

O-046-16

REGISTERED DESIGNS ACT 1949 (AS AMENDED)

**IN THE MATTER OF REGISTERED DESIGN NO 4023096
IN THE NAME OF GARDEN LIFE LTD**

AND

**APPLICATION No. 39/13 BY MELVYN JOHN COLES
TO INVALIDATE THE DESIGN**

Background and pleadings

1. The registered design which is the subject of this dispute was filed by Garden Life Ltd on 18 January 2012. The design is described in the application form as “Poultry run/aviary”. The representation of the design as registered is shown below:

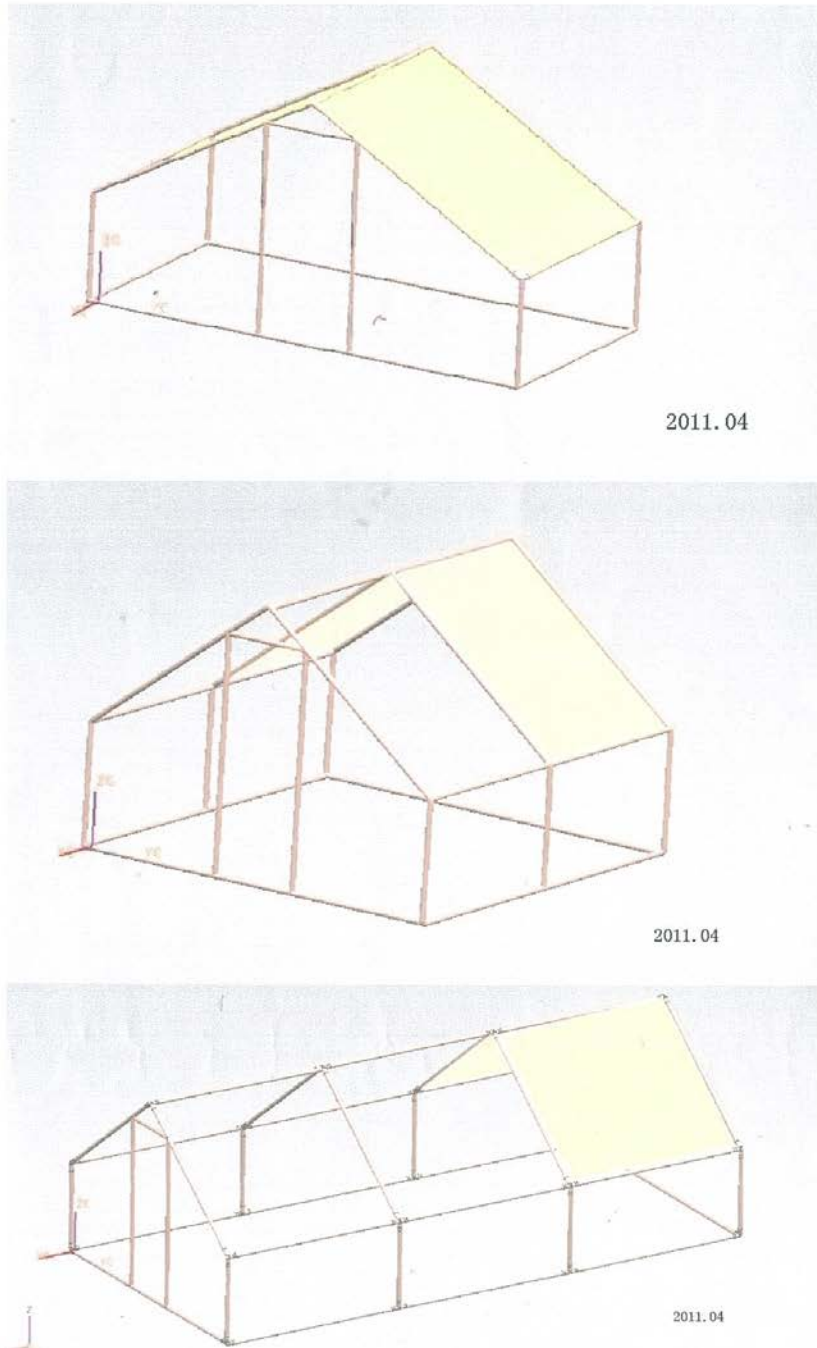


2. Melvyn John Coles has requested the invalidation of the design registration under section 1B(1)¹ of the Registered Designs Act 1949 (as amended) (“The Act”). This

