Neutral Citation Number: [2026] EWHC 908 (IPEC)

Case No: IP-2024-000126

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

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

Date: 22 April 2026

Before :

HIS HONOUR JUDGE HACON

- -

Between :

NO CLIMB PRODUCTS LIMITED	**Claimant**
- and -	
GAS SAFE EUROPE LIMITED	**Defendant**

- -
- -

Joshua Marshall (instructed by **Venner Shipley LLP**) for the **Claimant**
Barbara Cookson (solicitor) (of **Filemot Technology Law Ltd**) for the **Defendant**

Hearing dates: 10-11 March 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. The claimant ('No Climb') is the owner of European Patent (UK) No. 2 265 516 B1 ('the Patent'). The title of the invention is 'Testing apparatus for testing a gas or smoke detector controlling the distance between an aerosol dispenser and the detector'.

2. Safety devices used to detect escaping gas or smoke from a fire are familiar features in buildings. They require periodic testing. The claimed product mimics the presence of gas or smoke which, if the detector is functioning correctly, will trigger a response, usually an alarm generated by the detector.

3. No Climb alleges that the defendant ('Gas Safe') has infringed the Patent by marketing a device and also by marketing a replacement part for it.

4. Joshua Marshall appeared for No Climb, Barbara Cookson for Gas Safe.

The witnesses

5. Colin Chapman is a director and is Vice President of Engineering at No Climb. His evidence was about how Gas Safe's products are sold and used.

6. Mark Johnson is Director and Production Manager of L.E.C. (L'POOL) Ltd. His company supplied to Gas Safe the aerosol can which, as filled with the material that mimics smoke when emitted, is alleged to infringe the Patent. His evidence concerned the alternative uses of cans of that nature. There was evidence from John Stones, a director of Gas Safe. There was no witness statement from Mr Stones but he signed the statements of truth in the Re-Amended Defence and Counterclaim and a Response to a Part 18 Request from No Climb, and attended the trial for cross-examination.

7. Paul Pope was No Climb's expert. Mr Pope is Global Director of Fire & Life Safety at Ajax Systems CH, a Ukrainian company which makes heat, smoke and carbon monoxide detectors.

8. Graham Cardwell provided expert evidence for Gas Safe. Mr Cardwell is a Technical Manager at Illumino Ignis Ltd, a company that designs, supplies and supports fire safety systems and related products, including apparatus for testing such systems.

Person skilled in the art

9. It was agreed that the person skilled in the art is a designer of testing apparatus for smoke and/or gas detectors with some years' experience of working in that field.

10. Gas Safe added that the skilled person should also have experience of making plastic components such as Gas Safe's products. I disagree. The commercialised products I was shown were made of plastic but the Patent does not require this. I think that for Gas Safe to make good any qualification along these lines it would have been necessary to show on the evidence that (a) there is no viable alternative to the use of plastic, (b) there is some aspect of testing apparatus of the type claimed in the Patent which imposes a design restraint that requires a particular identified expertise in the manufacture of

plastic products, the identified expertise being beyond that which is within the common general knowledge of a designer of testing apparatus and (c) the design restraint in question is relevant to the issues in this litigation such that the skilled person would have to negotiate it when designing a product within claim 1. Gas Safe made no attempt to establish any of this.

11. In my view the skilled person is a designer of testing apparatus of the type claimed. No doubt the manufacture and marketing of such apparatus would involve others such as a person experienced in making plastic products and a number of other people with the combined expertise needed to bring a product to the market in the real world. None of this was shown to affect how the skilled person – the designer – would understand the Patent or the prior art.

Common general knowledge

12. Here there was common ground. Smoke and gas detectors deteriorate over time and must be tested regularly. If they are tested by directing particulates, aerosols or spray at the detector and this is done at too close a proximity, accumulations on the detector can hamper their performance. In other words, it was known to be a good idea to keep testing apparatus of this kind at a minimum distance from the detector.

13. It was agreed that there is an item of prior art which largely sets out the state of the art at the priority date of the Patent. It is US Patent No. 4,301,674 ('Haines'). Haines discloses a hand-held can which emits a spray of particles of a size and distribution that simulates smoke. The user sprays the particles at a smoke detector to test for an alarm response. The disclosure is illustrated in the figures shown below:

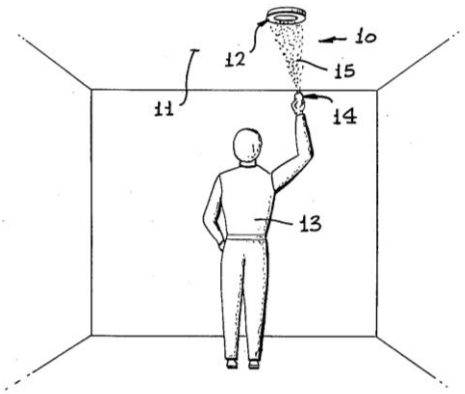


FIG. 1

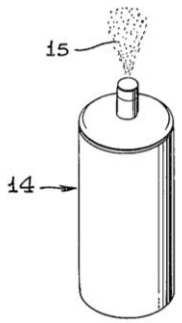


FIG. 2

The Patent

14. The Patent claims a priority date of 4 March 2008. The product of the invention includes a container within which there is material that can be dispersed as a spray, an aerosol or as particulates towards the gas or smoke detector. For simplicity I will just talk about the dispersion of a spray. To ensure that the testing works correctly the container must be at an appropriate distance from the detector. The invention is about maintaining an appropriate minimum distance using a spacer between the container and the detector while at the same time making sure that the product is convenient for carriage and storage. That convenience is achieved by allowing the spacer to move between a first position in which the spacer is collapsed or folded or otherwise arranged

to make the product as a whole relatively compact, and a second position in which the spacer serves to keep the spray nozzle at a minimum distance from the detector.

