



[2012] EWPC 53

Case No: CC11P03061

IN THE PATENTS COUNTY COURT

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 23/11/2012

Before :

HIS HONOUR JUDGE BIRSS QC

Between :

LOUVER-LITE LIMITED	<u>Claimant</u>
- and -	
HARRIS PARTS LIMITED	
(Trading as HARRIS ENGINEERING)	<u>Defendant</u>

Ben Longstaff (instructed by **Vertex Law LLP**) for the **Claimant**
Geoffrey Pritchard (instructed by **Bourne Jaffa & Co.**) for the **Defendant**

Hearing dates: 1st November 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRSS QC

His Honour Judge Birss QC :

1. This case concerns Registered Community Design No. 000361118-0001 for the headrail of a window blind. Mr Ben Longstaff appears for the claimant instructed by Vertex Law LLP and Mr Geoffrey Pritchard appears for the defendant instructed by Bourne Jaffa & Co. LLP.
2. The claimant (Louver-Lite) owns the registered design and claims that the defendant (Harris) has infringed the design by selling a headrail product called the “Valencia”. Harris denies that the Valencia infringes the registered design and contends that the design is invalid on the grounds of lack of novelty and lack of individual character. There is also an issue about whether and to what extent the design is dictated solely by function. By closing that point had fallen away as a freestanding attack on validity, because the parties were agreed that aesthetic considerations do play at least some part in the overall design, but function was relevant to design freedom.

The trial

3. The trial occupied the court for just over half of one day. The claimant’s evidence consisted of brief statements from Mr Birtles of Louver-Lite and from Mr Bridle, Louver-Lite’s patent attorney. Mr Birtles’ evidence explained how this action arose. Mr Bridle’s evidence consisted of placing in evidence a sample of prior headrail designs (ten US design patents and a patent for an invention) which were put forward as part of the design corpus. Neither Mr Birtles nor Mr Bridle were cross-examined.
4. The defendant’s evidence consisted of a statement and expert’s report from Mr Day. Mr Day is the managing director of Harris. He has over twenty-five years’ experience in this field of window blind headrails. He gave evidence about how the Harris design arose and gave expert evidence addressed to technical function. That issue of technical function was the only issue for which permission was given at the CMC to cross-examine.
5. Mr Longstaff submitted that Mr Day was effectively in an impossible position giving expert evidence as the managing director of the defendant. I do not agree. Given the nature of the points to be addressed and this case as a whole it was entirely proportionate for the defendant to have Mr Day give the evidence he did. He has the requisite technical experience. In listening to his cross-examination, I did not detect anything which would indicate his evidence was anything other than a proper attempt to assist the court.
6. There was a submission that Mr Day’s evidence was slipshod – I do not accept that. There was also a more substantive submission that his evidence was inconsistent as between Harris’ own design registration and the Louver-Lite registration. Essentially the point was that if Mr Day thought a particular design of his company’s was registerable and not wholly functional, how could he say the Louver-Lite design was wholly functional? I did not detect an inconsistency. It is clear that Mr Day’s position is that both designs have aesthetic elements (at least the curved sides) and functional elements. In my judgment Mr Day was a fair witness.

