I was told that there were no drawings other than some rough drawings done from time to time in chalk on the workshop floor. It took about a year to develop, and the prototype worked more or less perfectly first time and did exactly what was required. A further 9 were built, all basically built to the same design apart from a few "tweaks" (Mr Dawson's word). The first machine was built and developed during 2002 and into the beginning of 2003. On 26th February 2003 the application for the registered design was made. Mr Dawson considered that not only was it bigger than anything previously available, it cut well, worked well on and off the fields and was more efficient (requiring less fuel) than previous cutters.
22. According to Mr Dawson and Mr Hatfield (and I accept their evidence on this point) the design attracted a lot of attention in the turf-producing world. The former was approached by various other turf producers who asked him if he would sell a machine or produce machines for them. These approaches were turned down. Rolawn did not advertise the machine as such, but at some point (it is not clear when) produced some publicity shots, which are in appendix 3. They are plainly staged for the camera. They seem to have been available from 2003, when they (or at least one of them) were included in publicity material sent out by Rolawn.
23. Turfmech itself had sold wide area mowers for some time. It had even sold some to Rolawn. One of the products it sold was a wide area rotary mower known as the Progressive Tri-Deck. A rotary mower has one or more large rotating blades, rotating in a horizontal plane like a helicopter blade. The Tri-Deck had three of these (as its name suggests), and was towed behind a tractor. In 1995 Turfmech sold some of these to Rolawn. It had also entered into a licensing agreement in 2000 with Rolawn allowing it to manufacture a turf layer.
24. Turfmech was, naturally, interested in acquiring or developing new products. From time to time these things were discussed. On 29th April 2004 Mr Jarrett had a brainstorming meeting about products with Mr Archer. They discussed the possibility of developing a number of products including a lightweight

gang mower. Gang mowers, including cylinder mowers, were discussed at a similar meeting on 29th July 2004, where particular reference was made to selling direct to turf growers. Someone suggested taking the “poor Kesmac machine and improv[ing] it”, according to the note of the meeting. The notes of these meetings do not demonstrate (nor do they contra-indicate) that the Rolawn machine was discussed. Mr Archer says he was not aware of it at the time. They agreed to talk to turf growers and carry out some market research to assess whether developing a cylinder gang mower was commercially viable, and they were particularly keen to get buyers to commit to such a project so that the development costs could be shared. A note made by Mr Jarrett of an internal meeting on 17th August 2004 confirms his continuing interest in a gang mower of 11 or 13 cutters.

25. Mr Jarrett says he heard about the Rolawn machine in the second half of 2004. At a meeting on 30th November reference was made to producing a wide area mower to cater for 2 markets – turf growers (described in Mr Jarrett’s note as “light duty”) and local authority (“heavy duty”). The note then specifically refers to Rolawn, and says “Rolawn – their own hyd[raulic] 13 gang mower”. So it is plain that by this time Mr Jarrett had heard of Rolawn’s mower, though he may have misunderstood its size. However, it is plain that by this time his interest was piqued because he asked for a meeting with Rolawn to discuss producing their machine under licence. He told me that by that time he still had not seen the machine, or even a photograph of it. Nonetheless he had a meeting with Mr Dawson and a Mr Guy Barratt. They were under the impression that he was familiar with their machine; and he certainly did not ask to see it. Mr Jarrett proposed some round figures for costings and licence fees, and there was talk of a 13 gang version. Mr Dawson thought the licence fees proposed were too low in the light of the fact that the Rolawn machine would help their competitors, and he made reference to Rolawn having intellectual property rights in the design which it would protect. The meeting broke up with both parties expressing the view that they would think about it, but in the end Mr Jarrett did not pursue it.
26. I think that this is one area of evidence where Mr Jarrett’s evidence was unsatisfactory. His initial account of this meeting did not suggest that he knew much about the Rolawn machine when he attended it. His initial approach in cross-examination seemed to confirm it. He gave the impression that he was approaching this meeting largely blind about the product he was talking to Rolawn about and seeking a licence for. He said that he knew (from somewhere) only that what they had was a wide (very wide) area cylinder mower. Under later questioning he admitted that he probably knew that it was a 21 gang mower. Such a mower was an order (if not several orders) of magnitude bigger than anything else anyone had, and he admitted that knowing that would have made a big impression, but he professed to not remember that impression being made on himself. I think that the initial impression that he sought to give, which was that he was inviting discussion on licensing a product about which he knew very little indeed, was a false one.

He was, for some reason, being a little cagey about this. A failure to remember precise details about when and how he heard about what aspects of the Rolawn mower is understandable, but it is not understandable that he would have gone to the meeting with as little knowledge of the machine as he originally professed. He was not, of course, necessarily going to finalise the details of any licence, and I accept that it was to some extent a probing mission as to Rolawn's attitude. However, he managed to give Mr Dawson the impression that he knew about the machine, and I don't see why he would have bluffed. Since the meeting was left on the footing that both sides were going to think about it, I think it unlikely that Mr Jarrett, had he been as ignorant as he originally professed, would have left the meeting without asking for some further information. It would have been an ideal opportunity, and probably part of the purpose of any probe, had Mr Jarrett been as ignorant as he originally claimed. I think he has to some (though not to a large) extent understated the state of his knowledge at the time. I think it likely that he had a better impression of the Rolawn machine than he professed to me (at least originally) - it is quite possible that by then he had seen a photograph. Mr Jarrett's evidence about this meeting is one of the factors that cause me to approach his evidence with caution. I do not, however, find that he had a detailed knowledge of the machine, or had physically inspected one (or had got the fruits of someone else's physical inspection).

27. Nothing much happened relevant to this case for several months. Then in late June 2005 Mr Jarrett's interest in a wide area mower underwent a revival. He attended a meeting of the Turf Growers Association in that month. The meeting was held in a field in which the cut of the turf was, apparently, impressive. It was done with cutters made by a company called Ransomes, and growers remarked to Mr Jarrett that while they liked the cut that those cutters gave, the size of the Ransomes machine that carried them was such that it was too small for their use. Some of them said they would be interested in buying a 13 gang machine which carried them, and which would be more reliable than they perceived the Kesmac machine (which did not carry Ransome cutters) to be. He therefore identified this as a market need. I accept this evidence from Mr Jarrett.
28. This led to another brain-storming session with Mr Archer at which they exchanged ideas for a wide area mower. The ideas were put on to several pages of a flip chart by Mr Jarrett as the discussion took place. I have seen the flip chart entries; some of them are important on the question of copying.
29. The flip chart shows that the following specifications were debated and proposed, so far as material to this action:
 - i) A wide area cylinder turf mower with 13 gangs.
 - ii) It would be trailed, and would have a hydraulic fold up and fold down. It was to be neat and tight, with no "clatter" in the transport position.

The transport width was to be 2.5m – this reflected transport regulation restrictions.

- iii) The “fold options” were said to be “Short term – field (all or nothing); Med term – Local authority – individual section mowing”. This was explained as reflecting the possibility of partial folding such as, for example, folding one side up, so that cutting could take place on the other only, or allowing some cutters to be raised up so that that only a limited number of cutters did the cutting, which would be of interest to local authorities who had parks to mow.
 - iv) There would be a hydraulic drive.
 - v) A Ransomes cutter unit would be used because it was a better unit. There would be optional 8 or 10 inch units, and optional single or double rollers on them.
 - vi) Other matters were discussed which I do not need to set out here.
30. Then there was also a wish list of features – features which the design might have, but would not necessarily have. They included brushes to raise the grass which had been flattened by the (preceding) tractor tyres so as make sure it got cut, rear axle steering and a spring loaded break back to cater for the possibility of an arm hitting an obstruction. None of these features appeared in the final design.
31. Then there was a sheet entitled “Fold up inspiration”. It had 6 headings on it – Landpride, Great Plains, Roller manufacturers, Cultivation & Tillage, Kesmac, Rolawn. The first two and the last two are manufacturers; the middle two are activity areas. Roller manufacturers was intended to describe those who made large agricultural rollers. This list is a list of those people whose products might provide some ideas as to how to accomplish the aim of folding up the machine so as to achieve the desired transportation configuration in terms of width and integrity of the machine (no clatter etc). For present purposes it should be noted that Rolawn’s name is present, but it is last on the list.
32. Last, there was a heading “Development”, after which various points were listed: “Design proposals – Artistic drawing (layout), specifications; Lock down key features required; cost proposal; order commitment (3 orders); development for spring 2006”. The order commitment point was a reference to a desire to have 3 orders on board before the product started development, so as to minimise (and spread) the risk. The last point was a reference to a desire to have a mower ready for the beginning of the cutting season.
33. Those were the written points. In addition, however, there were some sketches which have some relevance to the copying question.