15. The Patent illustrates the invention by reference to six embodiments. Figures 3 and 4 show one of these. Figure 3 illustrates the device in compact form. The spacer 24 is attached to the container 20. The spacer is in four parts which separate out when the spacer is telescopically extended as shown in Figure 4, the parts being marked 24a to 24d.

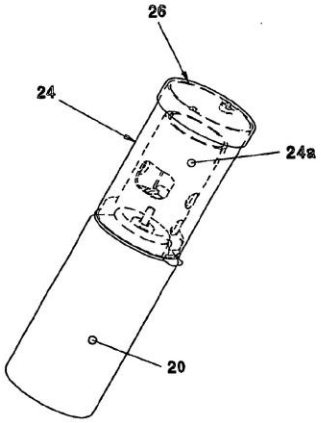


FIG. 3

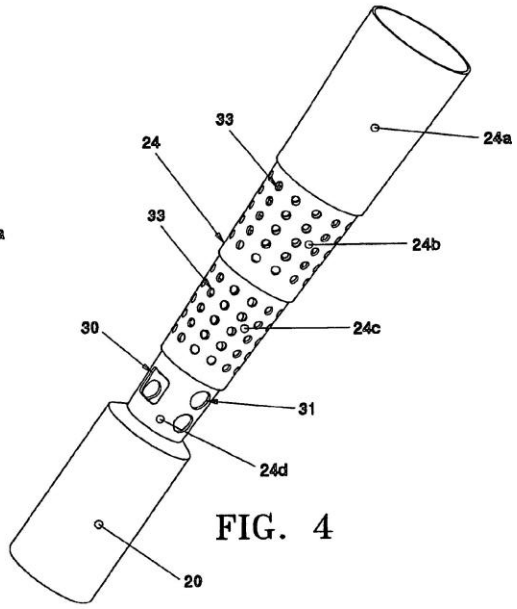


FIG. 4

16. In its extended form the spacer keeps the spray valve, unnumbered but shown at the top of the container in Figure 3, at a minimum distance from the detector which will be somewhere beyond the outer section 24a of the spacer. The aperture 31 shown in the inner and lower section 24d of the spacer is a finger aperture allowing the user to operate the valve and release the spray. In its compacted form the product is self-evidently easier to store and carry.

17. A product has been commercialised by No Climb in a form something like Figures 3 and 4 and sold under the trade name 'Sabre'.

18. This is claim 1 divided into integers:

Integer	**Patent Claim 1**
1.1	Testing apparatus for testing a gas and/or combustion product detector, comprising
1.2	a container arranged to contain a material dispensable as a spray, aerosol or particulate through an outlet aperture,

1.3	wherein the material dispensable as a spray, aerosol or particulate is representative of a gas and/or combustion product;
1.4	characterised by a spacer member,
1.5	wherein the spacer member is moveable between a first position which is convenient for carrying and/or storage and a second position which determines a minimum distance between the outlet aperture and the detector.

Construction

19. Two points of construction arose. The first is whether the spacer member of integer 1.4 must be compressible when fixed to the container. The second is whether the spacer member must be permanently fixed to the container. There was some expert evidence about this which I did not find relevant. The experts did not say that the claims or any other part of the Patent contained any term of art requiring their explanation in order for the court to arrive at a proper construction of claim 1.

Whether the spacer must be compressible

20. 'Compressible' is not a term of the Patent; it was the word used by the parties to identify the first issue on construction. They confirmed in argument that they meant telescopically compressible, as shown in Figures 3 and 4, for example.

21. The words of claim 1 require the spacer to be moveable between the two stated positions, but not that it needs to be compressible. This is claim 5:

> '5. Apparatus according to any preceding claim, wherein the spacer member comprises one or more telescopically extending sections, and wherein the first position the spacer member is retracted and in the second position the spacer member is extended.'

22. The claims are set out in the usual hierarchical arrangement with claims 2 and 13 all dependent on and narrower than claim 1. Claim 5 requires compressibility, which strongly implies that claim 1 does not.