The law

7. Council Regulation (EC) No 6 / 2002 applies to this case. I will refer to the relevant articles but there is no need to set them out. Art 3(a) defines “design”. Art 4 provides that a design will be protected by Community design right if it is new and has individual character. Novelty is defined in Art 5 and individual character in Art 6. To be new the design must not be identical to a prior design or different only in immaterial details (Art 5). A design has individual character if it produces a different overall impression on the informed user (Art 6 and Recital 14). This includes considering the design corpus, the nature of the product and the industrial sector to which it belongs, and the degree of design freedom (Recital 14 and Art 6(2)). Art 8 provides that the right does not subsist in features dictated solely by function. Art 10 provides that the scope of protection conferred by a Community design includes any design which does not produce a different overall impression on the informed user.
8. When in use the headrails in this case form part of a more complex system and Art 4(2) of the Regulation must be considered. I will address that in context below.
9. On the characteristics of the informed user, both sides referred to the summary I set out in paragraph 34 of my judgment in *Samsung v Apple* [2012] EWHC 1882 (Pat) (sitting in the High Court). It was meant to be a distillation of the learning from three cases: *PepsiCo v Grupo Promer* (C-281/10P) [2012] FSR 5 at paragraphs 53 to 59; *Grupo Promer v OHIM* [2010] ECDR 7, (in the General Court from which *PepsiCo* was an appeal) and *Shenzhen Taiden v OHIM*, case T-153/08, 22 June 2010. I will apply the same approach here. Although neither side referred to it, I note that paragraphs 33 to 35 of that judgment were quoted by Sir Robin Jacob in his judgment in the Court of Appeal in the same case ([2012] EWCA 1339). Sir Robin Jacob’s judgment was the leading judgment of the court in that case and Kitchin and Longmore LJ agreed with it. One particular point to note was that, as Sir Robin Jacob pointed out (paragraph 12), it is right to refer both to the judgment of the CJEU and the General Court in the *PepsiCo v Grupo Promer* case. Mr Pritchard also referred to paragraph 50 of my judgment in *Gimex v Chillbag* [2012] EWPC 31 in which I quote paragraph 46 of *Shenzen*. This is the same point as paragraph 34(i) of *Samsung v Apple*.
10. On the issue of designs dictated solely by function, both sides submitted that the correct approach to Art 8(1) was that explained by Arnold J in *Dyson v Vax* [2012] FSR 4. In other words the multiplicity of forms approach was not correct and the right approach is to consider whether every feature of a design is determined by purely technical considerations. If so then the design is excluded.
11. On design freedom, the parties agreed that it can be constrained by the technical function of a product (see Arnold J in *Dyson* summarising the General Court in *Grupo Promer*). Mr Pritchard also submitted that design freedom could be constrained by the need to incorporate common features and economic considerations. Mr Longstaff did not disagree about that and so I will assume, without deciding, that this is correct.
12. Overall both sides submitted that I should take the same general approach as summarised in my judgment in *Samsung v Apple* at paragraphs 53-59.
13. Finally I remind myself that what really matters is what the court can see with its own eyes, the most important things are the registered design, the accused object and the

prior art and the most important thing about each of these is what they look like. Although of necessity a verbalised list of features has to be gone through, it is the overall impression which counts and not that verbalised list (see *Samsung v Apple* in the Court of Appeal paragraphs 27-29).

The facts

14. The Louver-Lite Community registered design is at Annex A. The cross-section of the Harris Valencia product is at Annex B. Annexes C to S are images of the other relevant designs in this case, so far as it has been practical to include them. For the designs in Annexes C to S, each reference has more pictures associated with it than that but the image I have chosen gives a fair impression of the design. Mr Day also exhibited a further headrail at exhibit PD2 but Mr Pritchard confirmed PD2 was not relied on and I will ignore it. In court there were physical examples of the Louver-Lite Vogue headrail, the Valencia product, the Amo Slimline, the Amtrack and the Technolight headrails. It was agreed before me that in this case, the physical examples of the Louver-Lite Vogue headrail could be used to represent the Community registered design in question. The Louver-Lite Vogue cross-section is also shown in Annex A. The white blob visible inside the cross-section of this and a few other sections is the central spindle in the assembled product and is irrelevant.
15. The only issue of primary fact which arose related to the Amtrack and Technolight headrails. All the other designs were accepted as being part of the design corpus and their dates of publication were not in dispute. The argument about Amtrack and Technolight was about when they were made available. Did they pre-date the Louver-Lite design?
16. In order to grapple with the issue, it is necessary to go into the background. In July 2011 this action was transferred to the Patents County Court. The transfer order required the parties to liaise together about dates and to arrange a case management conference and listing hearing. The transfer order clearly envisaged the parties would do this in the autumn of 2011 however nothing was done. I understand that the claimant's position was that this was the fault of the defendant but even if that is true, the claimant could have taken steps to get the case moving in any event. In March 2012 the parties agreed directions to get the case moving again but again little was done. Again the claimant's position was that the defendant was to blame. In late July 2012 the claimant applied to strike out the defendant's Defence and Counterclaim for failure to comply with the Court's directions and rules. This came before me on 3rd September 2012. Counsel appeared for both sides. It was clear that the action could and should be tried promptly. Instead of striking the case out, which would have been unfair, I directed the trial would take place on 30th October and gave the necessary directions. At that stage the Defendant's counsel confirmed that the only prior art relied on in relation to validity was that pleaded in the Defence and Counterclaim. Also, at that stage the defendant had an expert's report of a Mr Royds dated 19th October 2011 (i.e. the previous year) but it needed to be amended and re-served. It emerged after the hearing that Mr Royds was not prepared to give evidence at trial and so the defendant decided to rely on Mr Day instead.
17. In Mr Day's expert's report he gives evidence about the Amtrack and Technolight designs. Harris's position was that these designs were relevant prior art and Harris sought to amend the pleadings to include them in Harris's case of invalidity. Louver-

Lite's position was that they would accept the Amtrack and Technolight as forming part of a design corpus which may or may not predate the design registration in issue but resisted the application to amend the pleadings. This application came before me as a telephone hearing on Monday 29th October, three days before the trial which was now fixed for 1st November. Mr Longstaff at that hearing did not object to Mr Day's report and witness statement and so the evidence was to come into the case in any event. The issue was the pleading and in particular whether Amtrack and Technolight could be relied on as allegedly invalidating prior art.