- i) The first is a sketch showing a plan view of the proposed machine showing a central carrying platform with staggered cutters in front and behind, with tractor tyres in front and an arrow demonstrating the direction of travel. The demonstration of staggered cutters is important. At the left hand end of the drawing is a sketch which (according to Mr Archer's evidence, which I accept on this point) is probably some sort of indication of folding of an end of the platform inwards. Arrows demonstrate the flow of clippings.
 - ii) The second is a sketch of the rear of the machine showing the arms folded in. It seems to show the innermost end of the carrying arms folded in through almost 180°, with the outer half then folded back outwards so that they point up at an angle of about 30°. Both arms are shown thus folded, giving a sort of cross effect. A third drawing below it shows pivot points about which the carrying arms can be drawn up and folded. It also shows some cutter heads being drawn up into the vertical for folding-up purposes. It is not easy to describe these features in words, but that does not matter, because the important point to note about these two drawings is that they do not resemble the final folding scheme, and, more importantly, do not reflect the Rolawn folding scheme either (save at the basic level of there being folding).
 - iii) A fourth drawing seems to show a plan view of the carrying platform, in three parts, with rollers distributed in a staggered form between them, fore and aft.
34. About 3 days later, on 28th July, there was a management meeting. There was a recorded discussion of the "Next New Product" – a 13 gang mower, trailed, with hydraulic units. It would be good for the spares business, and many turf growers were interested, and they could possibly cross over into local authority business if the 8.5m width could be folded down to 2.5m so as to be able to go on to the road. Ransomes heads were to be used. Salesmen were to go out with a spec sheet to double-check that that is what customers wanted. Mr Archer was to complete "schematics" by mid-August – some sort of basic designs.
35. Mr Archer told me that in the following weeks he looked at various designs of various bits of agricultural machinery, including those which the brainstorming meeting had anticipated, and including the Rolawn machine. He was doing so for inspiration as to what the intended mower should be like, including the folding mechanism, or more precisely (for present purposes) the folding scheme. I find that he did indeed look at a range of material, and that that material included the photographs of the Rolawn machine which had been given to him by Mr Jarrett prior to the brainstorming meeting. That exercise enabled him to procure the production of the "schematics" anticipated at the meeting in the form of a concept poster.

36. The concept poster was intended to show in outline what was proposed and, in the circumstances, to be shown to potential customers at a local authority focused exhibition called Saltex, which was to take place in September. The concept poster was actually produced by Mr Smith, on the instructions, and under the guidance, of Mr Archer. It did not take much more than half a day to produce. I attach a copy to this judgment as Appendix 4.
37. Mr Smith produced that poster on a CAD package, taking into account technical information that Mr Archer provided him with, such as cutting width, fold/up fold/down transport width and so on. In the top left-hand corner he put a photograph of the Rolawn machines (one of the publicity photographs referred to above) which Mr Jarrett provided him with so that it could be included there. It is small, and it is in fact doctored (on the instructions of Mr Jarrett) by the removal of the upper parts of each of the arms (so that the arms look flat when viewed from the front, not a triangular gantry) and by shortening them. Although it is not clear from the copy which I have annexed, there is a faint outline of a Ransomes tractor shown towing the conceptual mower.
38. The important aspects of that poster (for the purposes the present action) are as follows:
- i) It shows 13 cutter heads staggered in front and behind a beam which carries them, with the outermost one on each beam (or at least on the visible nearer beam) being at the front.
 - ii) It shows a wheel towards the end of each beam, and another inboard of that.
 - iii) It shows a beam which folds. The folding points are roughly half way along the beam, and then again closer into the body.
 - iv) It shows central support wheels behind the beam.
 - v) It shows a hydraulic tank between the central wheels.
 - vi) At the bottom it shows an outline of a folded up configuration. There is a plan view, which is not particularly informative for present purposes, and a side view, which shows folded arms leaning back.
39. That concept poster was taken to the Saltex exhibition, and used as a vehicle to test customer reaction. There was also a questionnaire which potential customers were invited to fill in, expressing preferences as to the design and configuration of a mower. Mr Jarrett considered that his idea for a 13 gang mower commanded support in the market. He had asked whether anyone would be interested in placing an order and paying a 20% deposit; no-one was. No customer showed enough interest until InTurf expressed an interest at the end of November. Mr Archer and Mr Jarrett went to see them at their premises

in Yorkshire and a specification was discussed and agreed. There was discussion of specialised detail such as how many blades there were to be on the cylinder, and the cut rate. The specification was in words, and dealt with a number of technical matters. The concept that was being discussed was that appearing in the concept poster. It had the “Feature” of “Hydraulic folding/unfolding for transport”, with a “Vertically articulated main frame to follow ground undulations”. The mounting arrangement for cutting units (which were to be Ransomes) was “Units mounted in individual arms which are themselves mounted to main frame beams”.

40. After the meeting at InTurf’s offices in Yorkshire, the participants decided that Mr Archer and Mr Jarrett should drive down to Grantham in Lincolnshire to see one of InTurf’s existing mowers, which was a coupling of two smaller mowers to produce a big one. This was said to be in order to help the Turfmech representatives to understand how it worked, and because Mr Archer had never been on a turf farm before. At one point at the hearing it was suggested that this visit took place to give an opportunity to Turfmech to see the Rolawn machine, or at least they did see it there whether they had intended to or not. Mr Archer rebuffed this suggestion, saying that it was winter and there would not have been any cutting. An even more compelling answer, overlooked by everyone at the hearing at the time, is that Rolawn’s fields are all in Yorkshire, not Lincolnshire. I therefore reject any suggestion that this visit was arranged so that the Rolawn machine could be viewed, or that it was the occasion of a view.
41. The arrangement with InTurf was that a machine would be designed and built for them to be ready by the next season. Mr Archer immediately started detailed design in earnest. He reviewed his file where he had stored the documents from which he had sought inspiration in the summer, and acquired more material, some of it coming from an inspection that he carried out of machinery in an agricultural dealer’s yard. Overall designs were produced, and a large number of computerised design drawings were produced. He was responsible for a large part of the design, but he asked Mr Harris to design the linkage with the tractor and a support for the cutters when in transport mode, as well as certain details around the wheels and the back. The support frame is of particular importance in this action because it is said that this was copied from the Rolawn design. Mr Harris told me (and I accept) that Mr Archer did not tell him where to put the support frame, or how to design it. He was asked to produce a support frame for the machine in its transport configuration and he did so. It was his idea to have frames leaning forwards, because that was the obvious engineering solution to manage the downwards forces of the leaning assembly which had to be supported. A roughly 90° angle was required. The “cup” parts were his solution for the interface between the machinery and the stand. At a later stage it was found that the supports bent under load, so he did some redesigning. According to Mr Harris, at no state in this operation was Rolawn mentioned, and he did not look at the Rolawn design before, or during, the design of the supports. I accept his evidence in relation to all this.

42. The machine, which became the Turfmech Maximow 13 and is one of the two allegedly infringing machines, was duly delivered to InTurf at the end of March 2006. There were teething problems, but this does not matter for the purposes of this action. InTurf did not purchase a second machine which was offered to them but it expressed interest in a wider machine (17 gangs) if one were produced. InTurf never did order such a wider machine, but Mr Philip Morris of Morris Brothers Ltd expressed an interest. In June 2006 Mr Jarrett provided him with a quotation for such a machine. He placed an order at the end of September 2006, and Mr Archer embarked on the necessary work to modify the 13 gang machine into the bigger 17 gang machine. This involved some lengthening and strengthening, and obviously adding additional cutters and the pipework associated with them. The result was something that looked like a bigger version of the Maximow 13, but it still operated in basically the same way. There was no allegation that any additional acts of copying took place during this phase of the operation. The Maximow 17 was duly delivered to its purchaser. Some modifications were needed, but again that is not material to the action.

The principal issues in this action

43. Those, then are the main facts. I shall have to revisit some of them in due course, but based on those facts the following issues arise:
- i) To what extent is there design right in Rolawn's machine?
 - ii) To what extent was there copying of Rolawn's machine by Turfmech?
 - iii) To the extent that there was copying, was it to such an extent as to infringe the unregistered design right?
 - iv) Does the registered design not have individual character so as to make its registration invalid?
 - v) If not, do Maximow mowers infringe – do they give the informed user a different overall impression or not?
44. While I have set out the issues in that order, it will first be useful to make some findings about copying, because on the facts of this case that is capable of potentially limiting the scope of consideration of the other unregistered design right issues. I shall therefore deal with that first.