23. Figures 1 and 2 show an alternative embodiment, apparently not commercialised, but within the claimed invention:

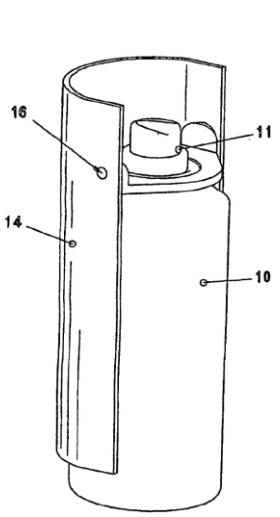


FIG. 1

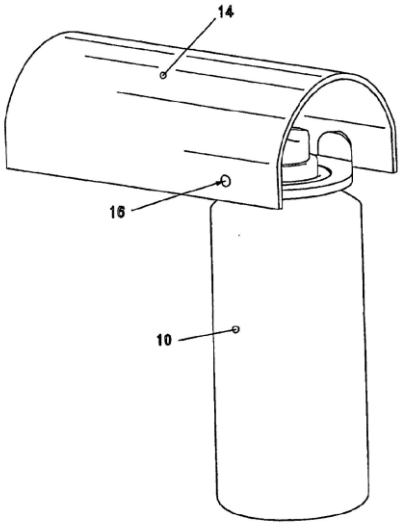


FIG. 2

24. The spacer 14 is pivotally attached 16 to the container 10. Figure 1 shows the compact storage form of the product. When the spacer is pivoted into a horizontal position as shown in Figure 2, it serves to maintain a minimum distance between the spray valve and the detector located somewhere beyond the distal end of the spacer.

25. Figures 12 and 13 show another embodiment which also does not feature a telescopically compressible spacer.

26. Gas Safe submitted that these embodiments were anomalous without pointing to any part of the Patent description which would lead the skilled person to believe that they are comparative examples or otherwise to doubt that they are fully within the invention claimed.

27. The spacer need not be telescopically compressible.

Whether the spacer must be permanently fixed to the container

28. No limitation as to the permanent fixing of the spacer appears in claim 1. Again, a later claim strongly implies that the claim 1 is not so limited, in this instance claim 2:

> '2. Apparatus according to claim 1 wherein the spacer member is movable between the first and second position whilst being fixed to the container.'

29. Figures 7 and 8 show an embodiment of the invention in which the spacer is neither telescopically compressible nor is it permanently fixed to the container:

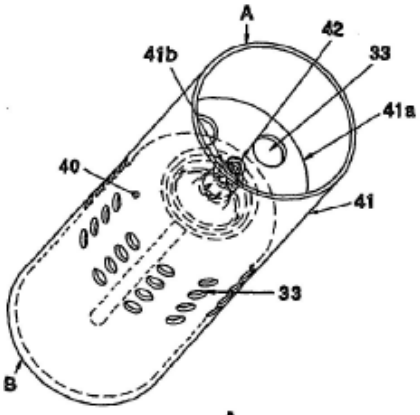


FIG. 7

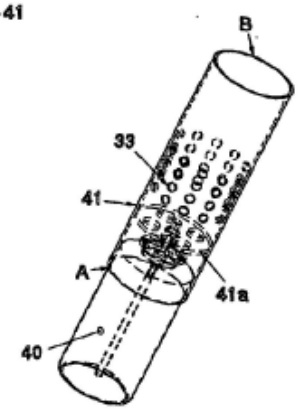


FIG. 8

30. Figure 7 shows the container 40 sitting within a cylinder 41 in the compact storage position. For use, the container is taken out of the cylinder, inverted and its top end is removably fixed just within the end A of the cylinder, with the spray valve facing along the axis of the cylinder. The cylinder then acts as the spacer so that the spray is directed through the spacer towards the detector located beyond the end B.

31. Gas Safe drew my attention to various parts of the description which, it was argued, suggest that the spacer must be permanently fixed to the container. In my view they do not.

32. The first was paragraph [0004] which discusses dispensing apparatus that 'does not form a "permanent part" of the aerosol product, …' This arguably teaches a spacer which is *not* permanently fixed to the container but in any event it is a discussion of the prior art, not the invention.

33. The second was paragraph [0032]:

> 'The preferred embodiment thus provides a spacer arrangement that is connected to or contains a container, preferably in the form of an aerosol canister during the usual carrying of the container and which does not make the container significantly larger or more bulky to carry but, either by hinging, telescoping, inverting or otherwise extending into an operative position acts as a spacer that inhibits use of the aerosol spray or particulate too close to a surface.'

34. This paragraph sets out preferred embodiments as opposed to defining the invention of claim 1 and even these preferred embodiments include the arrangement of Figures 7 and 8 whereby the spacer contains the container but is not permanently attached to it since the container must be pulled entirely out of the spacer before being inverted and removably refixed to one end of the spacer.

