Judgment

THE HAGUE DISTRICT COURT

Civil Division

Case no. /Case list no.: 266720 / KG ZA 06-694

Judgment in the interim relief proceedings of 21 September 2006

in the matter of

BETTACARE LIMITED,

a legal entity incorporated under foreign law,
with registered office in Surrey, United Kingdom,
claimant in the main action,
defendant on the counterclaim,
represented by: *mr.* K.A.J. Bisschop and *mr.* R.M. van der Velden in Amsterdam (the Netherlands),

versus

1. **H3 PRODUCTS B.V.**, a private limited liability company,
with registered office in Ittervoort, the Netherlands,
2. **WEDEKA B.V.**, a private limited liability company,
with registered office in Stadskanaal, the Netherlands,
defendants in the main action,
claimants on the counterclaim,
represented by: *mr.* D.J.B. Bosscher in Amsterdam (the Netherlands).

The parties will be referred to hereinafter as Bettacare and H3, defendants in the main action/claimants on the counterclaim separately as well as H3 Products and Wedeka.

In the main action and on the counterclaim

1. The proceedings

1.1. The course of the proceedings so far is evident from:
- the summonses of 20 July 2006 with exhibits (exhibits. 2 through 11);
- the document containing H3's exhibits (exhibits 1 through 4);
- Bettacare's additional exhibits (exhibits 12 through 18);
- the additional document containing H3's exhibits (exhibit 5);
- the hearing of 24 August 2006;
- Bettacare's pleadings;
- H3's pleadings also including its counterclaim.

1.2. It was not until the hearing and the start of its counsel's arguments that H3 indicated it wished to submit what it called "additional evidence" in relation to the alleged prior public use of the invention that forms the focus of this case, i.e. a child safety barrier ("top-of-stairs gate"). This involved a considerable stack of documents and the request was denied after Bettacare objected on the grounds of a breach of the due process rules applicable to interim relief proceedings.

1.3. In order for the parties to give the parties an opportunity to reach a settlement in regards to the evidence rejected in 1.2, judgement was set down for 21 September 2006. By way of e-mail dated 13 September 2006, the aforementioned lawyer Bisschop, acting on behalf of Bettacare, asked that judgement be given, a copy of which message was sent to the lawyer, Bosscher who did not react thereto.

2. The facts

2.1. Bettacare is the holder of European Patent EP 1 392 951 B1 (hereinafter: EP 951 or the patent), granted to it on 6 October 2004 following an application on 22 April 2002, with a claim priority date of 4 June 2001 based on a British patent for Child Barriers. No opposition notice was filed to the patent. The patent was granted for and is valid in Austria, Belgium, Switzerland, Cyprus, Germany, Denmark, Spain, Finland, France, United Kingdom, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, Portugal, Sweden and Turkey. The claims - in the original English text and the (undisputed) Dutch translation are as follows:

> *1.* *A child barrier for installation in a passage or the like comprising a frame with two side portions (4) which, in use, are positioned adjacent the walls of the passage, each side portion carrying one or more vertically spaced abutment members (20)for engagement with an adjacent wall, the abutment member(s) (20) on at least one of the side portions being connected thereto by an adjustment mechanism, each adjustment mechanism comprising an elongate threaded member (18), one end of which is connected to the associated abutment member (20) and the other end of which is longitudinally slidably received in the associated side portion, each adjustment mechanism also including an adjustment member (24) in screw threaded engagement with the threaded member (18), the adjustment member (24) and the associated side portion of the frame affording respective surfaces (14, 26) opposed to one another, on one (26) of which there is at least one resilient locking projection (28) and on the other (14) of which there is at least one cooperating locking recess (34), at least one of the projection (28) and recess (34) having two inclined ramp surfaces (30, 32) extending in opposite circumferential directions of the threaded member, one of the ramp surfaces (30) being inclined at a relatively shallow angle to a plane (26) extending radially of the threaded member and the other ramp surface (32) being inclined at a relatively steep angle thereto,* ***characterized in that*** *after the adjustment member (24) has been tightened by rotating it in one direction until it is in sliding contact with the opposed surface (14) on the frame, a substantially greater torque is required to rotate it in the opposite direction as a result of the engagement of the locking projection (28) in the locking recess (34).*