Was there copying by Turfmech of the Rolawn machine; and if so of what?

45. This, like many copying cases, is not a case where there is direct evidence of copying. I am asked to infer copying from a combination of a close similarity between two designs and an opportunity for Turfmech to have seen the Rolawn designs.

“The courts proceed on the basis that a close similarity between the claimant’s design and the alleged infringing article, coupled with the opportunity for the alleged copier to have access to the claimant’s design or work, raises an inference of copying. It is then up to the defendant to rebut the inference by evidence which shows that the apparent similarity arose in some other way.” (*Fulton v Grant Barnett* [2001] RPC 16 at para 95, per Park J).

46. First, then, the question of opportunity. It is common ground that Turfmech had the two publicity photographs of the Rolawn machine when Mr Jarrett and Mr Archer started to design, at the brainstorming phase in July 2005. To that extent they had an opportunity to copy what was in those photographs. However, what was in those photographs was limited. They could not see all aspects of the design. A trained engineer could deduce a lot from those photographs, but not everything was apparent. Two things in particular were not apparent – first, the design of the rear of the machine, and second the folding up technique beyond the first phase of folding the arms in half. One can see that the folded wings end up at right angles to their original deployment (in the purely horizontal plane) but otherwise the technique cannot be seen. When one knows what one is looking at, one can see one arm of the support in one of the photographs (where the arms are fully extended), but not its position relative to the cab, and one cannot really see it properly in the second, and can only understand where it might be when one has seen the real thing.
47. Accordingly, there is a level of detail which can only have been seen if one saw the real thing. That is particularly important in relation to the rear detail (tank and supports). Here access to the design is less straightforward. This is not a case where one could go to a dealer, or to a showroom, or to some other place where the machine was on display. There is no evidence that there was a gallery of photographs available somewhere. On the evidence the physical machine could only be seen while in use, or resting in the open, on Rolawn’s farm. There is evidence that that was possible, but that would probably have required a special trip for someone, and surreptitious activity if an unsupervised inspection were to have taken place. In the present case a finding that this took place would have involved a degree of disreputable behaviour which would require a strong body of evidence to establish. It would in practice have required:
- i) A deliberate trip to see the machine.
 - ii) Probably, a degree of sketching or, more likely photographing, to record the event. If a special effort was to be made to get details, it is unlikely that the person involved would have been content to rely on memory alone, particularly if that person were someone other than Mr Archer. That means the generation of documents, and since none have been disclosed it would mean that there must have been suppression, and

probably even deliberate destruction, of those documents. Mr Archer kept a file of inspiration documents, and no documents were disclosed which related to a physical view of the Rolawn machine.

- iii) Cover up by at least Mr Archer.
 - iv) If a surreptitious close inspection took place, that would have involved a trespass out of hours.
48. Accordingly, while an opportunity was technically available, for Turfmech to have availed themselves of it would have required a much more deliberate act, and probably a much more serious suppression of material, than in a more normal case where the claimant's work is more readily available (in the shops or otherwise). I bear this fact in mind when considering the strength of the inference and any rebutting material.
49. On the other hand, there is an admission that the Rolawn machine played some part in the thinking of Mr Archer and Mr Jarrett. It is recorded on the July flip chart that they intended to look to that machine for some inspiration on the folding mechanism. In this context "inspiration" can be taken to be synonymous with "ideas", and this imports the possibility of copying something, albeit at a higher level of abstraction than the slavish copying of detail and precise design.
50. In his evidence in chief Mr Archer sought to play down the significance that the Rolawn machine had for him. He says the photographs were only of "passing interest" to him, because he had been thinking about designing his own wide area cylinder mower for a year by that time, and there was nothing particularly special about the Rolawn machine, judging from the photographs. The fact that Rolawn was specifically listed as a source of inspiration at the meeting means that the interest was more than just "passing", and indeed in his cross-examination Mr Archer upgraded his professed interest to "some". In some cases this might seem a trivial distinction; in the context of this case I think it betokens an original, and deliberate, attempt to play down the significance of a consideration of the Rolawn machine in the design process. It is likely that Mr Archer would have had an interest in the Rolawn machine beyond "passing interest" for various reasons:
- i) It was a machine which had created a strong impression in the turf growing industry. Mr Jarrett was aware of that; it is highly unlikely that he did not pass on some of that to Mr Archer. That would have made Mr Archer look at it more closely.
 - ii) It was an apparently successful attempt to achieve what Mr Archer was trying to do. Any sensible designer would pay some attention to it.

- iii) It was a machine which was unlike any other preceding machine in its field. Again, any sensible designer (and Mr Archer was one of those) would give it more than passing attention.
 - iv) He knew that Mr Jarrett had sought a licence for the machine. Even though this attempt had failed, any machine in respect of which a licence was sought would be likely to be elevated in the consciousness of Mr Archer.
 - v) Mr Archer was thorough. He acquired material on a number of other designs, and went to a yard for further inspiration. In that context the idea that the Rolawn machine was only of passing interest seems to me to be implausible.
51. Mr Jarrett's witness statement does not in terms deal with the attention that he paid to the Rolawn machine when the design process for the Turfmech machine started. It certainly does not admit that the Rolawn machine played any particular part in his ideas. However, I consider, and find, that he did consider it to some real extent. I do so for the following reasons:
- i) In cross-examination he professed that as an engineer (which, by training, he was) he was curious about all machinery. In the light of that he must have been curious about how this particular piece of machinery worked, and he must have thought about it. Having thought about it, he cannot have dispelled it from his mind. Indeed, he admitted that when he first heard of the machine he would have been very interested to have seen how the machine worked.
 - ii) That point is reinforced by his acceptance in his evidence that a 21 gang wide area machine would be one on which the industry would remark; it had a "wow factor" and he would have felt the same way.
 - iii) He was sufficiently interested in the machine to attempt licensing discussions.
 - iv) He admitted that he discussed the photographs with Mr Archer. He must have done so for the purpose of seeing what lessons could be learnt from them.
 - v) He procured the inclusion of one of the photographs in the concept poster. He can only have done so on the basis that he wished to give the impression that this was the sort of machine he wished to produce. In the light of that it is implausible that he did not look at the photographs to see what lessons (inspiration) could be gleaned from them.
52. Accordingly I find that Mr Archer and Mr Jarrett did look to the Rolawn photographs, with a fairly close eye, to see what they could get from them which would help Mr Archer in his task of design. The photographs played a

greater part than Mr Archer was originally prepared to admit. In his cross-examination Mr Archer admitted in terms:

“The inspiration I drew from these [ie the photographs] was that it was clearly possible to fold the booms over on top of the adjacent sections and result in a nice, tidy, compact transport position; very much the thinking that we had had from the inception of the project at Turfmech.”

That shows a keen level of interest and a propensity to take things from the Rolawn design (I deliberately use a neutral phraseology at this point).

53. It is now necessary to turn to the similarity of the items, to see what level of copying might be seen to have taken place.
54. There are 17 of them. The first 7 are set out above. These are the only ones put to Mr Archer (probably because they are the most important) but for the sake of completeness I will list the other 10 here:
- 8 Cowling on central cutters.
 - 9 Laterally orientated support arm that supports each cutter. This refers to “rests” on which inverted cutter heads rest in transport mode.
 - 10 Two head stops on cutter heads.
 - 11 Wheels on end of the wings.
 - 12 Outside cutter head at the front.
 - 13 Lift arms on the 3 middle cutter heads.
 - 14 Box section used in construction of the wings.
 - 15 Rear arm mounts protrude from back of frame.
 - 16 Orientation and dimensions between the heads and the wings.
 - 17 Spacing of the heads (centre to centre)
55. One crucial point must be borne in mind in relation to this catalogue. It transpired during the trial (so far as it was not already obvious in relation to some items) that the similarity alleged was not a similarity of one actual design of feature to another. It is a similarity between features in a generalised sense. Thus, for example, it was not alleged that the lift arm on the middle 3 cutter heads (item 13) was a similar-looking lift arm; the similarity was having a lift arm at all. Again, the head stops on the cutter heads (item 10) were not said to be similar stops; it was the presence of stops in both machines that was relied on.
56. So far as these could be said to be similarities, Turfmech denied copying. I find that, at the generalised level at which they are described, they all exist. The problem for the claimant, however, is that once one descends to that level of generality, one opens up the field for saying that, for a variety of reasons, the inference of copying is rebutted, or not so strong, because, at a general level, the feature can be seen elsewhere or might otherwise be known to the

defendant. I consider each of the items in turn and make findings about the extent of copying.