35. The spacer of claim 1 need not be permanently fixed to the container.

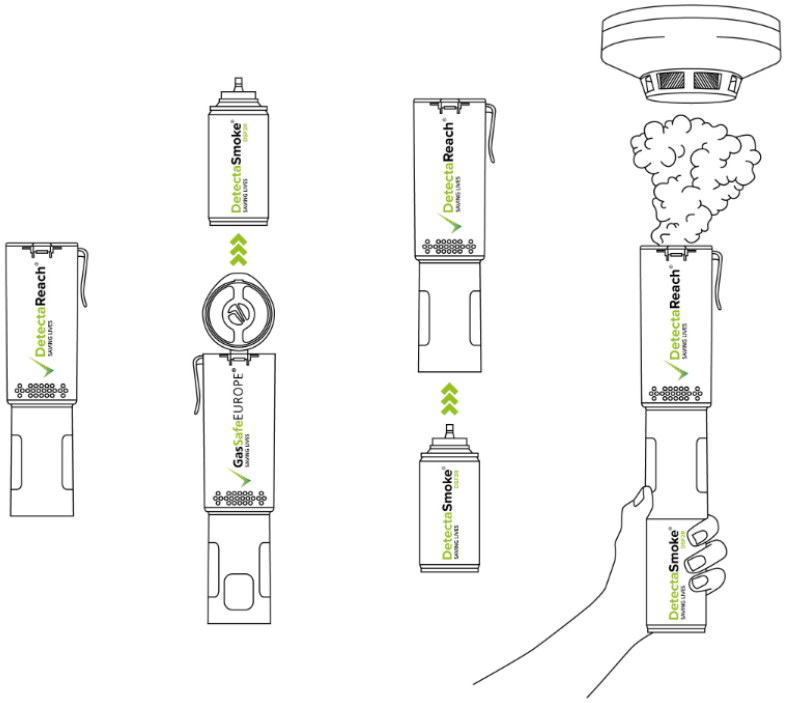
Infringement

Claim 1

36. Gas Safe sells two products alleged to infringe the Patent. One has the trade name 'DetectaReach' and consists of a container and spacer. Gas Safe accepted that if the spacer need be neither telescopically compressible nor permanently fixed to the container, its DetectaReach product falls within claim 1 and therefore the marketing of that product infringes the Patent under s.60(1) of the Patent Act 1977 ('the 1977 Act').

37. Infringement of claims 8 and 9 remains in issue although nothing was said about this in the parties' skeleton arguments or in oral submissions, save that I was referred to No Climb's claims charts and Gas Safe's pleaded Reply to the Defence.

38. Consideration of whether claims 8 and 9 have been infringed requires me to say more about Gas Safe's DetectaReach product. Below is a diagram taken from Gas Safe's instruction manual:



39. The diagram on the left shows the product in its compact form. The aerosol container is located in part of a plastic housing – the wider part, shown bearing the name 'DetectaReach'. The operational position is achieved by removing the container from the housing as illustrated in the diagram second from the left and attaching it to the base of the narrower part of the housing, as shown in the third diagram from the left. The final diagram shows the device in operation. Although not visible there, the narrower part of the housing has an aperture through which a finger of the operator can activate the release of the aerosol. The housing as a whole acts as the spacer.

Claims 8 and 9

40. These are claims 8 and 9 divided into integers:

	Integer
8.1	Apparatus according to [claim 1]
8.2	Wherein the container is provided with a valve actuator, nozzle or switch provided with the outlet aperture
8.3	And one or more sections of the spacer inhibit access to activation of the valve actuator, nozzle or switch
8.4	And a section attached to the container is provided with an aperture or apparatus in its side wall to permit operation of the valve actuator, nozzle or switch

	Integer
9.1	Apparatus according to claim 8
9.2	Wherein one or more of the sections inhibits operation of the valve, actuator, nozzle or switch by inhibiting access to the said aperture or apparatus when the spacer member is in the first position
9.3	Or the one or more of the sections enables operation of the valve, actuator, nozzle or switch by enabling access to the said aperture or apparatus when the spacer member is in the second position.

41. Integer 9.2 implies that the inhibition of access to activation of the valve actuator, nozzle or switch, within the meaning of integer 8.3, may occur when the spacer member is in either the first or second position. Putting this another way, provided that a section of the spacer inhibits such access in at least one of the two positions defined in integer

1.5, integer 8.2 is satisfied. Neither side argued otherwise and their brief written arguments seem to assume that this must be the case.

42. The parties likewise assumed that in relation to integers 8.4, 9.2 and 9.3, which refer to an 'aperture or apparatus' in the side wall of the spacer, there is no relevant apparatus in the DetectaReach product, only an aperture. I agree.

43. Gas Safe argued that the DetectaReach product does not fall within either claim 8 or claim 9 for the following reasons.

44. First, it does not have sections. This was said to be because the skilled person would interpret the 'sections' of claims 8 and 9 to be necessarily in the forms shown as 24a to 24d in Figure 4, i.e. parts of a spacer which nest within each other when the product is in its compact form (the first position) and which telescope out when the product is in its operational form (the second position). I agree that the description uses the word 'sections' in the context of what it calls the 'telescopic sections' or 'telescopically extendable sections' of the embodiment illustrated in Figure 4 and other embodiments shown in other figures. But claims 8 and 9 do not specify telescopic sections. 'Section' is a word of general application and in my view the skilled person would take the two parts of the DetectaReach housing, the wider and narrower parts, each to be sections of the housing and thus sections of the spacer within the meaning of claims 8 and 9.

45. Gas Safe's second argument is that claims 8 and 9 require at least two sections movable relative to one another to expose the aperture. They do not. Neither claim has any such requirement.