2. *A barrier as claimed in claim 1 in which the two opposed surfaces carry a plurality of locking projections (28) and locking recesses (34), respectively.*
3. *A barrier as claimed in claim 1 or claim 2 in which the shape of the or each locking projection (28) is complementary to that of the or each locking recess (34).*
4. *A barrier as claimed in any of the preceding claims in which the elongate threaded mechanism (18) is slidably received in a hole (16)formed in a fitting (12) carried by the associated side portion of the frame.*
5. *A barrier as claimed in claim 4, in which the fitting (12) is made of plastics material.*
6. *A barrier as claimed in any one of the preceding claims in which the adjustment member (24) is made of plastics material.*
7. *A barrier as claimed in any one of the preceding claims in which the frame is of generally U-shape comprising two side portions (4) connected by a base portion (6) and defines an aperture in which agate (2) pivotally connected to one of the side portions (4) is received.*
8. *A barrier as claimed in claim 7 in which the dimension of the locking projections (28) and recesses (34) in the axial direction of the threaded member is greater on the upper adjustment mechanism than on the lower adjustment mechanism.*

(...)

1. *Kinderbarrière voor installatie in een doorgang of dergelijke, omvattende een frame met twee zijdelen (4), die, tijdens gebruik, aangrenzend aan de muren van de doorgang zijn gepositioneerd, waarbij elk zijdeel één of meer verticaal uiteen geplaatste afsteunorganen (20) draagt voor samenwerking met een aangrenzende muur, waarbij het afsteunorgaan/organen (20) op ten minste één van de zijdelen daaraan is verbonden met een instelmechanisme, waarbij elk instelmechanisme een langwerpig van schroefdraad voorzien orgaan (18) omvat, waarvan een einde is verbonden met het geassocieerde afsteunorgaan (20) en waarvan het andere einde in de lengterichting schuifbaar is opgenomen in het geassocieerde zijdeel, waarbij elk instelmechanisme eveneens een instelorgaan (24) omvat dat met schroefdraad samenwerkt met het van schroefdraad voorziene orgaan (18), waarbij het instelorgaan (24) en het geassocieerde zijdeel van het frame respectievelijke oppervlakken (14, 26) verschaft die tegenover elkaar liggen, op een (26) waarvan zich tenminste een veerkrachtig vergrendeluitsteeksel (28) bevindt en op de andere (14) waarvan zich tenminste een samenwerkende vergrendeluitsparing (34) bevindt, waarbij ten minste een van het uitsteeksel (28) en de uitsparing (34) twee hellende hellingsvlakken (30, 32) heeft die zich in tegengestelde omtreksrichtingen van het van schroefdraad voorziene orgaan uitstrekken, waarbij een van de hellingsvlakken (30) helt onder een relatief flauwe hoek ten opzichte van een vlak (26) dat zich radiaal uitstrekt vanaf het van schroefdraad voorziene orgaan en waarbij het andere hellingsvlak (32) helt onder een relatief steile hellingshoek ten opzichte daarvan, **met het kenmerk dat** nadat het instelorgaan (24) is vastgedraaid door het roteren in een richting totdat het in schuivend contact is met het tegenover liggende oppervlak (14) op het frame, een wezenlijk groter draaimoment nodig is om dit in de*

tegengestelde richting te draaien als gevolg van de samenwerking van het vergrendeluitsteeksel (28) in de vergrendel-uitsparing (34).