18. I refused the defendant's application. As it was a telephone hearing, I indicated that I would give my reasons in writing if the parties wished for them. The reasons are these. CPR r62.23(2) applies (see ***Redd Solicitors v Red Legal*** [2012] EWPC 50). The defendant seeks to submit material in addition to that ordered at the case management conference. Save in exceptional circumstances the court will not consider such an application. I am not satisfied that there are any exceptional circumstances here. Moreover looking at the overall balance of justice, the defendant will suffer little prejudice as it will still be able to rely on the Amtrack and Technolight products as part of the design corpus, while the claimant would suffer prejudice if an amendment to the invalidity attack was made since it would have no proper time to investigate whether or not these products really were available before the relevant date.
19. Despite the argument three days earlier, at trial Mr Longstaff cross-examined Mr Day about his evidence that the Amtrack and Technolight had been available before 15th July 2005. Since the point was put, it is only fair to Mr Day for me to state my views on it.
20. Mr Day accepted that the physical exhibits he had produced for Amtrack and Technolight were modern and he was not suggesting they were pre July 2005 objects, however he maintained that products made to these designs had been available before that date. His view was based on his knowledge of the industry, a 2004 Amo brochure which he exhibited and what he said was a Technolight catalogue. The 2004 Amo brochure was in evidence and has pages for the Amtrack Vertical System. The pages are undated but I have no reason not to accept Mr Day's evidence that this is a 2004 catalogue. It shows a headrail which is the same as the physical exhibit. Mr Longstaff suggested that the headrail in the catalogue had a very slightly different curved side wall from that in the physical exhibit but it was not clear to me whether that very slight point was anything more than an artefact of the way the drawing appears. There is no reason not to accept Mr Day's evidence that the Amtrack design had not changed in substance since 2004. I think a design corresponding to the Amtrack physical exhibit (whose profile is Annex F) was available in public from 2004.
21. The position of Technolight is different. Mr Day referred to a catalogue in his evidence but no catalogue was given to the claimant and none was ever provided to me. Mr Pritchard submitted that, as a company in the field, Louver-Lite themselves were likely to know when something was available. They had called no contradictory evidence. That point is fine so far as it goes but given that Amtrack and Technolight were raised so late in the day, it is a weak point. I think the defendant has not proved that Technolight was available before 2005. In saying this I am not criticising Mr

Day in any way. If the catalogue had been produced that might have been different but without it, the evidence is simply not sufficiently cogent to prove the point.

Assessment

The product

22. The product in this case is a window blind headrail.
23. The headrail forms part of a window blind system with a number of further components. These include plastic end caps, a blind pulley mechanism, a bar running inside the rail, plastic elements known as trucks which travel inside the headrail and from which the blinds hang, top fixing brackets or clips and other things as well. Thus Art 4(2) of the Regulation applies. In essence the design for a headrail, since it is a component in this complex system, is only considered new and having individual character to the extent that, once incorporated, the headrail remains visible during normal use and only to the extent that those visible features of the component themselves fulfil the requirements of novelty and individual character. I will need to consider what parts of the headrail are visible in normal use.

The informed user

24. It was common ground that the informed user was a user of window blinds. However this common ground concealed a major dispute between the parties. Mr Pritchard submitted that since the headrail is fixed to a ceiling in order to be used and since the informed user was a user of the blinds, it followed that this had to be taken into account. So much is unexceptional and I agree. However the point was taken further and at one stage Mr Pritchard appeared to suggest that this meant that the informed user, as a person operating the blinds, would only ever look at these products from a distance, perhaps a metre or more. To that end the evidence included photographs of headrails in situ taken from below from about that distance, although the quality of the photographs themselves was not high enough for me to place any weight on them. The effect of the argument about only observing these designs in that way tends to make all the headrails in this case look the same even when they are not.
25. If the defendant's argument means that the only way in which the relevant informed user observes these designs is at a distance when they are fixed in situ, then I reject it for the following reasons.
26. The informed user's overall impression is necessarily determined in the light of the manner in which the products are used and on the basis of the handling to which they are normally subject (*Shenzen* paragraph 66). Moreover the Court of Justice in *PepsiCo v Grupo Promer* paragraph 53 explained that the informed user is someone between the average consumer and the "sectoral" expert. The defendant's argument comes close to a submission that the informed user in this case is simply the average consumer, which would be wrong in law.
27. Furthermore the argument seems to me to be founded on a factual premise for which the defendant has called no evidence. The argument is that "users" are simply operators of the blinds and only ever interact with the product when it is in situ, fixed to a ceiling. The point leaves out of account how the product got there. We know