46. The third argument is that access to the aperture of the DetectaReach product is never inhibited. Claim 8 does not require inhibition of access to the aperture. It requires inhibition of access to activation of the valve actuator, nozzle or switch. When the DetectaReach is in the first position, such access is inhibited by the wider section of the spacer. The narrower section of the spacer is attached to the container in the second position and that section has an aperture in its side wall which permits operation of the valve actuator, nozzle or switch. I find that claim 8 has been infringed.

47. Gas Safe was correct to argue, at least by implication, that when the DetectaReach is in the first position access to the aperture in the narrower section of the spacer is not inhibited as required by integer 9.2.

48. However, the word 'or' at the start of integer 9.3 indicates that the requirements of integers 9.2 and 9.3 are in the alternative. In the second position, the narrower section of the DetectaReach spacer enables operation of the product by enabling access to the aperture in that section. Integer 9.3 is satisfied. Accordingly I find that claim 9 has been infringed.

Infringement in relation to the DetectaSmoke product

49. Gas Safe's other product is called the 'DetectaSmoke'. It is the can of aerosol in the DetectaReach product – the 'container' in the language of the Patent. When the contents of the container run out, the user of a DetectaReach can buy a replacement DetectaSmoke container.

50. No Climb alleges that the marketing of DetectaSmoke cans infringes the Patent under s.60(2) of the 1977 Act. Section 60(2) provides:

> '*(2) Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.*'

51. I was referred to the summary of the requirements contained within that subsection set out in *Jeff Gosling Limited v Autochair Limited* [2025] EWHC 1687 (IPEC) at [45], drawn from *KCI Licensing Inc v Smith & Nephew plc* [2010] EWCA Civ 1260, *Grimme Maschinenfabrik GmbH & Co KG v Scott* [2010] EWCA Civ 1110, *Nestec SA v Dualit Ltd* [2013] EWHC 923 and *Prevayl Innovations Ltd v Whoop Inc* [2025] EWHC 399 (IPEC):

> 'The supply of, or the offer to supply, a product to a person not entitled to work the invention is an act of infringement under s.60(2) if the following are found on the balance of probabilities:
>
> (1) The supply or offer to supply takes place in the United Kingdom and the product is a means relating to an essential element of the invention, i.e. a means which contributes to implementing the technical teaching of the invention without being of completely subordinate importance to the implementation; this is irrespective of where the core of the invention lies (*Nestec SA v Dualit Ltd* [2013] EWHC 923 at [168]-[175] and *Prevayl* at [76]).
>
> (2) Those means are suitable for putting the invention into effect, i.e. adaptation of the means or its use together with other means could put the invention into effect (*Prevayl* at [79]-[86]).
>
> (3) At the time of the supply or offer to supply, the supplier knows or it would be obvious to a reasonable person in the circumstances that (a) adaptation of the means supplied or its use together with other means could put the invention into effect and (b) at least some parties will intend to put the invention into effect in the United Kingdom in that way (*KCI Licensing* at [53]).
>
> (4) Excluded from (3)(b) above are maverick parties, which includes those with an intent to put the invention into effect in a manner which a reasonable person having knowledge of all the relevant facts would regard as irresponsible.'

52. Only requirement (3) was in issue, i.e. the knowledge of the supplier of the DetectaSmoke containers and, if it arises, the knowledge of a reasonable person in the position of such a supplier.

53. Gas Safe was ordered to give disclosure on this issue but failed to do so. No Climb asked in correspondence whether this meant that Gas Safe was taking no point on

knowledge, to which there was no answer. Nothing has been said about it in Gas Safe's evidence. Gas Safe's skeleton argument stated only that there would be cross-examination on the topic.

54. Mr Chapman speaks in his witness statement about how Gas Safe's products (though not the DetectaSmoke containers in issue) are sold and used and his evidence was not challenged by cross-examination.

55. It may be, as seems to be implied in Gas Safe's skeleton argument, that the intention was to direct cross-examination only to the pleaded issue arising under s.60(3) of the 1977 Act (see below) although in the event that did not happen either, probably because it was unlikely to lead anywhere.

56. All this by itself suggested that the requirements of s.60(2) are satisfied. Such a conclusion is strongly reinforced by the wording which appears on DetectaSmoke containers:

> 'For use with DetectaReach® reusable delivery system. Insert can into the DetectaReach® as per instructions. When can is empty simply replace with a new DetectaSmoke® DSF2R can. Available from your distributor.'

57. I have no doubt that suppliers of DetectaSmoke containers knew, and it would have been obvious to a reasonable person in the circumstances, that such a container would be used to put the invention of claim 1 into effect. The Patent has thereby been infringed pursuant to s.60(2), subject to an available defence.

58. Gas Safe relied on s.60(3) of the 1977 Act:

> '*(3) Subsection (2) above shall not apply to the supply or offer of a staple commercial product unless the supply or the offer is made for the purpose of inducing the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent by virtue of subsection (1) above.*'

59. In *Nestec SA v Dualit Ltd* [2013] EWHC 923, Arnold J held that coffee capsules compatible with the claimant's coffee machines – designated NX capsules – were not staple commercial products, at [182]:

> 'I agree with the view expressed by Justice Crennan of the High Court of Australia in *Northern Territory of Australia v Collins* [2008] HCA 49 at [145], albeit in a slightly different statutory context, that in order to qualify as a staple commercial product, a product must ordinarily be one which is supplied commercially for a variety of uses. …even now NX capsules have no use other than with a limited range of portionised coffee machines.'