2. *Barrière volgens conclusie 1, waarbij de twee tegenover liggende opper vlakken een veelheid van respectievelijk vergrendeluitsteeksels (28) en vergrendeluitsparingen (34) dragen.*
3. *Barrière volgens conclusie 1 of 2, waarbij de vorm van het of elk ver grendeluitsteeksel (28) complementair is aan die van de, of elke vergrendeluitsparing (34).*
4. *Barrière volgens één der voorgaande conclusies, waarbij het langwerpige van schroefdraad voorziene mechanisme (18) schuifbaar is opgenomen in een gat (16) dat is gevormd in een fitting (12) die wordt gedragen door het geassocieerde zijdeel van het frame.*
5. *Barrière volgens conclusie 4, waarbij de fitting (12) is gemaakt van een kunststofmateriaal.*
6. *Barrière volgens één der voorgaande conclusies, waarbij het instelorgaan (24) is gemaakt van een kunststofmateriaal.*
7. *Barrière volgens één der voorgaande conclusies, waarbij het frame in hoofdzaak U-vormig is en twee zijdelen (4) omvat die zijn verbonden door een basisdeel (6), en een opening definieert waarin een poort (2) die scharnierend is verbonden aan een van de zijdelen (4) is opgenomen.*
8. *Barrière volgens conclusie 7, waarbij de afmeting van de vergrendeluitsteeksels (28) en uitsparingen (34) in de axiale richting van het van schroefdraad voorziene orgaan groter is bij het bovenste instelmechanisme dan bij het onderste instelmechanisme.*

The following figures, as reduced and represented below, form part of the patent:

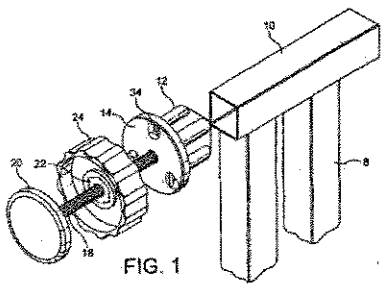


FIG. 1

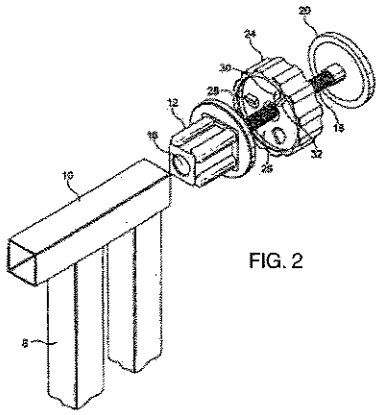


FIG. 2

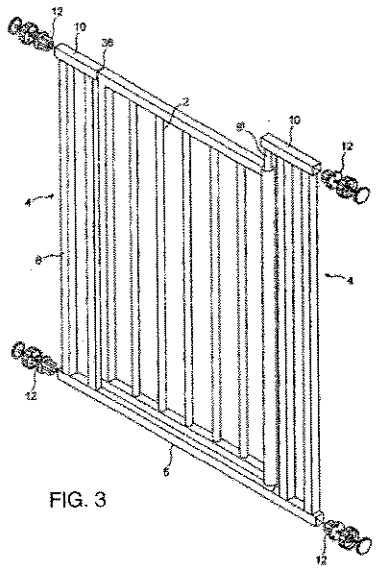


FIG. 3

2.2. Child barriers serve to close openings in and around the home to improve the safety of small children and are usually placed at the top or bottom of the stairs or in door openings. Such barriers block off the passageway for small children but can be opened easily by adults. According to the patent, the child barrier has a child-proof locking mechanism for this purpose (to confirm the gate is fixed to the wall) in the form of a rotating ratchet mechanism. Through construction according to the patent design less torque is needed to tighten the ratchet mechanism than to loosen it. Adults can do the latter, whereas children cannot. For this purpose an adjustment member and the opposed surface are provided with at least one cooperating locking projection and locking recess respectively.

2.3. Bettacare focuses on the manufacturing and sale of products for parents of small children. Its child safety barriers are among its most important products.

2.4. H3 Products, previously called WM Holding B.V. (and which also used the trading name W&M (Ned. Baby Products B.V.), markets child safety barriers in the Netherlands and also exports them to countries abroad, including Germany. Wedeka manufactures these child safety barriers for H3 Products and sells and delivers these products to them. A Dutch company, Bruca B.V., previously manufactured these child safety barriers for H3 Products. Both H3 Products and Bruca B.V. were previously trading partners of Bettacare. Once Bettacare served a writ on Bruca B.V. in November 2005 to make it aware of the patent, Bruca B.V. ceased production of the child safety gates that Bettacare considered to be an infringement. Wedeka then took over the production in question.