57. **Arms fold back on themselves at the mid-way point.** It is true that both sets of arms do this. There is no other wide area mower which does this except for one called the Green Zizzor, and there is no evidence that Mr Archer knew of that machine at the time he was designing. However, the evidence showed that there are plenty of agricultural implements which achieve narrowness by some form of folding – Mr Archer had some of them in his inspiration folder, though nothing which folded in quite this way. He admitted that he drew inspiration from the Rolawn machine in respect of folding one part over the other, and I find that he copied this as a feature – that is to say, he took this idea from Rolawn, which was probably the immediate trigger for it.
58. **Folded arms lean backwards on to support frame.** The idea of leaning the folded arms back had not apparently occurred to Mr Archer by the time of the July brainstorming (judging by the flip-chart drawings) but had occurred to him by the time of the concept poster, because he must have told Mr Harris to draw the small drawing on the poster showing that. However, as various witnesses, including Mr Wright, pointed out, leaving folded-in arms vertical presented its own difficulties in making the base and joints strong enough for transport, and folding forward presented well-understood engineering difficulties in throwing the weight forward, straining the connection between mower and tractor, and possibly fouling the tractor cab (especially with the extra length of a 17 cutter mower, which was part of the overall conception for the future). Mr Brouwer agreed that leaning back was the simplest engineering solution. Accordingly, arriving at a decision to lean back has a perfectly plausible engineering basis independently of its having been done on the Rolawn machine. I do not think that as a feature, and bearing in mind its independent engineering source, leaning back is something which invites an inference of copying on the facts of this case; or if it does, then I consider that the inference is rebutted in this case. Leaning back on to a support frame is a similar feature, but it is not clear that Mr Archer had an opportunity to see this. As I have pointed out, it is not readily apparent from the Rolawn machine photographs in the hands of Turfmech in the summer of 2005, and a support frame does not figure in the concept poster. If Mr Archer is to have copied the idea (and he certainly did not copy the frame itself) then he must have got additional information from somewhere, and I am not satisfied that he, or anyone else, utilised the opportunity (such as it was) of seeing the Rolawn machine in the fields before an instruction was given to Mr Harris to design a frame. A frame would not be absolutely necessary, because one could make the arms' framework at the base sufficiently strong to maintain a leaning back position without a frame, but I accept the evidence of Mr Archer that a simpler solution is to spread the load by supplying support at the rear. Mr Wright thought the idea of a self-supporting arm framework (ie one that supported itself without a supporting frame) would be over-engineering, and I accept that evidence. Accordingly, the existence of a support frame has a separate

engineering justification. That does not mean by itself that the idea of a support frame was not copied, but taking all the facts together I find that it was not. I am not satisfied that the prima inference of copying arises, but if it does then I am satisfied that it has been rebutted.

59. **Support frame leans forwards and has two uprights.** As a matter of literal wording, at that level of verbal description, there is a similarity. However, the actual designs are plainly different and do not begin to suggest copying of actual design. Yet again, all that is described here is an idea. I have already dealt with the concept of a rear support frame (or stand). That, as an idea, was supplied by Mr Archer to Mr Harris, who designed the actual frame. He it was who decided how many uprights it should have (two seems pretty obvious anyway), where they should go, and what the angle should be. He did not copy anything relevant. This level of similarity therefore does not betoken any copying of anything.
60. **Staggered arrangement of heads.** This exists on both machines. Mr Wright's unequivocal evidence was that this feature is common to all multi-gang mowers; without it there is a risk that strips of grass will escape all the cutters and go unmown. Mr Archer had sufficient independent experience of mowers to know this. It appears, albeit in a rudimentary form, on the July flip-chart drawings. Although one could probably see it in the photographs of the Rolawn machine that were available to him at the time and thereafter, it is such an obvious feature that I cannot infer copying from its presence. I therefore do not do so.
61. **Linear framework extending laterally.** Again, on a literal basis this is a similarity. All wide area mowers have to achieve some lateral distribution of the cutters. There is a variety of other mowers on which cutter heads are distributed on frames or arms, but with one exception no mower does it with quite the sort of wing or arm shape adopted by the Rolawn machine. The exception is a mower called the Green Zizzor, which has a solid beam structure (as on the concept poster), not a framework, extending out on each side, from which are suspended 13 electrically driven cylinder cutters. That design, however, was not apparently known to Mr Archer at the time he was designing. Other designs in which other agricultural or horticultural machines deployed tools on framework wings were, however, known to him, if only from his inspiration-gathering exercise. I think that Mr Archer was probably influenced by the Rolawn machine in deciding to use a wing-like structure to carry all the mowers. The choice of a framework, rather than a solid structure was, Mr Archer said, an engineering choice to reduce weight. Once he had taken the idea of the wing, this was probably, as I find, an inevitable choice. There was no copying of even the idea from Rolawn.
62. **Oil tank between wheels.** Conceptually this similarity exists. The oil tanks are completely different shapes; they are clearly not copied as such. Mr Archer's intention to put it there dates from the concept poster, because one can see it

there. It is not apparent in the photographs, so if the idea is copied it must have been taken from a physical view by someone in Turfmech, if not Mr Archer himself. His evidence did not suggest to me that he was lying when he said he had not seen a physical machine at the time. The position of the oil tank over the wheels is explicable in engineering terms as being a good place to carry such a large quantity of oil, though it is not the only place. It can be seen there on other machines used as inspiration by Mr Archer such as the Ransomes TG4650. Taking all this material together, I do not think it right or fair to infer or find copying of this feature as an idea.

63. **End “runner” wheel, located at rear.** This is a similarity, but not significant. Something is likely to be necessary to support the outer part of the arm, and to enable it to follow the contour of the land. A wheel is an inevitable design choice. Putting it behind the cutters is a standard choice for mowers where possible, since if it were in front it would flatten the grass before it passed into the cutters. A wheel here therefore does not tend to suggest copying the idea. There is in fact a dissimilarity between the wheels. The Rolawn machine has a castor wheel; the original Turfmech wheel was fixed. It was turned into a castor (and in fact moved forward) as a result of the mowing experience of InTurf. This dissimilarity would tend to point away from copying of the idea. The banality of this as a piece of lawnmower design means that I do not infer copying from the presence of the idea in both machines.
64. **Cowling on central cutters.** This is not material. The cutters all come with cowlings when supplied by Ransomes. It is the customer’s choice to take them off. To rely on this point of detail as being evidence of copying of anything relevant strikes me as absurd.
65. **Laterally orientated support arm that supports each cutter.** Mr Archer says, and I accept, that this is a common design solution, and is to be found on Ransomes and Hayter cutters with which he was familiar. It might just be apparent from the photographs that Mr Archer had; if not, he would have had to have got into very close proximity to the machine to see it. I have already considered the level of proof which would be required to justify a finding of that sort of inspection, and it is not present in this case. I do not consider that this similarity demonstrates a copying of this feature as an idea. The arms themselves are of a completely different physical design.
66. **Two stop heads on cutting heads.** Having some sort of stop on the cutters to restrain them in transit is an obvious mechanical need. The stops on the Rolawn could only have been apparent on a detailed mechanical inspection, which I do not find to have taken place. This similarity is not evidence of copying. The plea, however, is an indication of a somewhat unfocused claim in this respect on the part of the claimant.