60. Gas Safe's evidence was that DetectaSmoke containers need not be used with a spacer. I accept that. Gas Safe's argument was that when used in that way they are articles which fall within the prior art. I discuss the prior art below, but assuming that to be true I do not agree that this of itself gives the containers the status of a staple commercial product. The argument advanced was, in effect, that if a product cannot infringe under

s.60(1) of the 1977 Act because it forms part of the prior art, it must be a staple commercial product. That is not a tenable argument.

61. As to what a staple commercial product is, it is not hard to envisage that a product such as, say, sugar qualifies. Sugar is used all the time for a wide range of intended purposes. Nails collectively in all forms would probably be a staple commercial product although in practice, like most industrial products, nails come in a variety of types and if a specific variety of nail were to be considered the position may become more nuanced. Moving along the spectrum from sugar, there may be products less frequently used for a narrower range of purposes which also fall within the definition. DetectaSmoke containers do not. They have a single intended use, namely to test smoke or gas detectors. I acknowledge Mr Johnson's evidence that containers of that type can be filled with other material and used for other purposes but empty containers are not relevant to the point in issue. Gas Safe has no defence under s.60(3).

The prior art

62. Gas Safe pleaded that claims 1, 8 and 9 lack both novelty and inventive step over each of three items of prior art:

    (1) US Patent Application no. 2007/0186618 A1 ('Ackerman'),

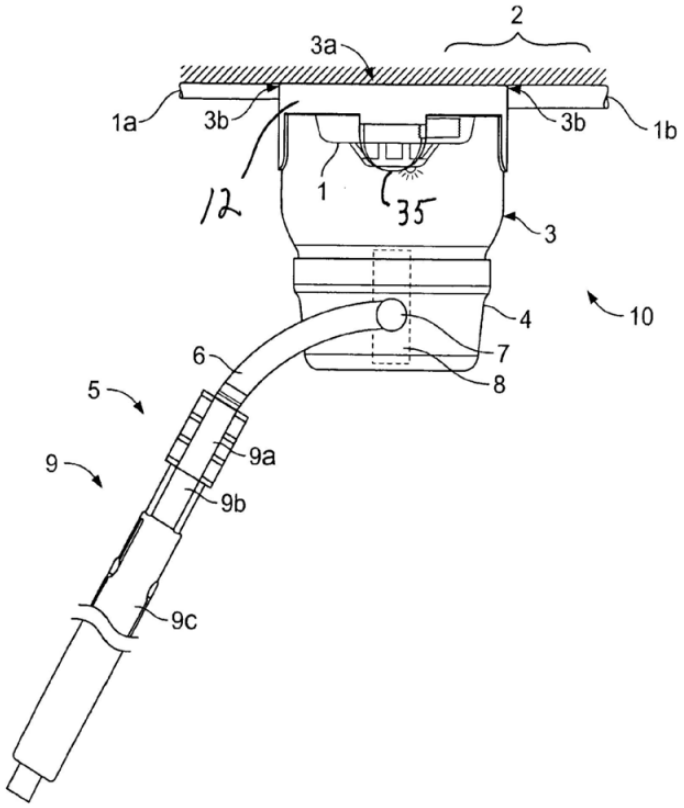
    (2) US Patent no. 5,361,623 ('Wantz'), and

    (3) US Patent no. 5,060,503 ('Spohn').

63. At the trial Gas Safe stated that no argument was being advanced as to the invalidity of claims 8 and 9 if claim 1 was found invalid. I need only consider claim 1.

Ackerman

64. Ackerman discloses a device for testing smoke detectors. It is of a type which Ackerman calls an 'enclosed delivery system' whereby the aerosol is delivered into a contained and controlled space around the detector. Extraneous materials in the surrounding environment are excluded. A testing chamber defined by and contained within a cup surrounds the smoke detector. The aerosol container of the device is also within the testing chamber. When the cup is pushed upwards towards the ceiling on which the smoke detector is attached, aerosol is released from the container to test the detector's performance. Optionally, a handle may be pivotally attached to the container to enable its operation from below. Figure 1 shows an embodiment:

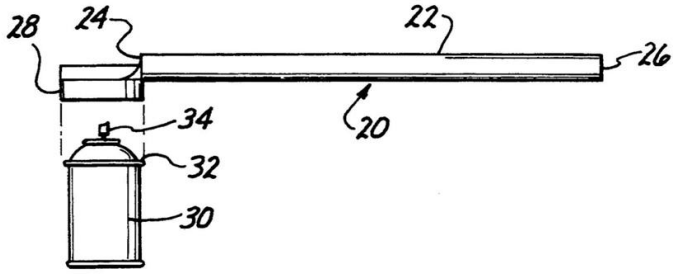


65. The detector 1 is mounted on the ceiling 2. A cup 3 is fitted over the detector. The enclosed space within the cup also contains the aerosol can 8 shown in dotted lines. The optional handle 5 is attached to the container at 7.