2.5. Bettacare also served writs on H3 Products and Wedeka to make them aware of the patent. In correspondence preceding these preliminary relief proceedings, H3 Products and Wedeka adopted the stance that the patent was invalid due to public use before the priority date.

3. The dispute

3.1. In short, Bettacare claims a cross-border patent infringement injunction with ancillary demands, which include a list of purchasers as well as numbers of the alleged infringing products and the profit earned thereon by H3, as certified by a chartered accountant, a product recall and a letter of correction, all under penalty of a forfeiture and costs by law.

3.2. It was not until the hearing that H3 instituted its previously unannounced counterclaim in relation to – as far as the interim relief judge understands – compensation for the extrajudicial costs it incurred in the run up to these interim relief proceedings. The further substantiation thereof, as referred to in the pleadings – to the extent it is - has not been forthcoming.

3.3. The parties dispute each other's claims in the main action and on the counterclaim. The parties' contentions are dealt with further below to the extent they are of significance.

4. The judgment

Counterclaim

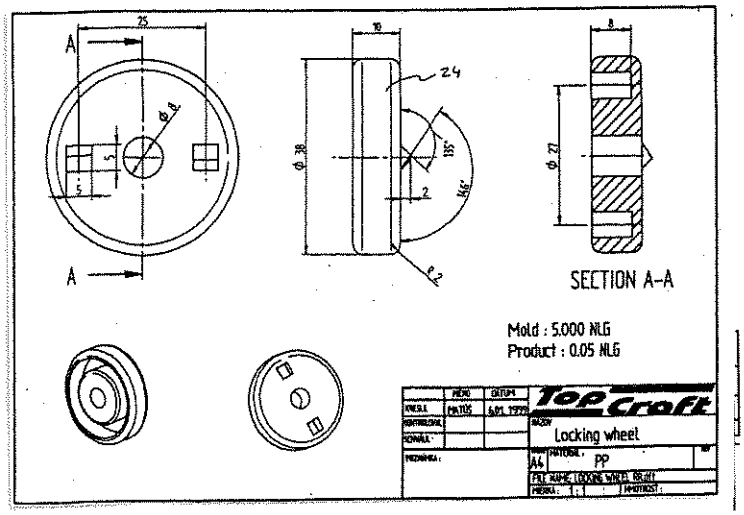
4.1. The counterclaim that was not instituted until the hearing and without any prior notice is inadmissible due a breach of the due process requirements in interim relief proceedings. If admissible, this claim would have been dismissed anyhow for a lack of any form of substantiation and because it was not stated that an urgent interest was at stake, an interest that was not otherwise evident.

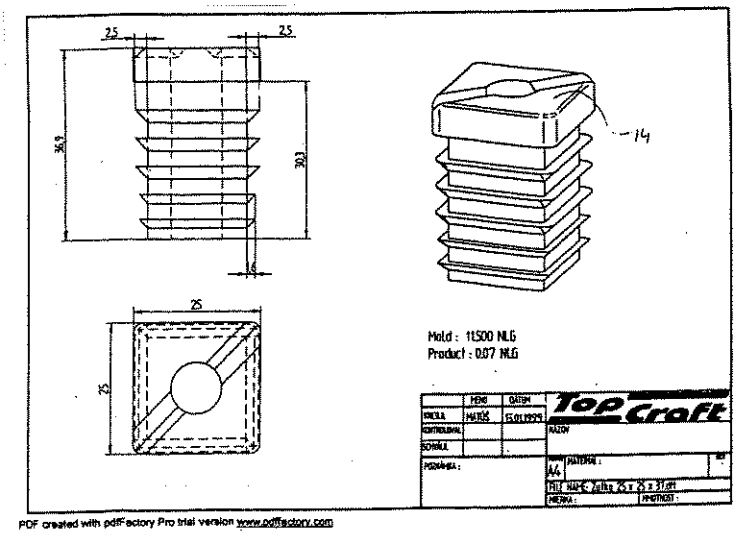
Public prior use?

