United States District Court,
N.D. Illinois.

NEWELL OPERATING CO,
v.
INTERCROWN USA.

June 13, 2008.

Jason G. Harp, Richard Jerold Hoskins, Schiff Hardin LLP, Chicago, IL, for Newell Operating Co.

Bryan Hunt Opalko, Lynn J. Alstadt, Buchanan Ingersoll & Rooney PC, Pittsburgh, PA, Donald Quirk Manning, McGreevy Williams, P.C., Rockford, IL, for Intercrown USA, et al.

STATEMENT

FREDERICK J. KAPALA**, Judge.**

On March 31, 2008, this court appointed a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure to provide a recommendation on the construction of the claims in the patent at issue. The special master filed a report and recommendation on May 5, 2008. Defendants have filed an objection, and the matter has been fully briefed. For the reasons set forth below, the court overrules defendants' objection and accepts the special master's report and recommendation.

Defendants object to the following recommended construction of the claim term "generally cylindrical support post:"

A structure extending from the finial and inserted into the support sleeve. The cross-section of the structure is circular throughout most of its length. But the size of the circular cross-section need not be uniform throughout the length of the structure; this means, for example, that the structure may be tapered. *This definition does not exclude a screw*. (Emphasis added.)

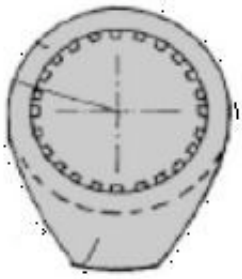
Defendants request that the court correct the last sentence of the foregoing paragraph to read, "*this definition excludes a screw*" because the special master's construction is based on a misunderstanding of the cross-section of a screw. In response, plaintiff contends that the court should accept the special master's claim construction, without defendants' proposed change, because the report and recommendation makes clear that the special master did not misunderstand the cross-section of a screw.

Defendants maintain that the following description from the special master's report and recommendation demonstrates his misunderstanding of a cross-section of a screw:

Certainly one holding a screw before one's eyes sees that the shank of the screw has straight sides, and the outer edges of the threads appear to describe a straight line. Further, the cross section of a screw is indeed

"uniform" along its length. Such a section will show a circle that represents the shank, and a dot or other short line or mark that represents the passage of the thread through the plane of the section.

In his declaration attached to defendants' objection as Exhibit 1, Dr. Robert Sturges, professor of Mechanical Engineering at Virginia Polytechnic Institute, explains that the cross-section of a screw is ovoid or egg shaped, not circular. Defendants suggest that the cross-section described by the special master would look like the image below on the right, which defendants maintain looks nothing like an accurate representation of the actual cross-section of a screw shown in the image below on the left. FN1

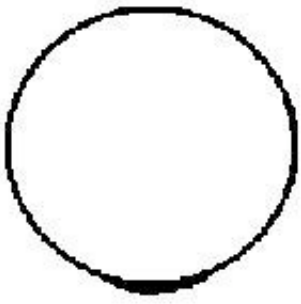


Cross-Section of Screw (Detail of Fig. 6)



Special Master's cross-section

In the court's view, however, the image on the right does not demonstrate the special master's misunderstanding of the cross-section of a screw because it is an inaccurate, or perhaps distorted, depiction of the special master's written description quoted above. The special master expressly stated that the "dot or other short line or mark ... represents the passage of the thread through the plane of the [cross-] section." While the image above on the left may be an accurate depiction of the cross-section of a particular screw, the following image is an accurate depiction of the cross-section of a screw with different characteristics:



The special master's written description accommodates both images because the size and shape of that portion of the cross-section which protrudes outside of the circular shank depends upon the particular characteristics of a given screw. The special master's written description accommodates screws of varying sizes and proportions such that the "dot or other short line or mark" expands or contracts depending on such characteristics as the angle of the thread, the thickness of the thread, and the depth of the thread. The image which defendants contend depicts an accurate cross-section of a screw appears to have very thick and deep threads resulting in the ovoid or egg-shaped cross-section described by Dr. Sturges. FN2 Footnote 36 of the report and recommendation, which follows the last sentence of the special master's above quoted written description, makes clear that the "dot or other short line or mark" to which he refers varies in size depending on the characteristics of a given screw:

The position of the mark will depend upon where, along the longitudinal axis of the screw, the section is taken. *The size of the mark will depend upon the size and conformation of the threads*. If the screw is tapered, the size of the circle will become smaller as sections are taken in the area of the taper, but the cross-sectional shape will remain the [*sic*] substantially the same. (Emphasis added.)

The "dot or other short line or mark" that the special master describes creates the ovoid or egg-shape cross-section that Dr. Sturges describes when the threads are of a sufficient size relative to the shank. Thus, contrary to defendants' argument, the special master was not laboring under a misunderstanding of the cross-section of a screw when he concluded that the definition of "generally cylindrical support post" does not exclude a screw. Consequently, the court denies defendants' request to invert that conclusion.

Even if the court were to agree with defendant's contention that the special master misunderstood the appearance of the cross-section of a screw, the court fails to see how such a misunderstanding renders the challenged conclusion erroneous. It seems to the court that screws with all but the most ovoid cross-sections would still be "generally cylindrical."

Defendants also argue that the special master's construction of the claim term to include a cross-section that "is circular throughout most of its length" is inconsistent with his conclusion that the term "does not exclude a screw" because the cross-section of a screw is not circular throughout its length. The special master, however, made clear that he was not construing the term to require a uniform cross-section throughout:

Intercrown apparently feels that the adoption of its proposed "straight sides and uniform cross section" construction would preclude a threaded post. But this argument does not hold up under close analysis. As indicated above, the ' 595 patent specification permits various surfaces, including the post surface, to be "discontinuous or intermittent." The specific examples given are "star or splined cross sections," but there is no indication that the inventors intended to exclude other possibilities, such as the intermittent surface provided by screw threads.

Thus, contrary to defendants' argument, the court finds no internal inconsistency in the special master's construction of the claim term "generally cylindrical support post." Based on the foregoing, defendants' objection is overruled and the court accepts the special master's report and recommendation.

FN1. The image on the left is a detail of Fig. 6 in United States Patent No. 6,116,771, attached as Exhibit 2 to defendants' objection.

FN2. In fact, Fig. 5 in United States Patent No. 6,116,771, shows a side view of the same screw a cross-section of which is shown in Fig. 6. The side view makes clear that this screw's threads are very thick and deep.

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