66. In Ackerman's discussion of the prior art enclosed delivery systems, where the environment around the detector is protected from material other than that emitted by the testing device, are distinguished from 'open delivery systems', such as that of the Haines prior art (see above). This distinction was confirmed by both experts as having been generally known.

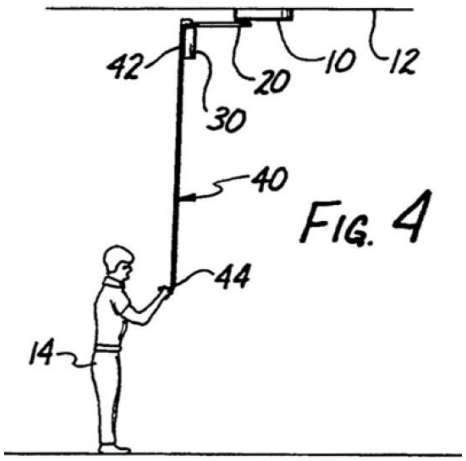
Wantz

67. Wantz claims a product for testing smoke detectors with a tube of at least 12 inches in length mounted on the spray nozzle of an aerosol dispenser. The stated advantage provided by the tube is that it allows use of the product on a smoke detector mounted out of arm's reach while at the same time eliminating the application of liquid particles onto the detector. Application of the particles is undesirable because they do not emulate smoke and they cause unsightly deposits on the detector housing and other disadvantages. Figure 2 shows an embodiment:



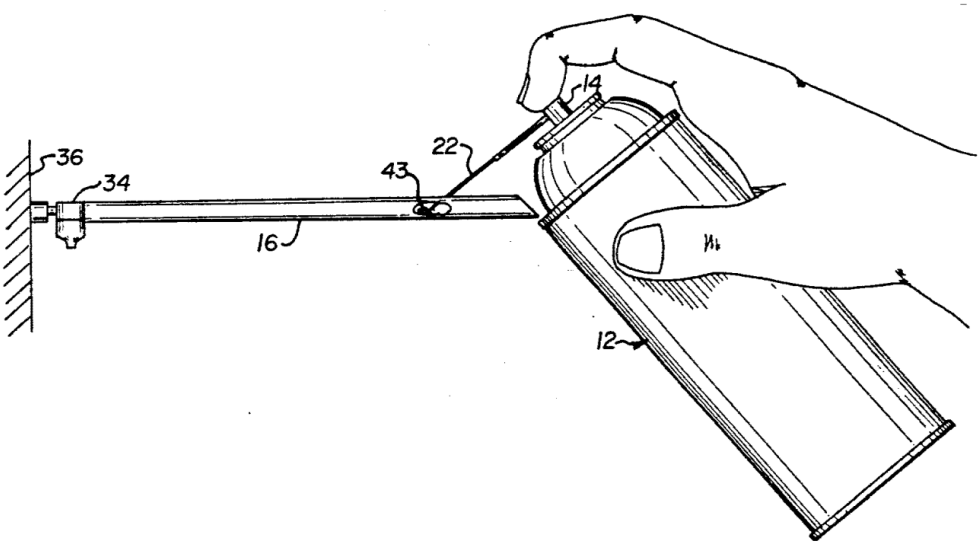
68. A mounting ring 28 is attached to the tube 22. The mounting ring snap fits onto the aerosol container 30.

69. Wantz refers to the need to permit the device to access detectors located on high ceilings and to that end discloses the use of an extension pole as shown in Figure 4 marked 40:



Spohn

70. Spohn discloses a test kit for gas detectors. This is Figure 2:



71. Gas containing a predetermined gas mixture of a known concentration held in an aerosol can 12 is passed via a hollow needle 22 attached to the outlet valve 14 of the can into a pierceable conduit 16 and from there to an inlet opening 34 of a gas detector 36. A pumping device in the gas detector draws the gas from the conduit into the inlet opening. This is another arrangement which prevents false results due to contamination from the surrounding atmosphere.

Novelty

72. Mr Pope gave unchallenged evidence in his witness statement that a spacer as discussed in the Patent is a distancing device used in an open delivery system to create a minimum distance between the emitter of the spray and the detector. He said that an enclosed delivery system has no need of a spacer. In cross-examination Mr Cardwell agreed that a spacer is a feature of an open delivery system but not an enclosed system. I understood this to be the case because the structure which defines and creates the enclosed space in an enclosed system will necessarily fix or substantially fix the relative positions of the spray outlet and the detector.

73. The experts were further agreed that both Ackerman and Spohn disclose forms of an enclosed delivery system and that neither discloses a spacer as that term would be understood by a skilled person reading the Patent. Claim 1 requires a spacer. It does not lack novelty over either Ackerman or Spohn.

74. It was also common ground between the experts that Wantz does disclose a spacer, being the tube 22 shown in Figure 2 of Wantz (see above). The dispute turned on integer 1.5 and whether the tube is moveable between a first position which is convenient for carrying and storage to a second position in which it serves to determine a minimum distance between the spray outlet of the container and the detector.

75. The tube in Wantz is attached to a mounting ring which snap fits on to the aerosol container. No Climb argued that this is not the same thing as moving between a first position for the purpose of convenient carriage and storage to a second position which maintains the required minimum distance. Rather, the spacer in the first position is removed from the container altogether and would necessarily be carried and stored separately from the container.