that the informed user is not a manufacturer, designer or seller (see the references given in paragraph 34(i) of my judgment in *Samsung v Apple*) but that does not distinguish between a person who buys or chooses the products and a person who operates them. Who buys the goods in this case? Are they chosen and bought by consumers and fitted by them? Are they chosen by architects/building interior designers so that the people who draw the blinds have never seen them close up and do not care about details? Or are we somewhere in between with both kinds of activity taking place? Generally it seems to me it is safe to start from the premise that a user of a product is likely to be a person who is involved in buying or selecting it as well as in operating it. In this fairly simple design case, if Harris had wanted to contend otherwise, in order to advance a case that the informed user can only observe the designs at a distance, they could have called evidence to address the issue.

28. The evidence is lacking. In his speech Mr Longstaff sought to give evidence about the matter but I will not take what he said into account. I must do the best I can on the material provided to me. I believe Harris is the party who could and should have called evidence to make this point good. It might be said that Louver-Lite too should have called evidence about the informed user. That is true in general terms but they can be forgiven for thinking there was no issue about the matter. There is no point in trying to address this issue by reference to the burden of proof since the characteristics of the informed user are as much a matter for a claimant as a defendant.
29. Looking at the matter another way, it seems to me that insofar as these are goods bought and installed by consumers, then those informed users will be able to observe the products side by side when being chosen, will look at them before installation and will also be concerned with their appearance in use, in situ. On the other hand insofar as these are goods selected by architects and the like but actually used as window blinds by, for example, office workers who did not choose them, then the informed user will not be the office worker but will be the architect. The architect responsible for selecting the product will have the opportunity to observe the products side by side and will also be concerned with their appearance in use, in situ. In both cases the end result is more or less same, the informed user will be able to encounter the products as free standing items and see them side by side but will always think about them in the overall context that what really matters is the appearance of the product in use when fixed to a ceiling.
30. The argument is also inconsistent with another important element in the defendant's case. Part of the defendant's case included the submission that the designs are compared side by side. This side by side comparison is usually the case in Community design cases but it is not necessarily so (see *PepsiCo v Grupo Promer* paragraph 55, cited in *Samsung v Apple* paragraph 34(v)). If it was true in fact that the informed user only ever observes these designs when fixed to a ceiling then that informed user has no opportunity for a side by side comparison. So these two parts of Mr Pritchard's submissions are inconsistent.
31. In the afternoon after the trial was complete, Mr Pritchard submitted a short supplemental skeleton referring to the judgment of HHJ Fysh QC in the Patents County Court in *Woodhouse v Architectural Lighting* [2006] RPC 1. The case was about designs for a street lantern and Judge Fysh held that the informed user was a member of an urban development team and would be concerned with the visual impact of the light in situ even though the goods were sold by reference to physical

specimens available on a table. This case does not assist the defendant's argument. For one thing it emphasises the lack of evidence on the point. More importantly I do not doubt at all that an informed user will be concerned about the visual impact in situ. That is quite different from the submission I understood to be made at trial that in effect the only way in which a user can see the product at all is from a distance. As Mr Longstaff pointed out in his brief written submission in reply, Judge Fysh held that the informed user must have in his mind's eye the visual impact of the lantern in situ in addition to the table inspection.

32. In rejecting the extreme nature of the defendant's case I should make clear that I accept that the appearance in situ is very important and that the informed user will look at and consider the appearance of these products in situ. These products are used by being fixed to a ceiling and their appearance in that context is undoubtedly important. However I do not accept that this means that the informed user never interacts with these products by looking at them directly when not fixed to a ceiling and I do not accept that the informed user will be unable to make a side by side comparison.