¹ Which is relevant in invalidation proceedings due to the provisions of section 11ZA of the Act.

section relates to the requirement that designs must be novel in comparison to others that have been made available to the public. The prior art which Mr Coles claims destroys the novelty of the registered design is shown below:

Doc 4



3. Mr Coles claims:

“This product was imported by GS4 Distribution 26 Mowbray Grove TS19 8XA phone 07845061521. I enclose import documents from the supplier date Sept 20 2011 – and was sold by them before Garden Life copied it. The manufacturer is Hebei Machinery China.”

4. Garden Life Ltd filed a counterstatement, signed by John Bolton, its director:

“We have undisputable proof that we have been selling this (our own) design since Jan 2011.

Our factory in China will confirm that they produced the design to our unique requests and they do not sell to anyone else.

They will also confirm that Hebei Machinery copied the design from our own spec.

Notwithstanding the above, the evidence supplied by Mr Coles is meaningless. It simply shows the import of “Metal Coops” which could mean anything. It also includes a very crude pencil line drawing of some shapes which resemble our design, drawings which a primary school child could have produced!”

7. The only evidence in these proceedings comprises four documents attached to Mr Coles’ application form². Both parties were given additional opportunities to file evidence, but no evidence was filed. Neither party requested a hearing, although they were given the option of a hearing if they wished, prior to this decision being made. Neither party filed written submissions in lieu of a hearing. I make this decision on the basis of the papers filed by both parties which comprise:

- the claim as set out in paragraph 3 of this decision in the application form, DF19A;
- the covering letter dated 23 September 2013 from Mr Coles;
- the four documents attached to the application form;
- the notice of counterstatement (form DF19B) and the attached counterstatement, as set out in paragraph 4 of this decision.

Evidence

8. Mr Cole’s evidence, attached to his (amended) application for a declaration of invalidity, consists of four pages, labelled Doc 1, Doc 2, Doc 3 and Doc 4. Doc 4 is the alleged prior art which I have reproduced above in paragraph 2 of this decision. The other three documents are as follows:

² Documents attached to a statement of case or a counterstatement constitute evidence in accordance with rule 21(1)(a) of the Registered Designs Rules 2006.

ISSUE HEBEI MACHINERY I/E CO., LTD NO.181, TAIHUA ST., SHIJIAZHUANG CHINA 050051, TEL:008631187055909		ORIGINAL 商业发票 COMMERCIAL INVOICE		
To LAYTON GRAFTON 26. MOWBRAY GROVE BISHOPS GAETH STOCKON-ON-TEES CLEVELAND TS19 8XA T:07845061521		No. OC12636202	Date: 20 SEP., 2011.	
Transport details SHIPMENT FROM XINGANG TO FELIXSTOWE BY VESSEL		S/C No 11HM6202	Terms of payment T/T.	
Marks and numbers	Number and kind of packages; description of goods	Quantity	Unit price	Amount
LAYTON GRAFTON METAL COOPS				
	METAL COOPS		FOB XINGANG ,CHINA	
	METAL COOP 400*400CM	25PCS	@USD160.00	USD4000.00
TOTAL:		25PCS		USD4000.00
G.W.:1100KGS N.W.:850KGS. PACKING: CARTONS WITH METAL PALLET TOTAL: 25PCS				
河北机械进出口有限公司 HEBEI MACHINERY IMPORT & EXPORT CO.,LTD. (25) 欧建军 OUJIANJUN (MANAGER)				