4.2. In the main action, H3's chief defence is that the patent is invalid, because designs according to the patent were used publicly before the priority date, a defence also known as "public prior use". This is the only validity defence that H3 has advanced. This defence is rejected for the reasons as set out below.

4.3. Strict requirements must be met before public prior use of an invention is accepted in proceedings on the merits. It must be possible to clearly determine the timing of the alleged use. It must be possible to identify that the applied design is the same as the invention, i.e. that it impairs novelty. Finally the circumstances under which use took place must be clarified. In particular, if the alleged public use lies in the own sphere of the party relying thereon, TBA (Technical Board of Appeal) case law dictates that "up to the hilt" proof of all of this must be submitted. It must also be examined in interim relief proceedings whether there is a good chance that these requirements for prior public use will be satisfied in proceedings on the merits.

4.4. H3 substantiates its viewpoint of public use with *copies* of two drawings entitled *Locking Wheel* and *Zatka,* allegedly dated 6 and 15 January 1999 respectively. These parts were purportedly used in a *wooden* Bravo child safety gate of H3 Products (then called WM Holding B.V.) Copies of two invoices made out to this latter company for moulds were also submitted, namely invoice 04/99 for the *Zatka Mould* and invoice 011/99 for *Wheel R35 Mould.* No proof is submitted that these invoices were also paid. The drawings in question (reduced and reproduced below) are as follows:





4.5. The first question relates to whether this impairs the novelty of the patented design – a safety gate with such a lock is not clearly shown here in any event. The inventive concept idea that lies behind the wording of the main claim of EP 951 relates in the Court's preliminary opinion to a child-proof rotating ratchet mechanism with cooperating projections and recesses, applied in a child safety gate so that greater torque is needed to release the gate than is needed to close or tighten it.

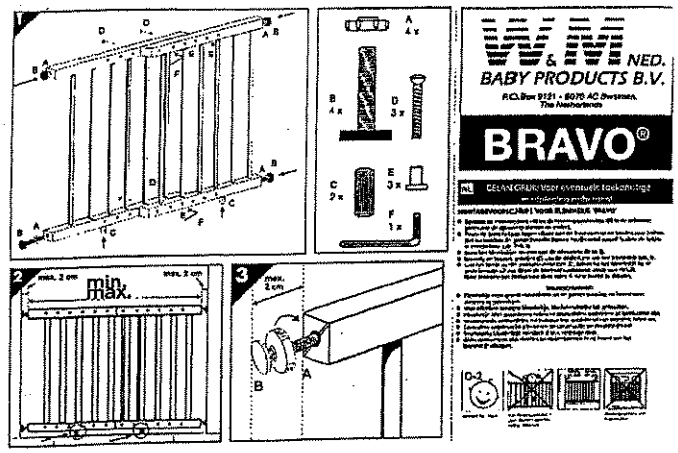
It is not a simple matter to accept with H3 that the cooperation between the adjustment dial with the locking projections (as shown in the top diagram) and the square fitting with locking recess in the form of a grove (as shown in the bottom diagram) constitute the essential parts of such a child-proof rotating ratchet mechanism. In fact it would be difficult to state this as it is evident from the drawings that the projections and recesses in question have different angles of inclination, the one relatively steeper than the other. It is however not definitively determined, simply because there is nothing in the drawings to support that the parts in question are meant to work together.
There is, for example, no member containing a screw thread shown anywhere.

4.6. But even if these drawings did describe an infringing mechanism, the question must arise how such a structure would function in a *wooden* child safety gate, which – in contrast to a metal child safety gate – could not be hollow inside, as Bettacare correctly points out. A provisional assessment of the Zatka mould shows that this is only suitable for use in a metal child safety gate. It is not disputed the old Bravo gate of WM Holding/H3 Products was made from wood.