67. **Wheels on the end of the wings.** This idea has already been dealt with. Wheels are a natural support. Their presence does not betoken a copying of the idea.
68. **Outside cutting head at the front.** The point here is that if one looks at the outermost head on each wing of each machine, it is at the front of the wing rather than at the rear. Mr Archer explained that the presence of a wheel, which had to be behind the cutter, meant that the cutter had to be in front, and in any event it was sensible to put it there so that the operator could actually see where the extreme cutter was. While one can probably see from the photographs that the Rolawn outermost cutter was in that position, this feature is equally explicable by a natural design choice. Mr Wright described it as general practice and pointed to examples in the prior art. Yet again, these factors combine to prevent this being serious evidence of copying.
69. **Lift arms on the middle three heads.** This is the mechanism by which three central cutters (which are under the chassis) are lifted both to cope with undulations and to allow for transportation. Mr Archer's evidence was that using lift arms for these, as for the cutter heads on the wings, produced a consistent design, and using a different mechanism or arm would have produced unnecessary complications. I accept this evidence. Furthermore, it is not apparent to me how Mr Archer could have copied this idea from the Rolawn machine without a pretty close up inspection; the evidence does not support such an inspection having taken place. This is not evidence from which copying can be inferred.
70. **Box section used for the construction of the wings.** Again, this similarity exists. Mr Wright's evidence is that this is a common material to use. Mr Archer agreed, and said that Turfmech had specialist laser equipment for cutting this material. It was therefore a natural choice. It is verging on the absurd to suggest that its use by Turfmech calls for an explanation, much less does it support an inference of copying.
71. **Rear arm mounts protruding from the back of the frame.** This similarity exists as a concept, but the mounts are different and they protrude at different angles. Only the idea is the same. According to the evidence of Mr Brouwer, an arm on which the mower is suspended is used (and it is a standard arm), and once one has a narrow beam from which to hang it (which the Turfmech machine apparently has in this sense), and once a decision is taken to pull, rather than push, the cutters (which is the case with the Turfmech machine) then the protrusion is an engineering inevitability. Mr Wright's evidence on this (which was somewhat bedevilled by his failure to understand what was being referred to for a lot of the time, for which he is not to be blamed) is that to do otherwise would require a different design of the wing. Once one has already placed elements such as the front cutters where they are, it becomes inevitable that the rear cutters are trailed behind the wing, and this protrusion follows. In my view it is something that can only be inspected fairly close up,

and I do not think it likely that Mr Archer (or any agent of his) had such an inspection. Based on all this, I do not think a prima facie inference of copying exists, or if it does I find it is rebutted.

72. **Orientation and dimensions between the heads and the wings.** This is apparently intended to convey the fact that if one looks at how the cutters are orientated and positioned one to another, they are similar. Mr Brouwer made the point that they are closer together than one sees on other gang mowers. In this context that is meaningless. The distances between them are different, and measurably so. This is not even a relevant similarity, let alone evidence of copying.
73. **Spacing of heads (centre to centre).** Again, this is not a similarity, let alone a relevant one. The centre to centre spacing of the heads is different (it differs by 4 cm laterally, and 5 cm longitudinally, the Turfmech spacing being greater). I fail to see how this connotes a similarity that is relevant for present purposes. It is actually a point of difference.
74. I have so far taken the various pleaded similarity elements one by one to see what can be seen from them individually. That, however, should not be the end of the exercise. In assessing whether similarities are such that an inference of copying arises one should also look at the aggregate. It is possible that one could find that individual elements, by themselves, do not support an inference of copying in relation to that element, but it is important to look at the whole as well, because innocence may be inversely proportional to the number of elements which betray a similarity. I have done that exercise. In my view it does not lead to any further inference of copying. I have found that there probably was an element of copying in that Mr Archer took the idea of a towed mower with wings with cutters disposed underneath from the Rolawn photographs. He also took the idea of folding them over half way. However, beyond that I do not think that the aggregate of the similar features is prima facie explained by copying. Once he had taken those ideas, the other alleged similarities would be capable of flowing naturally without copying, and I find on the facts that they did.

Design right generally and the areas of dispute

75. Design right exists by virtue of section 213 of the Copyright Designs and Patents Act 1988 ("the Act"). The relevant provisions are as follows:

"213 (1) Design Right is a property right which subsists in accordance with this Part in an original design.

(2) In this Part "design" means any aspect of the shape or configuration (whether internal or external) of the whole or any part of an article.

(3) Design right does not subsist in -

(a) a method or principle of construction ...

(4) A design is not "original" for the purposes of this Part if it is commonplace in the design field in question at the time of its creation.

(5) Design right does not subsist unless and until the design has been recorded in a design document or an article has been made to the design.

....

226(1) The owner of the design right in a design has the exclusive right to reproduce the design for commercial purposes -

(a) by making articles to that design ...

(2) Reproduction of a design by making articles to the design means copying the design so as to produce articles exactly or substantially to that design, and references in this Part to making articles to a design shall be construed accordingly.

(3) Design right is infringed by a person who without the licence of the design right owner does, or authorises another to do, anything which by virtue of this section is the exclusive right of the design right owner."

76. Certain potential points can be got out of the way at this stage. There is no challenge to originality in relation to the design of the Rolawn machine other than a commonplace point. It was not suggested that it was copied from anywhere. Nor is there any issue arising out of section 216(5) - although the machine was not recorded in any design document, an article was plainly made to the design. There are, however, issues as to:

- i) The scope of design right claimed and claimable.
- ii) Commonplace
- iii) Whether any part of the claim is in fact a claim to a method or principle of construction.
- iv) Whether the Turfmech machine is made substantially to the Rolawn design (it is not contended that it is an exact copy).

To what extent is there unregistered design right in the Rolawn machine?

77. Because of the nature of the submissions of Rolawn in this case, it will be necessary to identify with particular care the scope of the rights that are claimed and claimable.
78. The pleaded claim to design right has been set out above. The Rolawn mower is referred to, and then specific aspects of the shape and configuration are referred to verbally with that explanation clarified by reference to photographs. To this there is sought to be added the verbalised extension that I have identified above.
79. It is important to isolate the design in respect of which protection can be properly claimed, and it is vital to ensure that it falls within the definition of design. The Act defines design as “any aspect of the shape or configuration ... of the whole or any part of an article”, and the right cannot exist until there is an embodiment of the design in an article or in a design document. This combination of features means that design right is confined to what one can actually see in an article - either the physical article or a drawing. This is what one would naturally expect from the concept of “design” (which is what is protected) which is a physical manifestation of an idea, not some underlying abstraction, and it is reinforced by the definition of the “designer” in section 214 as:

“the person who *creates* [the design]” (my emphasis).

You cannot create a design until you have actually reduced it to a particular form. It is not a design while it is a conception in the designer’s head, and it becomes a design when it takes physical shape on paper or in the flesh.

80. This means that Mr Alexander’s more abstraction-based proposals for design right are not correct. His client is not entitled to claim design right in the abstraction of ideas involving folding over, folding again, and leaning on a stand and so on. Nor is it entitled to claim design right in the concept of a tank between two vertical support stands at the back of a wide area mower. What it is entitled to claim design right in (subject, of course, to matters such as commonplace) is aspects or configuration of the physical manifestation, not some underlying design concept.
81. In support of his submission that he was entitled to rights to things at a level of abstraction Mr Alexander relied on an analogy with copyright. He said that a playwright was entitled to claim protection from the copying of the plot of his play, even if not a single word is literally reproduced. That may be so, but the reason is not that the plot of the play is protected as such. What is protected is copyright in the work. The work is the play. If the plot is protected it is because the reproducer of the plot has, on the facts, copied a “substantial part” of the work (section 16(3)(a) of the Act and related sections - not, it should be

noted, the same test as for design right infringement). It remains the fact that it is the whole of the work as such that is the subject of the copyright protection. By the same token, what is protected from copying in design right cases is the design, meaning the physical manifestation. It is not some underlying abstraction. The test for infringement is set out in section 226 (see above) - if there is to be protection for the underlying ideas it must come through that, not because the underlying ideas are themselves the design. That, among other things, is probably one of the rationales behind the “method or principle of construction” exception.

82. In relation to copyright the distinction was encapsulated by Hoffman J in *Billhöfer Maschinenfabrik GmbH v T H Dixon Ltd* [1990] FSR 105 at page 121. Commenting on dicta of Buckley LJ in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 he said:

“The trial judge had found as a fact that the defendant had not copied the plaintiff’s drawings of box girder lintels. All that the defendant had taken was ‘the idea of a box girder lintel’ but the plaintiff said that the idea ‘because of its intrinsic importance, had constituted a substantial part of the.....drawings.’ In other words, the defendant had copied a kind of Platonic form of a box girder lintel which could be abstracted from the actual forms in the drawings. It was this argument which Buckley LJ rejected. Copyright does not project ideas but only the actual forms in which the ideas are expressed.”

83. This is a logical approach, and produces a consistent scheme or general structure of intellectual property rights. The actual physical manifestations of artistic works and designs are protected by design right. Ideas are the field of patents. Mr Alexander’s more abstract case would be appropriate for patents, if appropriate for protection at all.
84. With that point out of the way, I turn to consider the claims of Rolawn that are capable of being designs for the purpose of the Act. This means that I rule out Mr Alexander’s more abstract way of putting the case – the “specific approach to constructing a mower which gives rise to this particular shape”, and so on. I also rule out the way in which the case is put on the basis of the 7 features in appendix F (and the additional heads brought in by Mr Brouwer), so far as they rely on the concept or idea underlying them. Thus, by way of example, Rolawn are not, on any footing, entitled to claim design right in the concept of a mower which has arms folding back on themselves at the mid-way point. What they may be entitled to claim design right in is in their particular mower, or an aspect of the shape or configuration of it, one of which shapes can be verbally described in the manner just set out, but in which it is the actual manifestation of it which is the design. The most the 7 points (and Mr Brouwer’s additional 2) can be relied on for in this context is as a verbal means for drawing attention to the particular bits of the actual design which are said

to be the designs for the purposes of this action. The same goes for Mr Alexander's extended formulation.