Issuer HEBEI MACHINERY I/E CO., LTD NO.181, TAIHUA ST., SHIJIAZHUANG CHINA 050051, TEL:008631187055909		ORIGINAL 装箱单 PACKING LIST	
TO: LAYTON GRAFTON 26, MOWBRAY GROVE BISHOPS GAETH STOCKON-ON-TEES CLEVELAND TS19 8XA T:07845061521			
Marks and numbers	Number and kind of packages; description of goods		
LAYTON GRAFTON METAL COOPS			
	QUANTITY.	G.W.(KGS)	N.W.(KGS)
<u>METAL COOPS</u>	2 PACKAGES	1100KGS	850KGS

TOTAL:	2 PACKAGES	1100KGS.	850KGS.
GW.:1100KGS. N.W.:850KGS. PACKING: METAL PALLET TOTAL: 2 PACKAGES.			
河北机械进出口有限公司 HEBEI MACHINERY IMPORT & EXPORT CO.,LTD. (25) 欧建军 OUJIANJUN (MANAGER)			

HEBEI MACHINERY I/E CO., LTD. NO.181 TAIHUA ST, SHIJIAZHUANG, CHINA 050051, T: 008631187055909		TSNS030104	
Consignee LAYTON GRAFTON 26, MOWBRAY GROVE BISHOPS GAETH STOCKON-ON-TEES CLEVELAND TS19 8XA T: 07845061521		ORIGINAL INFINITY CARGO LOGISTICS (CHINA) LIMITED 华建国际货代(上海)有限公司 AS THE CARRIER BILL OF LADING	
Notify Party CAMAIR FREIGHT SOLUTIONS LTD THE CARGO TERMINAL DURHAM TEES VALLEY AIRPORT DARLINGTON CO. DURHAM DL2 1LU T: 00 44(0)1325 335600		Excess value declaration as per clause 15 For delivery of goods please apply to: ZENITH INTERNATIONAL FREIGHT LIMITED, REGISTERED OFFICE: ZENITH HOUSE, VALLEY COURT, BRADFORD, WEST, YORKSHIRE, BD1 4SP BRADFORD BD1 4SP UNITED KINGDOM Phone: +44 1274 727888 Fax: +44 1274 727999	
Place of receipt XINGANG, CHINA		Place of delivery FELIXSTOWE, UK	
Vessel CMA CGM THALASSA / FL786W		Port of loading XINGANG, CHINA	
Port of discharge SOUTHAMPTON, UK		Description of Goods METAL COOPS	
PARTICULARS AS DECLARED BY SHIPPER - CARRIER NOT RESPONSIBLE			
Modes and Numbers LAYTON GRAFTON METAL COOPS	No. and kind of Packages 2 Package(s)	Description of Goods METAL COOPS	Gross Weight 1100 KG
			Measurement 6.7 M3
Container CMAU5763756	Seals A3283163	Type 40HC	Weight(KG) 1100
			Volume(M3) 6.7
			Packages 2 PKG
			Mode CFS/CFS
SHIPPED ON BOARD 23-Sep-11 INCOTERM: FOB			
23-Sep-11			
FREIGHT COLLECT The goods and interests are accepted and dealt with subject to the terms and conditions of the bill of lading which must be duly endorsed in exchange for the goods. If witness whereof, Infinity Cargo Logistics (China) Limited as Carrier has signed the number of Bills of Lading stated herein, all of this and any bills, one to which being accomplished, the others to stand void. Terms of Bill of Lading continued on the back hereof.			
Freight amount	Freight payable at 3 (THREE)	Place and date of issue INFINITY CARGO LOGISTICS (CHINA) LIMITED 华建国际货代(上海)有限公司 AS THE CARRIER INFINITY CARGO LOGISTICS (CHINA) LTD. 华建国际货代(上海)有限公司 61000000	
No. of original B(s) / L			
The Carrier received for shipment, in apparent good order and condition, unless otherwise indicated herein, the goods, or the container(s) or package(s) said to contain the goods herein mentioned, to be carried subject to all the terms and conditions provided on the face and back pages of this Bill of Lading by the vessel named herein or any substitute at the Carrier's option and/or other means of transport, from the place of receipt or the port of loading to the port of discharge or the place of delivery shown herein. In accepting this Bill of Lading, the Merchant agrees and accepts to all its stipulation, exception, terms and conditions on the face and back hereof, whether written, typed, stamped, printed or otherwise incorporated.			