Headrail design: design constraints, design freedom, function and aesthetics

33. It is impossible to analyse the issues in this case without looking in detail at the profiles in cross-section. However in doing so I must not lose sight of the fact that overall impression to an informed user is the real issue. The informed user is never going to take a hacksaw to these rails and cut them so as to scrutinise the cross-section, nor are they going to dismantle a whole item to scrutinise the cross-section either. Moreover the ends are capped in normal use. Thus although the cross-section profiles can be used to explain why the headrails look the way they do, the cross-section profiles as such are irrelevant (Art 4(2)).
34. All the headrails have a generally C-shaped cross-section for good functional reasons and they have to be this way in order to work. Some of the early designs have quite an angular appearance. Two examples of the angular form of these headrails are the prior Harris design called Economy 2 (annex C) and a prior Louver-Lite design shown in the Allsop patent (annex D). It can be seen that both have the same general C shape as the Louver-Lite design. Almost all the headrails are symmetrical front and back.
35. In general the C-shaped cross sections in issue have a flat top, side channels on each side underneath the flat top, side walls running downwards and flanges extending inwardly at the bottom. The internal faces of all these products are entirely functional. No aesthetic considerations come into play at all. Thus the presence of internal ribs or other details on some of the designs is irrelevant. A further reason they are irrelevant is that they are not really visible in normal use (see Art 4(2)). Visible in normal use are the side walls, the side channels and the flanges. The flat top is visible before the product is fixed in place and the fact it is generally flat is obvious once it is in situ.
36. The purpose of the flat top is to fit against the ceiling. The flat top and the side channels allow for clips to be fitted which in turn allow the rail to be fixed in place. The channel has a minimum depth in order to work, but the designer is free to make it deeper. The channel also has a minimum practical height so as to accommodate a

screw on the clip, but could be higher. Not all headrails have such side channels but many do (including the Louver-Lite design). The surface of the flat top itself is not visible in normal use since the rail is fixed to the ceiling. Mr Longstaff produced a sketch (X1) which showed how by moving the bottoms of the side channels together one could produce a design with a narrow flat top even though the sides were the same distance apart. His point was to show that the top width itself is independent of the horizontal distance between the sides of the C-shape.

37. Mr Day's evidence was that there were two categories of width which were standardised throughout the industry. I accept that. He called them "wide" and "slim". This width is reflected in the width of headrail and necessarily in the widths of runners known as "trucks". The trucks are plastic components from which the blinds hang and which slide inside the profiles. The Louver-Lite design, the Harris alleged infringement and a prior product called Amo Slimline (Annex E) have slim trucks. The Amtrack (Annex F) and Technolight (Annex G) have wide trucks.
38. Mr Pritchard submitted the width of the top part of the section was purely functional to accommodate the trucks and corresponding standard clips. Although in theory a designer could design their own clips, Mr Day said that in practice it was not done and was not economic. I accept Mr Day's evidence on this. It seems to me that this imposes a design constraint. The top piece has to be a certain width to accommodate the standard clips. The two standard sizes reflect the "wide" and "slim" designs.
39. Mr Longstaff also emphasised that Mr Day accepted that there was room for some variation in relation to the top width but what in fact Mr Day accepted was there was scope of variation at the level of "point something" of a millimetre. That sort of design freedom is tiny and has no practical significance in this case.
40. However none of these means that the width of the structure overall is purely functional. Mr Day's evidence was that the width of the headrail was solely dictated by the width of the trucks. I accept that but I did not understand him to mean by that that the choice between the standard "wide" width and standard "slim" width was itself a purely functional matter. To my eye the wide profiles have a materially different appearance from the slim ones. Wide designs are the size they are because it is a standard size and so too are slim rails. In other words the choice between wide and slim is, I find, a choice which involves aesthetic considerations at least to some extent. I will return to this point below.
41. The side of the section is the place in which the most design freedom exists and in which aesthetic considerations come into play. Curved sides are chosen for their appearance. Although there is a modest functional benefit from curved sides (they are a bit stronger than straight ones), the real reason they are used is to enhance the appearance of the product. Viewed in situ, the curved sides together with the channel to some extent, are the key determinants of the visual impression created by these profiles. Examples in the design corpus exist such as Amo Slimline (E), Amtrack (F), Technolight (G) as well as in the rails with no channel such as UK registered designs '855 (annex H) and '262 (annex I). The US design patents show a variety of curved sides. Most are symmetrical back to front but some are not (annexes K and O). Most do not have side channels but some perhaps do (annexes O and Q). These are all headrails for blinds but they may not be intended for use in the same truck-based

vertical systems as the Louver-Lite and Harris products. Design N is a concertina system.