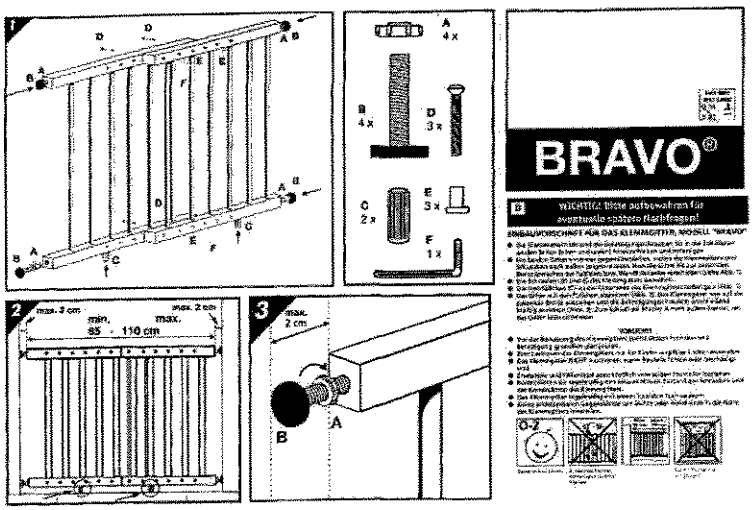
4.7. Even if the issues under 4.7 were to be ignored and it could hypothetically be accepted that the drawings refer in principle to a child-proof rotating ratchet mechanism, as referred to in the patent, it is the Court's provisional finding that it has not been sufficiently proved (i.e. "up to the hilt") that the date is correct and that the circumstances under which the invention has purportedly been used have not been adequately clarified. Bettacare refers to the significant fact that the wheel invoice is dated 13 February 1999, but reflects a most unusual payment date of more than 3 years later (i.e. 13 March 2002) whilst the invoice for the other mould has a payment term of 1 month. This would have to be explained with reference to specially agreed payment terms (as H3 indicates in its pleadings) which are not evident anywhere and so questions regarding the date have not been satisfactorily resolved. As stated, absolutely no evidence has been submitted that these invoices are paid.

4.8. Moreover H3 has not rebutted Bettacare's contention that discussions were held within the context of the previous collaboration between Bettacare and W&M/H3 Products, (which started after the patent priority date in the summer of 2001) as to the possibility of Bettacare distributing W&M/H3 products in the United Kingdom. H3 showed a number of child safety gates to Bettacare for this purpose. None of these had an abutment mechanism that matched the patent.

4.9. Finally, significant doubt has arisen in the proceedings as to the accuracy of drawing 3 of the (undated) assembly instructions of H3 Products' Bravo gate as submitted by H3 (exhibits 3 and 4 from the document containing H3's exhibits; submitted in each case only as a *copy*). The manual in question is partly reproduced below (the issue centres on the drawings).



Drawing 3 seems to imply the use of a ratchet mechanism by means of a diagonal groove/recess (in the wood) that more or less corresponds with that in the bottom drawing under 4.4. By comparing drawings 1, 2 and the unnumbered parts diagram on the one hand with drawing 3 on the other from these assembly instructions, one sees that adjustment A in the first drawings is always smaller than screw head B, whilst the opposite is the case in drawing 3 (the head of B is also white in this drawing in contrast to black on the others). As Bettaware correctly points out, drawing 1 appears to refer more to a traditional fastening system with a nut/bolt combination. It is very significant that *no diagonal groove* is drawn on extremity A in drawing 1, whilst it suddenly is in drawing 3 – thus suggesting that it is possible to use a ratchet mechanism according to the patent (although corresponding locking recesses on the inside of head B are not revealed, while just as little is clarified about the angles of inclination of the diagonal groove). If the latter is the case, then not only is the set of the 4 aforementioned drawings inconsistent, but it is also not immediately clear why they do not include any instructions on how to release the gate, as such is only possible with an opened gate when using the patented abutment members. A further clue that drawing 3 may have been altered, as Bettacare contends, is that a Bravo gate that Bettacare purchased includes assembly instructions with a set of drawings in which drawing 3 does correspond with the remaining drawings and *does not show any diagonal grove,* as reproduced below:



This drawing 3 shows a traditional nut/bolt fastening system. Clamp bolt B has a black head here, just as in the other drawings and dial A is smaller than the head of B, just as in the other drawings.