Decision

9. Section 11ZA of the Act provides the capacity for a registered design to be invalidated on the ground (section 1B) that it was not new or that it did not have individual character. Section 1B reads:

- “(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.
- (2) For the purposes of subsection (1) above, a design is new if no identical design whose features differ only in immaterial details has been made available to the public before the relevant date.
- (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.
- (4) In determining the extent to which a design has individual character, the degree of freedom of the author in creating the design shall be taken into consideration.
- (5) For the purposes of this section, a design has been made available to the public before the relevant date if-
 - (a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and
 - (b) the disclosure does not fall within subsection (6) below.
- (6) A disclosure falls within this subsection if-
 - (a) it could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned;
 - (b) it was made to a person other than the designer, or any successor in title of his, under condition of confidentiality (whether express or implied);
 - (c) it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date;
 - (d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or

- (e) it was made during the 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his.
- (7) In subsections (2), (3), (5) and (6) above “the relevant date” means the date on which the application for the registration of the design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.
- (8)
- (9)”.

10. According to section 1B(7) of the Act, prior art can only be relied upon to invalidate a registered design if it has been disclosed to the public prior to the application date of the registered design being attacked, unless the exceptions in subsection (6) apply. This means that the relevant date for my assessment is 18 January 2012.

11. Garden Life Ltd/Mr Bolton has made a challenge in the counterstatement to the effect that Mr Coles’ evidence does not prove his claim. It is necessary for Mr Coles to establish a prima facie case. The evidence is light in the extreme. There is a lack of proof of provenance in relation to Doc 4 which would link it to or give it corroborative value compared to the other three documents. Mr Coles gives no narrative in his application to explain the significance of Doc 4; the only reference he makes to the evidence in his claim is that it consists of import documents. However, Doc 4 is a set of drawings. This is not an import document. The only reference which Mr Coles makes to Doc 4 is in his covering letter dated 23 September 2013 which accompanied the application for invalidity. He describes Doc 4 as “the manufacturer’s design drawings Doc 4 dated 04/2011”.

12. In this letter, Mr Coles says that Hebei Machinery I/E Co Ltd has been manufacturing “at least six versions and assorted sizes since mid 2011”. This is the crux of the matter: there is no proof what the “metal coops” listed in the import documents (1-3) look like. Mr Coles himself refers to at least six versions. Doc 4 shows three different versions, two of which comprise less or more segments than the registered design. There is nothing to prove that the metal coops referred to in the import documents match any of the three drawings. I note that Doc 1 gives the measurement of the coops as being 400cm x 400cm. This would appear to rule out the top and bottom drawings, but it is still not possible to find that the middle drawing is the one referred to in the import documents. In any event, I am doubtful that the import of a product by a business from the product’s manufacturer even represents public disclosure; and there is nothing to show that it was ever sold.

13. The evidence lacks cogency and presents too flimsy a basis to invalidate the registered design, especially considering Mr Bolton questioned the probity of the evidence in the counterstatement. Mr Coles did not meet this challenge by filing further evidence. Mr Coles has failed to establish that the design was not new at the relevant date.

Outcome

14. The application for a declaration of invalidity fails. Design number 4023096 is to remain registered.

Costs

15. Garden Life Ltd has been successful and is entitled to a contribution towards its costs from the published scale (Tribunal Practice Notice 4/2007). I must, though, also take into account that Garden Life Ltd has not been legally represented in these proceedings and that its costs would not, therefore, have included any professional legal fees. I therefore reduce by a half (except in relation to expenses) what I would otherwise have awarded. There was little in the way of pleadings to consider. The amount of the award is £100.

16. I hereby order Melvyn John Coles to pay to Garden Life Ltd the sum of **£100** which, in the absence of an appeal, should be paid within fourteen days of the expiry of the appeal period.

Dated this 27th day of January 2016

**Judi Pike
For the Registrar,
The Comptroller-General**