42. The Louver-Lite design has two lower horizontal flanges extending inwards to stop the truck falling out. Some trucks have slots into which these flanges can fit. The design is constrained to some degree since the flanges have to allow the blind to function, but the precise shape of the flange and in particular its length and the angle it makes with the side wall, are not constrained. This can be seen by comparing the thin flange on the Amo Slimline (E) with the flange on the Louver-Lite design (Annex A 0001.2). Some of the US design patents have flanges (e.g. annexes J, M, P, R and possibly S) which differ in various ways.
43. Having addressed the different features of the headrails in the design corpus, I will look at the designs overall. Harris submitted that the US design patents were irrelevant because they were not designs, with channels, for vertical blinds. I do not agree that they are irrelevant but even if I confine myself to headrails with channels (C, D, E, F, G and perhaps Q and O) one can see that what distinguishes each product from the other is the shape of the sides and how the sides meet the channel at the top and the flange at the bottom. The walls can appear curved or angular. The curves can be quite rounded with a relatively narrow radius of curvature or quite flat, with a larger radius. The appearances of the walls differ in detail. Some designs have visible ribs on the outside (Economy 2 (C) and Allsop (D)) and others are smooth. There are narrow and wide systems, corresponding to wide and narrow trucks but I do not accept that this means that the width of the rail has no aesthetic relevance at all. The wide rails have a different appearance from the narrow ones.

Overall impression of the Louver-Lite design

44. The informed user would not consider the Louver-Lite design to be a radical departure in headrail designs. The feature which is most significant from the point of view of overall impression is the combination of the side channel and the curved side wall making two relatively sharp edges at the top and bottom. The relatively sharp edge at the top emphasises and gives definition to the channel, even when looked at from below. The relatively sharp edge at the bottom emphasises and gives definition to the flange. The curve is smooth and symmetrical and the overall impression of this design, looked at in situ, is of a rail with sides which are curved with a fairly flat curve and pronounced edges top and bottom. Overall the headrail has what I would call a trim appearance.

Novelty

45. I am sure the design is novel. The closest prior art design is the Amo Slimline (Annex E). The two are plainly not identical and differ by more than immaterial details.

Individual character

46. Individual character is the real battle ground in this case. Mr Pritchard submitted that the Louver-Lite design was a trite box section design with no individual character bearing in mind all the other designs available which are similar box sections, many with curving sides. In particular he submitted that the Louver-Lite design did not produce a different overall impression from that produced by the Amo Slimline

(Annex E). He also submitted that if the Harris Valencia infringed (i.e. did not produce a different overall impression) then the Amo Slimline must not produce a different impression either. The defendant also pleaded that the Louver-Lite design lacked individual character over prior Registered Design 2 027 855 (Annex H) and “common general knowledge”. Finally the defendant also sought to rely on the Amtrack on the basis that it was in fact prior art even though it was not pleaded, I think on the basis that it formed part of “common general knowledge”. Pleading “common general knowledge” in a design case does not help and does not justify relying on unpleaded items of prior art.

47. To my eye the Amo Slimline has a much rounder, fatter curve than the Louver-Lite design. It is without a sharp edge at the top and has almost no real edge with the flange at the bottom. In reflecting on this question I have taken the trouble to put all the cross-sections to one side and look at the whole physical exhibit of a made up Amo Slimline product and a Louver-Lite Vogue product and considered them in particular from the point of view of their appearance in use fixed to a ceiling. The informed user would regard the Amo Slimline as creating a more rounded, almost oval overall impression which in my judgment is different from that produced by the Louver-Lite design. Amo Slimline has a more bulbous appearance. I would not call it a trim design like the Louver-Lite.
48. In fact when one looks at the cross-section, it is possible to see why the Amo Slimline looks different. Unlike the Louver-Lite design, there is no flat bottom to the side channel. The top of the curved side starts from the inside bottom of the vertical member in the channel and has an almost straight diagonal part until gently curving round and inwards again to meet the flange at a gentler angle. The flange is much shorter than the flange in the Louver-Lite design.
49. I do not accept that it is open to Harris to contend that the Louver-Lite design lacks individual character over the Amtrack headrail but I will say that I do not think the argument would have succeeded in any event. To my eye the Amtrack looks very different simply because it is a wide design. The sides on the Amtrack are almost flat but they do have a very slight curve. The curve is much less pronounced and of a larger radius than the Louver-Lite. It is true that in the Amtrack the edges which the curved sides make with the side channels and flanges are more like the Louver-Lite edges and less like the Amo Slimline edges. On the other hand the flanges in the Amtrack are much longer than the Louver-Lite flanges. Overall, to my eye the Amtrack has a boxy appearance which is different from Louver-Lite.
50. None of the other prior designs (pleaded such as registered design ‘855 or not) are as close to Louver-Lite as the two I have referred to. I find that the Louver-Lite design has an individual character and is a valid design registration.