Commonplace

85. With those conclusions defining the subject-matter of what is under consideration it is now necessary to consider whether any of the properly defined designs are excluded by their being commonplace.

86. As Mummery LJ observed in *Farmers Build Ltd v Carrier Ltd* [1999] RPC 461, the term commonplace is not defined. In order to see if a design is commonplace:

“... it is necessary to ascertain how similar that design is to the design of similar articles in the same field of design made by persons other than the parties or persons unconnected with the parties ... If a number of designers working independently of one another in the same field produce very similar designs by coincidence the most likely explanation of the similarities is that there is only one way of designing that article. In those circumstances the design in question can fairly and reasonably be described as ‘commonplace’. It would be a good reason for withholding the exclusive right to prevent the copying in the case of a design that, whether it has been copied or not, it is bound to be substantially similar to other designs in the same field.”

87. There was a dispute in the present case as to what the design field was by reference to which commonplace had to be tested. Turfmech's case was that the design field in question was agricultural machinery generally, while Rolawn maintained that it was the field of mower design (which is narrower). However, the heat largely went out of this issue because Rolawn accepted that in the light of the evidence a designer and a notional informed user would be aware of agricultural machinery generally. This is in accordance with the views of Jacob LJ in *Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd* [20-05] RPC 6 at para 45 when he said:

“I think that when the Act speaks of ‘design field in question’ a reasonably broad approach is called for. What matters are the sort of designs with which a notional designer of the article concerned would be familiar.”

88. One therefore looks to the field of agricultural machinery generally, which for these purposes includes mowers.

89. Once the proper subject of the design right claim has been identified (ie the actual designs, and not the underlying concepts) commonplace becomes relatively easy to deal with. It was common ground that design right can be claimed in an overall piece of design which itself contains a number of

commonplace elements - in other words, the combination is not necessarily commonplace merely because its constituent parts are. While a lot of the individual elements of the actual designs of the Rolawn mower can be found elsewhere in the design field, there is nothing in the relevant design field that looks like the actual mower in the particular configurations in relation to which design right is claimed. Thus it is (I find) commonplace to have staggered cutters, and commonplace to have a box structure made up of triangular sections. However, the particular combination of those features that one sees making up the overall designs of "the whole" in its extended, semi-retracted and fully retracted positions is not commonplace. I saw nothing sufficiently resembling that particular overall design in any of the art relied on by either of the experts as would make those particular designs the sort of thing one sees elsewhere. The same is true of the side assembly as a whole (in respect of which design right is claimed) and of the particular rear assembly of tanks and arms. The particular designs in question, as an overall piece of art, are not apparent elsewhere in the field. Commonplace is therefore not a bar to a claim to design right of those particular manifestations.

90. It therefore follows that commonplace is not a bar to a claim of design right in this case.

Method or principle of construction.

91. This point does not arise in relation to the particular designs of the overall machine in its unfolded, semi-folded and finally folded states. If one is looking at that overall design then it is simply not, in any sense, a method or principle of construction. Nor does it arise in relation to the particular appearance of the tank between two sloping support arms at the rear of the machine. That, again, is a particular design (or aspect of shape or configuration) and is not a method or principle of construction. Turfmech accepted this.
92. However, the exclusion of methods and principles of construction does provide another bar to the more generalised way in which Mr Alexander put his case on the subsistence of design right. The abstract idea of an arm holding cutters which folds over on to itself by means of a hinge in the middle seems to me to describe a method of construction of an arm. Similarly the idea of a tank sitting over the rear wheels is a method of constructing a piece of apparatus which has two wheels and to which one wishes to add a tank - as an idea it is a method of construction. There are, if it matters, sound engineering reasons (in terms of balance and load support) for putting it there. The same applies to the 7 particular aspects of the design relied on by Rolawn. For example, having a staggered arrangement of heads, in the abstract, is a method of constructing mowers (again there are sound practical reasons behind that), based on the principle that you can get more than one row of cutters and by staggering them you can ensure that grass does not escape being cut because of gaps between the tracks of the cutters.

93. What I have just said seems to me to be self-evident, but it is also supported by authority. In *Landor & Hawa International Ltd v Azure Designs Ltd* [2007] FSR 181 the Court of Appeal approved a formulation in Russell-Clarke on *Copyright in Industrial Designs (7th Edn)* at para 3-80:

“A method or principle of construction is a process or operation by which a shape is produce, as opposed to the shape itself ... The real meaning is this: that no design shall be construed so widely as to give its proprietor a monopoly in a method or principle of construction. What he gets is a monopoly for one particular individual and specific appearance. If it is possible to get several different appearances, which all embody the general features which he claims, then those features are too general and amount to a method or principle [of construction]. In other words, any conception which is so general as to allow several different appearances as being made within it, is too broad and will be invalid.”

94. The Court also followed Jacob J in *Isaac Oren v Red Box toy Factory Ltd* [1999] FSR 785:

“It is possible to make a device visually very different from Mr Oren’s designs but which works the same way ... it follows that there is no principle monopolised here - only a visual embodiment of a device constructed in accordance with a principle.”

95. If one applies these tests to the 7 specific features relied on by Rolawn one can see that each of them falls within them. There are several appearances which an arm can adopt when folded back on itself at the midway point - the folding back is therefore a method or principle of construction. And so on.
96. The same applies to Mr Alexander’s more generalised description of Rolawn’s design rights which I have set out verbatim above. When he articulates the matter in the way he does, it becomes plain that he is describing a way of constructing a wide area mower. It does not generate any single particular appearance of the mower; mowers produced in accordance with that general description could have very different appearances, albeit recognisable as coming from the same root. Frankly, I consider that the Turfmech machines achieve that. When one looks at those mowers, one can tick off a lot of the features, but the overall design impression is different. They are built to the same principles or methods of construction. There is no design right in those principles or methods.

Infringement

97. By virtue of section 226, set out above, a person infringes if, without authority, he copies the design so as to produce a design exactly or substantially to the unregistered design. There are therefore 2 elements - copying “the design”,

and doing so so as to produce articles to exactly the same or substantially the same design.

98. So far as the first of those elements is concerned, I have made my findings about copying above. There was an element of copying of overall ideas as to how to go about the matter. However, “the design” was not copied. What was essentially taken was certain methods or principles of construction, and those matters are excluded from being design right. The copying that took place therefore does not fall within section 226.
99. In the light of that, questions as to the second element do not strictly arise, but I will consider it anyway. It is a matter of judgment as to whether what has been reproduced is an article “exactly or substantially” to the design of the claimant. I was treated to the views of the experts on this point, but in the end the relevant view of substantiality is mine. In any event, the principal view of Mr Brouwer as to similarities was not a subjective view as to what the machines looked like. His views took the form of a list of features, often in generic terms, which he said were present in both machines. Thus he listed things such as overlapping cutters, wheels on the end of wings, and so on. Such a list is not particularly helpful, both because (in the case of many items) he was listing methods of construction which are not protected, and because they do not assist in the exercise of the overall impression (at least in case like the present). I therefore have to look at the two machines through my own spectacles, as it were. A list can help to explain an impression; it cannot, in the end, govern it.
100. There is no question of the Turfmech machine being “exactly” to the design of the Rolawn mower - one only has to look at the two to see that. So far as substantiality is concerned, again the answer seems to me to be absolutely clear. The two mowers have certain features in common (some of the principles or methods of construction) but otherwise cannot be said to be substantially the same. Their respective appearances are far too different. They each have lateral arms which fold roughly at the mid-point, with mowers disposed underneath, but the arms have a very different shape. The Rolawn machine has a triangular construction in the vertical plane; the Turfmech mower has no equivalent. The Turfmech machines have fewer cutters; their support bars are different; the Turfmech machine has an extra support wheel in the middle of each arm; the stops are different. The differences can be described further, but I do not need to do so because visual impact is more important than verbalisations in this context, and the impression is clear. In the first folded state the impression is again different, and the differences are even clearer in the ultimate folded up state. In this last state the overall impression of the Rolawn machine is of a girder structure, with some cutters. The overall impression of the Turfmech machine is of a jumble of cutters. Even the most casual glance at the tank and the supports shows that they are very significantly different, both as a matter of overall impression and as matter of detail. There is, in my view, no way in which one can say that they are “substantially” to the same design within the meaning of the statute. The only

way in which they can be said to be substantially to the same design is by reducing the description to a high level of verbal abstraction which reduces the Rolawn design to a method or principle of construction – for example, a tank over the rear wheels with a forward-leaning support stand with a horizontal member. That is not sufficient for these purposes.