76. It seems to me that the detachment of the spacer from the container in Wantz does not help No Climb since the spacer need not be permanently fixed to the container, as I have found (and as No Climb argued).

77. However, there is no clear and unambiguous disclosure in Wantz of a first position of the spacer which is convenient for carrying and/or storage. In my view the skilled person reading Wantz would have gleaned nothing about convenience of carriage or storage and how the position of the spacer can enable that. Claim 1 does not lack novelty over Wantz.

Inventive step

78. Mr Cardwell provided no evidence in his report that assists the assessment of inventive step of claim 1 over any of the items of prior art as seen from the perspective of the person skilled in the art. He said in cross-examination that he was never asked to

consider the differences between the prior art and the invention of claim 1 or, in that regard, what would have occurred to the skilled person having read each item of prior art. In relation to claim 1 Mr Cardwell did discuss a product known as the 'Smokin' Gun' which he was provided with in 2018. Mr Cardwell may have taken the Smokin' Gun to be something like the product described in Wantz but if so, in cross-examination he accepted that the Smokin' Gun does not have the same form as the device described in Wantz and that his evidence on the Smokin' Gun was not relevant.

79. On top of this I think Mr Cardwell misunderstood claim 1. He thought that the first position referred to in the claim involved the apparatus being in a storage bag and then, in use, the apparatus is moved to a second position outside the bag. That is not what the skilled person would have understood the first and second positions of claim 1 to mean. The claim refers to 'the spacer member [being] moveable between a first position which is convenient for carrying and/or storage and a second position which determines a minimum distance between the outlet aperture and the detector'. Thus, the two positions are positions of the spacer, not the apparatus as a whole. The claim and the description make sense only if the two positions are positions of the spacer relative to the rest of the apparatus.

80. Mr Pope gave relevant evidence. In his report he noted that neither Ackerman nor Spohn mention spacers, both being about enclosed delivery systems. He did not think that the skilled person at the priority date would have been led by either item of prior art to contemplate anything about spacers, never mind a spacer that moved from a first to a second position as claimed in the Patent.

81. I accept that evidence. Claim 1 does not lack inventive step over either Ackerman or Spohn.

82. I will quote what Mr Pope said in his report about Wantz in relation to claim 1 (original italics):

> '82. However, Wantz does not teach that the spacer member can move between a first position (convenient for carrying and/or storage) and a second position which determines a minimum distance between the outlet of a canister and the detector (claim 1).
>
> 83. The tube can "*friction fit*" or "*snap fit*" to the top rim of an aerosol spray dispenser …, but this would be an inconvenient state for transport or storage in this configuration. The state of being totally unattached to the aerosol canister is also not a position which is convenient for carrying and/or storage of both parts; having two parts in that way is less convenient. There is nothing in Wantz indicating that the two parts connect together in any way for the purposes of transport or storage and, so, the skilled person would understand that Wantz requires carrying two separate pieces when not in use.'

83. In this part of his paragraph 83 Mr Pope appears to assume that the convenience provided by the invention when the spacer is in the first position comes from its being somehow attached to the container – i.e. not 'totally unattached' but rather that they 'connect together in [some] way for the purposes of transport and storage'. If this is what makes carriage/storage 'convenient', it sits uneasily with No Climb's case on the

construction of claim 1: there is no limitation in claim 1 requiring any sort of attachment of the spacer to the container, a construction with which I have agreed.

84. Having re-read Mr Pope's evidence when writing this judgment, my difficulty is that Mr Pope was not cross-examined on how this part of his paragraph 83 can be reconciled with No Climb's case on the construction of claim 1.

85. I now quote the rest of Mr Pope's paragraph 83 which concludes his evidence on Wantz in relation to claim 1:

> 'Given the focus on needing to reach the detector with an actuator pole or with a longer tube (i.e. something very bulky), the skilled person would not be too concerned about considering ways to make the aerosol canister and the other parts of the disclosed apparatus fit together more conveniently for transport or storage.'

86. As I understand this passage, Mr Pope says that Wantz when read as a whole includes the use of a bulky extension pole (see Figure 4 of Wantz shown above) which necessarily rules out convenient carriage or storage. The skilled person would therefore not have turned his or her mind to convenience of carriage or storage and would not have thought of the idea of the spacer being positioned in two alternative positions, the first of which would be convenient for carriage and storage.

87. I would only reject Mr Pope's unchallenged evidence if it were self-evidently nonsense or necessarily inconsistent with some other part of No Climb's case. The first part of his paragraph 83 comes perilously close. The second part, however, seems consistent with what Mr Pope says in his paragraph 82.

88. I must go with the evidence as it is. I accept that the skilled person reading Wantz, which among other things teaches the use of a bulky extension pole, would not have contemplated anything to do with positioning the spacer in such a way as to afford convenient carriage or storage. Accordingly, I find that claim 1 does not lack inventive step over Wantz.

Conclusion

89. The Patent is valid. Claims 1, 8 and 9 have been infringed by the marketing of both the DetectaReach and DetectaSmoke products.