Scope of protection

51. I have dealt with design freedom and features seen in the design corpus above. In the relevant field the general C-shape with the side channel is a given (Economy 2 (C) and Allsop (D)) and there are pre-existing designs with bulbous curved sides (Amo Slimline (E)) and almost flat slightly curved sides (Amtrack (F)). However there is scope for design freedom and it resides in the sides, including the combination between the appearance of the side walls, the side channels and the top and bottom

edges of the side walls. Mr Pritchard submitted that the Louver-Lite design was trite. That is going too far but bearing in mind everything that has gone before, the Louver-Lite is not a design with a wide scope of protection. Its scope of protection is quite narrow but, as I have found already, the design does have its own individual character.

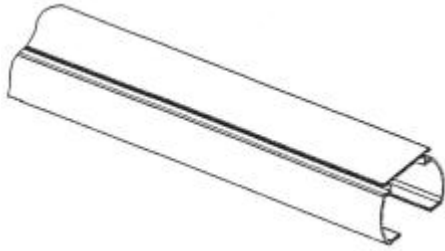
Infringement

52. The Harris Valencia looks almost identical to the Louver-Lite design. Again to reflect on this question I have taken the trouble to put all the cross-sections to one side and look at the whole physical exhibit of a made up Harris Valencia product and a Louver-Lite Vogue product (which represents the Community design) and considered them in particular from the point of view of their appearance in use, fixed to a ceiling. Even bearing in mind that the informed user is particularly observant and shows a relatively high degree of attention, they are virtually indistinguishable. The side wall curve is identical. The flange on the Valencia is a little thinner but the edge of the side wall with the flange is the same and so too is the edge the side wall makes with the top channel. The appearance of the combination of side wall and side channel is the same. The Valencia produces the same overall impression as the Louver-Lite design.
53. In fact when one looks at the cross-section, it is possible to see very small differences between the Valencia and Louver-Lite designs but they are truly trivial. The bottom inside corner of the channel is not quite as sharp as the Louver-Lite. The top edge between the side wall and the flat bottom of the channel is a tiny bit softer in the Valencia than the Louver-Lite design. The cross-sections do show that the flange in the Valencia is indeed very slightly shorter than the Louver-Lite flange but it is an insignificant difference. The biggest difference between the two is the presence of slight ribs on the inside edge of the Valencia cross-section but they are not visible in normal use and are irrelevant.
54. In my judgment, even bearing in mind the relatively narrow scope of protection of the Louver-Lite design, the Harris Valencia product is an infringement.

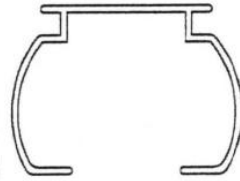
Conclusion

55. I will give judgment for the claimant. Registered Community Design No. 000361118-0001 is valid and has been infringed by Harris.