4.11. That these differences could be clarified by the fact there are two types of Bravo safety gates on the market, and that only the first gate (which is no longer available) had the ratchet mechanism, in contrast to the "simplified" version that is now produced in China, as H3 alleges, is in no way plausible and must be ignored.

4.12. The written declarations of involved parties, as submitted by H3, which state that the constituent parts under 4.4 produce the child-proof ratchet mechanism and/or that child safety gates with such abutment members were allegedly used, are in the Court's preliminary opinion inadequate and cannot satisfy the high threshold of proof.

4.13. It is the Court's preliminary opinion that it accordingly does not follow that there is a good chance that the stringent requirements referred to in 4.3 will be satisfied in the proceedings on the merits. Further evidence is absolutely necessary for this purpose, however interim relief proceedings are not the forum for such evidence and one should accordingly wait for the proceedings on the merits. The validity of EP 951 must therefore be assumed for this reason.

Infringement

4.14. It is the Court's preliminary opinion that H3 Products and Wedeka infringe the patent by using an abutment member, according to the patent, with a child-proof rotating ratchet mechanism in the form of an adjustment mechanism and projections and recesses, according to the patent, as used in each case for the Lotus or Lukas safety gate referred to in the proceedings as *private label.* The following was taken into consideration.

4.15. The *only* non-infringement argument that H3 advances (in addition to the public use defence) is that its safety gates only have the aforementioned child-proof rotating ratchet mechanism, with projections and recesses according to the patent, on one of the four angular points and they accordingly fall outside the scope of protection of the patent. The infringement is otherwise not challenged. In particular it is also not challenged that the child-proof locking mechanism H3 uses as such under the similar mechanism falls out of the scope of the patent. It is further not disputed that the figures below with corresponding numbering to claim 1 are a reproduction of H3's safety gates.

Fig1

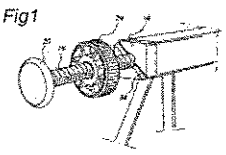
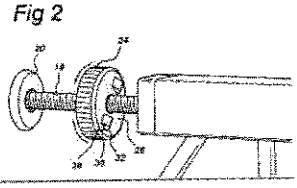
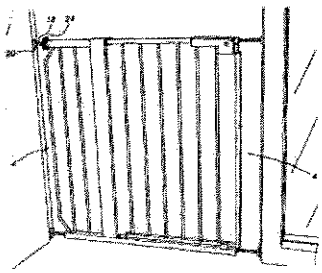


Fig 2





4.16. H3's non-infringement defence, as provisionally adjudged, does not hold and is based on an incorrect reading of the main claim. After all, claim 1 refers to *each side portion carrying one or more vertically spaced abutment members (20)* (column. 6, line 58 through column. 7, line 1), so that one abutment member per side is enough. As this claim further states that *the abutment member(s) (20) on at least one of the side portions being connected thereto by an adjustment mechanism* (column 7, line 2-5), it is argued that according to the patent only one of the two abutment members needs to include the adjustment mechanism. It also follows from the text that abutment members can also be placed in a barrier without an adjustment mechanism.

4.17. As such, it is this Court's provisional opinion that H3 Products and Wedeka have (literally) infringed the patent.

Cross border infringement

4.18. Bettacare claims a cross-border infringement injunction against H3 Products and Wedeka, two companies established in the Netherlands. It submits in this respect that H3 exports to foreign countries and more specifically that it has proved that in any event infringement is made in Germany. Regarding this, it is considered as follows.

4.19. It has become sufficiently plausible - and it was also not disputed at all - that H3 Products also (literally) infringes the patent in Germany. Regarding the specific issue of infringement abroad, H3 put forward no other defence than that the ruling of the European Court of Justice of 13 July 2006 in the case GAT/LuK would imply that when bringing forward an invalidity defence according to German law, in interim relief proceedings the interim relief judge in the Netherlands would lose competence. Bettacare has disputed this supported by reasons.