Conclusions on infringement of unregistered design right

101. The foregoing focuses on the detail of the Maximow 13 machine. No additional points arise in relation to the Maximow 17 – it is effectively more of the same. Accordingly, on unregistered design right I conclude as follows:

- i) While there is unregistered design right in the physical aspects of the Rolawn machine shown and described in the Particulars of Claim, there is no design right in anything of any greater degree of generality.
- ii) There is no design right in the general way in which the Rolawn machine is constructed.
- iii) No material parts of the Rolawn machine have been copied. The most that has been copied is some general ideas of how to put the machine together.
- iv) The result of the copying is not such as to produce an article exactly or substantially to the Rolawn design.
- v) The result is that there is no infringement of unregistered design right by Turfmech.

Registered Design

102. Issues of validity and infringement arise under this head. Turfmech claims a declaration that the registration is invalid on the ground that the appearance lacks individual character and (at least as a matter of pleading) that the design consists of features of appearance which are solely dictated by the machine's technical function. The designs are registered by reference to photographs; they appear in Appendix 5 to this judgment.

103. The relevant legislation for this claim is the Registered Design Act 1949 as amended by European Directive 98/71EC. The Act protects "designs" with certain qualities. Design is defined in section 1(2) as:

" The appearance of the whole or a part of a product resulting from features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation."

“Product” is defined in section 1(3) as:

“Any industrial or handicraft item other than a computer program; and, in particular, includes packaging, get-up, graphic symbols, typographic type-faces and parts intended to be assembled into a complex product”.

104. It will therefore be seen that the Act is capable of applying to a complex product itself; the Rolawn mower is such a product. The contrary was not contended by Turfmech.

105. Section 1(B) sets out the scope of the protection afforded by the Act:

“1(B)(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.”

... 1(B)(3) For the purposes of subsection (1) above, a design has individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date.

1(B)(4) In determining the extent to which a design has individual character the design freedom of the author in creating the design shall be taken into account.”

106. Section 1C deals with technical function:

“1(C)(1) A right in a registered design shall not subsist in features of appearance of a product which are solely dictated by the product’s technical function.”

107. Section 7 deals with the rights given by registration:

“7(1) The registration of a design under this Act gives the registered proprietor the exclusive right to use the design and any design which does not produce on the informed user a different overall impression.”

(2) For the purposes of subsection (1) above and section 7A of this Act any reference to the use of a design includes a reference to:

(a) the making, offering, putting on the market ... of a product in which the design is incorporated or to which it is applied

(3) In determining for the purposes of section (1) above whether a design produces a different overall impression on the informed user, the degree of freedom of the author in creating his design shall be taken into consideration.”

108. Section 7A makes it an infringement for anyone to do something which is the exclusive right of the proprietor of the design.
109. It is common ground that in construing and applying the Act I should take into account one of the recitals in Directive 98/71 pursuant to which the Act was amended. The recital (no. 13) deals with the informed user and the individual character of the design - it goes to the question of validity. It reads:

“(13) Whereas the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design *clearly* differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.” (My emphasis)

110. Jacob LJ considered an equivalent recital in the community Design Regulation (Reg 6/2002) in *The Procter and Gamble Company v Reckitt Benckiser (UK) Ltd* [2007] EWCA Civ 936. It is common ground that I can and should apply what he said in that case about community designs to the UK registered design case before me. He held that the word “clearly” which I have emphasised in the above recital demonstrated that for validity purposes one needed “clear blue water” between the registered design and the prior art. He distinguished this from the test of “different overall impression” which applies to infringement, which was a lesser test - a smaller degree of difference would lead to a competing product being non-infringing. See paragraph 19 of his judgment -

“It is sufficient to avoid infringement if the accused product is of a design which produces a ‘different overall impression’. There is no policy requirement that the difference be ‘clear’. If a design differs, that is enough - an informed user can discriminate.”

111. The “informed user” is an important character. The perceptions of this person are central to both validity and infringement. He has to perceive that the design has sufficient individual character (assessing the width of the stretch of blue water for these purposes) and the difference between the registered design and the accused product. *Procter* indicates that the “informed user” is not the same person as the “average consumer” in trade mark law. The “informed user” has greater experience and a greater power of recollection, and therefore of comparison, than the trade mark consumer. Jacob LJ approved a decision of the Higher Provisional Court of Vienna when it said:

“The ‘informed user’ will, in the view of the Appeals Court, have more extensive knowledge than an ‘average consumer in possession of average information, awareness and understanding’ ... in

particular he will be open to design issues and will be fairly familiar with them ..." (see para 26).

The informed user will also form a more considered view than the average consumer:

"I would say that what matters is what strikes the mind of the informed user when [the product] is carefully viewed" (para 25 - Jacob LJ's emphasis).

"So what matters is the overall impression created by it: will the user buy it, consider it or appreciate it for its individual design? That involves the user looking at the article, not half-remembering it." (Para 27 - Jacob LJ's emphasis)

112. Jacob LJ also made an important point about the level of generality at which designs have to be viewed for the purposes of comparing the overall impression. The higher the level of generality, the less difference there is likely to be, as a matter of overall impression, between the articles one is comparing. Thus one modern compact car, at a high level of generality, may be the same as another - they have the same general shape, four wheels, and so on. However, moving to lower level of generality (or a higher degree of particularity) differences emerge. So at this level the overall impression of (say) a Ford Focus is not the same as (say) a Renault Clio. Jacob LJ addressed this point shortly in paragraph 35(vii) of his judgment:

"In this exercise the level of generality to which the court must descend is important ... The appropriate level of generality is that which would be taken by the notional informed user."

Validity

113. With those points in mind I turn to consider the attack on validity. Not much time was spent on this point in submissions. Turfmech's skeleton argument said that this point was run as a squeeze on infringement. Its argument was that one could only say that the Maximow machines gave a similar overall impression as the Rolawn machine by adopting a high level of generality for the purpose of comparison, and if one adopted that high level consistently and applied it to the validity step then Rolawn's machine lacked individual character and the registration was therefore invalid. Other than that point, I did not detect any great enthusiasm for the attack on validity, but it was raised and not abandoned and I therefore have to deal with it.
114. The informed user, in my view, is one who uses machines in the turf growing industry. He is not as narrow as someone who is familiar only with mowers (or wide area mowers), without more, but he is certainly familiar with them (and with other machinery). I did not detect much difference between the

parties on that point. Such a person would have some familiarity with agricultural equipment other than mowers, and so the design corpus encompasses wide area mowers and other agricultural machinery towed or mounted on the back of tractors for cultivating wide areas.

115. With that established, I turn to consider whether the Rolawn machine has individual character within the meaning of section 1(B)(3). This exercise involves a comparison with the prior art. The prior art relied on by Turfmech consisted of 2 wide area mowers (one called the Jerry Clipper and one called the Kesmac 11 gang mower), 1 seeder, 7 sprayers and a folding roller. The principal relevant feature of the middle two categories was that they had arms made of metal framework, which folded on themselves at a half way point and then either lifted up vertically, or folded in so as to lie parallel to the track of the tractor. They also had some storage mechanism in the nature of a tank. The roller arms folded in and up when not being used for rolling behind a tractor. The two mowers are, so far as relevant, described below.
116. The comparison exercise is for me. As Jacob LJ pointed out in *Procter*, expert evidence does not really assist one. And, as he said at paragraph 3:

“The most important thing about each is what they look like.”

117. Carrying out that exercise, it is quite plain to me that the Rolawn design has the relevant individual character. The two mowers relied on are shown in Appendix 6. There is a manifest and clear difference between the Rolawn machine and both of the mowers. So far as folding configuration is concerned, the Jerry Clipper does not have one. It does not fold in any relevant way at all - it is moved by raising the cutters a bit, and then moving the tractor to what is the side of the mower in its cutting configuration and towing it from there. In its fully deployed form it gives an obviously different impression from the Rolawn machine. The Kesmac has some superficial similarity in the deployed form, but one does not have to look at it for long to appreciate that the Rolawn machine gives a very different overall impression. It does retract itself, but it does not have anything like the same central beam mechanism for suspending the cutters as the Rolawn machine has, and its folded up position has a bunching, dangling effect. There is no sensible level of generality at which one can say that the Rolawn machine does not give a clearly different impression in all its configurations.
118. Nor is the picture changed by adding in the non-mower machines which are relied on as prior art. I have not depicted them, but am satisfied that they look even more dissimilar and the overall impression is even more different (they are none of them mowers). All they do is demonstrate some of the design features incorporated into the Rolawn machine, but they all clearly give a different overall impression. Whether taken individually, or as a body, the difference in impressions is still the same.