Annex A
The registered design
0001.1



0001.2



0001.3



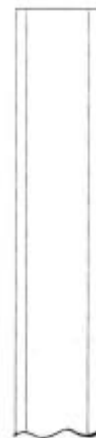
0001.4



0001.5



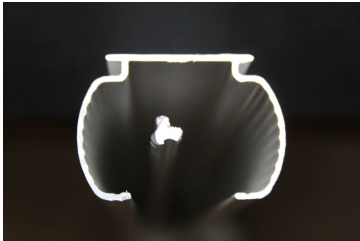
0001.6



The Louver-Lite Vogue itself

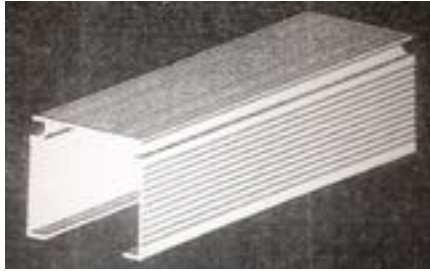


Annex B
The cross-section of the Harris Valencia product alleged to infringe

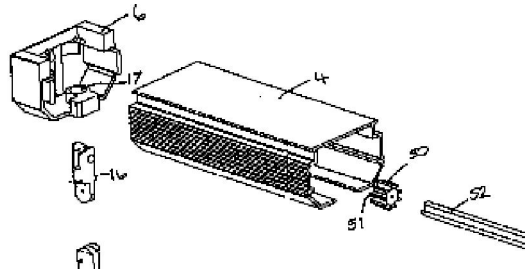


Other designs

(C) Harris Economy 2



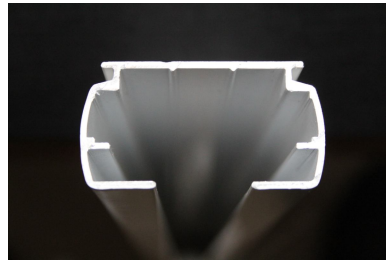
(D) Allsop patent US 6651721
(Figure 1, extract)



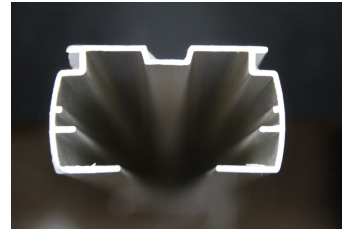
(E) Amo Slimline



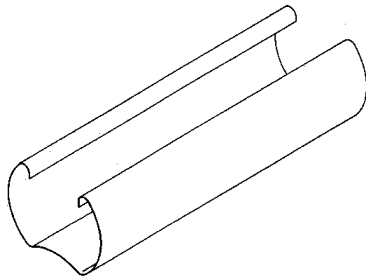
(F) Amtrack



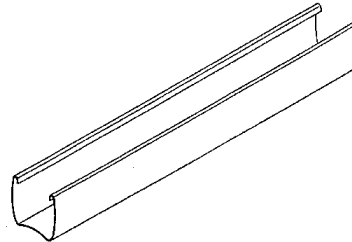
(G) Technolight



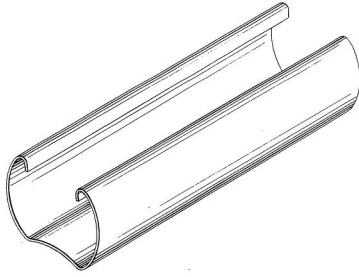
(H) UK Registered Design 2 027 855
(1992)



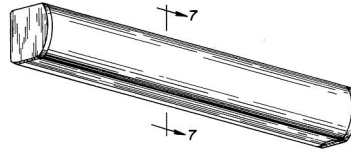
(I) UK Registered Design 2 070 262
(1997)



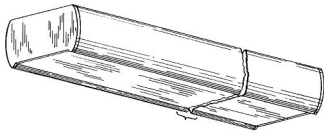
(J) US Design patent D361010 (1995)



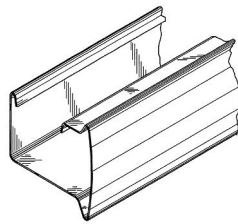
(K) US Design patent D355094 (1995)



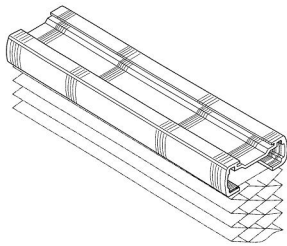
(L) US Design patent D385449 (1997)



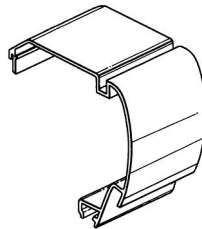
(M) US Design patent D440444 (2001)



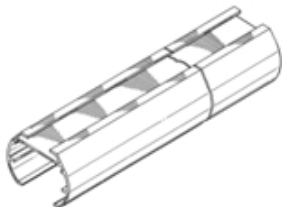
(N) US Design patent D439461 (2001)



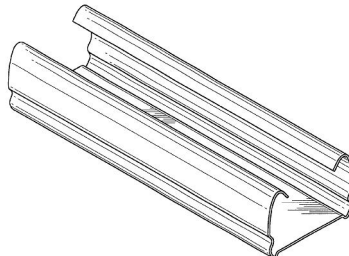
(O) US Design patent D443457 (2001)
(This is the same as UK registered design
2090065 relied on by Harris)



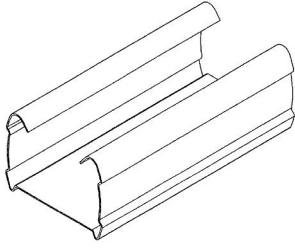
(P) US Design patent D486340 (2004)



(Q) US Design patent D502037 (2005)



(R) US Design patent D541094 (2007)



(S) US Design patent D403910 (1999)