4.20. The defence by H3 is rejected. By preliminary judgment, it does not follow from the priorly mentioned ruling - which pertained to (German) proceedings on the merits and in which the present issue has not literally come up for discussion - that when putting forward an invalidity defence in interim relief proceedings regarding the patent in another country, like H3 has done in these proceedings, the interim relief judge in the Netherlands (competent on the basis of article 2 EU Regulation 44/2001) would lose competence on the basis of what is provided in article 22 sub 4 EU Regulation 44/2001. Like already decided by this court in interim relief proceedings prior to the mentioned ruling GAT/LuK, the interim relief judge in the Netherlands in a case like this can only make a *preliminary* judgment in the form of an assessment of the chances of that invalidity defence - whether this pertains to Netherlands law or foreign law does not make a difference in this respect - with which the exclusive field of article 22 sub 4 EU Regulation 44/2001 in interim relief proceedings in respect to foreign law in principle is not entered, as nothing final regarding the validity according to foreign law is *established.*

4.21. The interim relief judge in the Netherlands therefore in principle has cross-border jurisdiction against these Dutch defendants, which is not changed by putting forward a validity defence based on the German part of EP 951. It has not been stated that in Germany "interim relief"-type ("kort geding"-type) proceedings or proceedings on the merits (compare Supreme Court NJ 2002/563) are pending and no circumstances have been brought forward or have become evident based on which a cross-border injunction in the underlying case should be rejected. Therefore, a cross-border infringement injunction relating to Germany can be granted against H3 Products and against Wedeka, as it has become sufficiently plausible that the latter as a manufacturer of H3 Products threatens to commit infringement in Germany, all this as formulated in the operative part of the

judgment.

4.22 Other cross-border injunctions are rejected on the basis of non compliance with the obligation to furnish facts.

Conclusion

4.23. The considerations above lead in the main action to an injunction on direct patent infringement. An injunction on indirect patent infringement is however dismissed as separate requirements exist for indirect infringement and Bettacare has not discharged its obligation to furnish facts in this regard. An injunction limited to the infringing child safety barriers referred to in these proceedings, as argued for by H3 in the alternative and motivated by Bettacare is dismissed, for lack of cause. The injunction is reinforced with the imposition of a penalty. No cause is likewise seen for reducing the penalty, as required by H3.

4.24. The ancillary claims in the main action go beyond the scope of interim relief proceedings and are accordingly dismissed.

4.25. As the party against which judgement has mainly been given, H3 will be ordered to pay the costs of these proceedings in the main action. The need to interpret the Enforcement Directive on the basis of guidelines means in terms of Article 14 thereof that Bettacare's specified costs and the costs of its counsellors and patent agents, which H3 does not dispute, will be awarded.

4.26. The period referred to in Article 260 of the Dutch Civil Procedure Code will be fixed at 6 months.

4.27. The counterclaim is not admissible. This does not lead to a separate costs order given the inextricable connection between the main action and the scope of the subject-matter of the counterclaim.

5. The ruling

The interim relief judge

in the main action

- issues an injunction against H3 Products and Wedeka, to take effect 5 calendar days after the service of this judgement, prohibiting direct infringement of European Patent EP 1 392 951 in the Netherlands and Germany, such under penalty of the forfeiture of € 10,000.00 for each day or part thereof that a defendant disobeys the injunction in whole or in part or – at Bettacare's entire discretion – for each product in respect of which a defendant disobeys the injunction in whole or in part;

- orders H3 Products and Wedeka to jointly and severally pay the costs relating to the main action in these proceedings, estimated to the date of this ruling on Bettacare's side to be € 20,196.00 for the fees of its attorney of record, local counsel and patent agents and € 387.74 for disbursements;

- rules that this judgement to date be provisionally enforceable,

- fixes the period referred to in Article 260 of the Dutch Civil Procedure Code at 6 months from today's date;

- dismisses all further or other claims;

on the counterclaim

- declares that H3 Products and Wedeka have no cause of action.

This judgement was delivered by *mr.* G.R.B. van Peursem and pronounced in public on 21 September 2006, in the presence of the Registrar.