119. The scope for design freedom has to be taken into account. I am satisfied that on the evidence of the experts, and some of the other witnesses, that there is considerable scope for design freedom in a case such as this, but even taking that into account to its fullest extent it is quite apparent to me that the Rolawn machine still gives a clearly different impression when put against the background of the entire design corpus.
120. Accordingly, this attack on validity fails.
121. There is a pleaded attack on validity on the basis that the Rolawn registered design consists of features of the appearance which are solely dictated by the machine's technical function (section 1(C)(1)). This was not developed at the trial, and did not feature in Turfmech's final submissions. It seems to have been quietly abandoned, and rightly so. There is nothing in the point.
122. Accordingly, Turfmech's claim for a declaration as to invalidity fails.

Infringement

123. Registered design right is infringed if Turfmech has used a design which would not give the informed user a different overall impression (see section 7). This comparison is again one to be carried out by the trial judge, and once again it is a visual matter in respect of which expert evidence is of little assistance. A catalogue of similar features was relied on by Rolawn, but that exercise is a useful one only so far as it assists to verbalise a visual impression.
124. Appendix 7 places the registered design photographs alongside photographs of the Maximow 13 in corresponding configurations or attitudes. Mr Lykiardopoulos says that one carries out a comparison between the two corresponding photographs in all cases, and, he says, the differences are patent and large - certainly large enough for the purposes of section 7. At one stage Mr Alexander seemed to be saying that one approached the exercise at a level of generality which metaphorically involved backing off some distance, so that (for example) one would see two machines with wings, or two machines with arms that folded up half way, and that therefore the overall impression of the two machines was the same. However, by the end of his final submissions he accepted that the exercise that I have to conduct is one involving a comparison of the photographs (transcript, day 8 lines 22-3).
125. I think that Mr Alexander and Mr Lykiardopoulos are right about the nature of the exercise. As Jacob LJ indicates, consideration has to be given to the level of generality to be applied to the exercise - the concept is inherent in the concept of "overall impression" - but generality must not be taken too far. Just as, in his case, it was too general to describe the bottle as "a canister fitted with a trigger spray device on the top", in the present case it is too general to describe either product as "a wide area mower, with rigid arms carrying cutters, and whose arms fold themselves up at a mid-way point", and so on. One of the problems with words is that it is hard to use them in this sphere in a way which avoids

generalisation. But what matters is visual appearance, and that is not really about generalities. An informed user would not view these machines from across a field or two (to use a metaphor deployed by Mr Alexander), from which vantage point they might conceivably appear similar (though even then I doubt it). He would view them closer up, with a proper view of their differences. That is the equivalent of comparing the photographs.

126. I therefore perform that exercise, using the spectacles of the informed user. I ask myself whether the Turfmech design produces a different overall impression, photograph by photograph. It has to be done photograph by photograph, because the photographs as a whole define the design. In every case I come to the clear conclusion that a different overall impression is produced by the Turfmech machine. In each case it would be possible to articulate the differences in words, but the exercise is pointless, because the ability to define differences verbally does not necessarily mean that a different overall impression is given any more than a comparison of verbalised similarities means that the machines give the same overall impression. I believe that the point speaks for itself. Having said that, I would articulate the most striking differences as being the triangular gantry of the Rolawn (missing from the Turfmech machine), the additional wheel on the Turfmech arm, the differences at the forward end of the machine (where it joins the tractor), the very striking differences in the fully folded position (the overall impression of girders in Rolawn vs the overall impression of distributed cutters in Turfmech) and the obvious differences in the shapes of the support structure and tank, both when viewed from the rear and when viewed from the side.
127. This conclusion makes it unnecessary for me to deal with one point that arose in argument arising out of the fact that the Turfmech machine does not have any aspect of its deployment which corresponds to the twisted stage of the Rolawn machine immediately before the arms are swept back and upwards. It will be remembered that the Turfmech machine merely hinges its folded arms into the vertical before leaning them back. Two of the photographs which form part of the registration show the Rolawn machine in this twisted state. The point arose as to whether this, by itself, was fatal to the infringement claim on the footing that the impression of the machines was inevitably different in this respect so that there was bound to be a different overall impression. Mr Alexander argued that, on the basis of *Oren v Red Box* [1999] FSR 785, those two drawings could be disregarded as somehow being subsidiary and not of the essence of the design. The point would only have mattered had I been of the view that there was a similar overall impression in relation to all, or perhaps most of, the other drawings. Since that is not my view, the point does not matter, and I will not say anything more about it.
128. Section 7(3) requires me to take design freedom into account in reaching my decision. I have done so, but in truth it has little impact on my decision. A designer would have had a good amount of design freedom in designing the Turfmech machine. There are a number of ways in which the arm could have

been made to fold, or the arm could have been designed, or in which the arm could have been supported in its transport mode; and so on. The more there is design freedom, the greater is the prospect that similarities in the product should be taken as producing a similar (not different) overall impression. However, even allowing for that degree of design freedom in the present case, my view is that expressed above.

129. That deals with the Maximow 13 machine. It is not suggested that there were any other or better reasons for saying that the Maximow 17 machine infringes. I therefore find that there has been no infringement of Rolawn's registered design right in this case.

Conclusion

130. I therefore dismiss both the claim and the counterclaim.

Appendix 1



Photograph 1



Photograph 2



Photograph 3



Photograph 4



Photograph 5



Photograph 6



Photograph 7



Photograph 8



Photograph 9



Photograph 10

Appendix 2

Pictures referred to in the Particulars of Claim (slightly cropped)



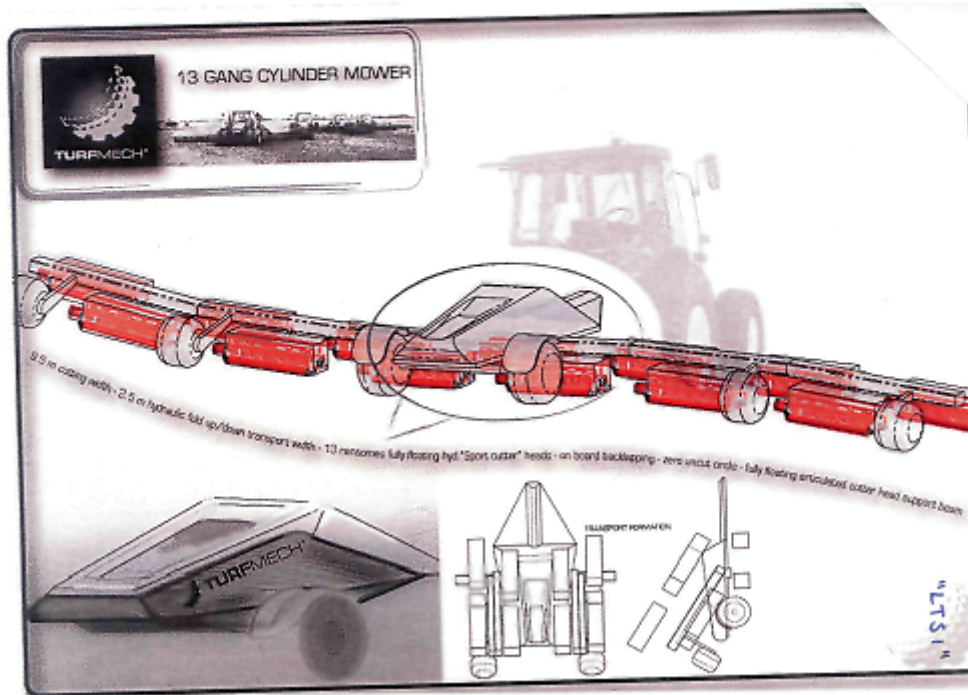


Appendix 3

Publicity shots of Rolawn mower



Appendix 4
Concept poster



Appendix 5

The Registered Design registered photographs

Note – the original photographs were of a reduced quality







Appendix 6

Some of the prior art (for registered design purposes)



Photograph 1 – Jerry Clipper



Photograph 2 - Kesmac

Photograph 3 - Kesmac



Appendix 7

Comparison of the registered design photographs and the Kesmac 13 machine





The ~~Maxi~~Maxi 13 does not have an equivalent position due to a different folding sequence.



