

COMMISSIONER'S DECISION

OBVIOUSNESS - Reglet Structure

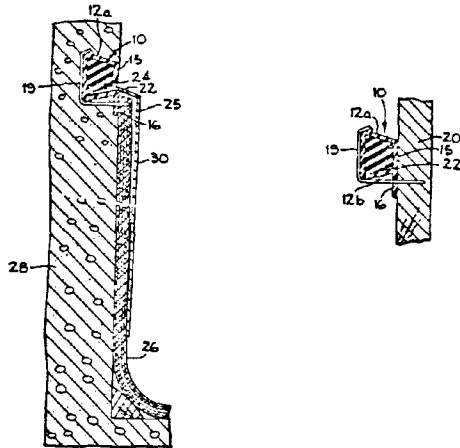
Reglets (or mouldings) are inserted in concrete structures when they are poured so that cover structures, such as flashings parapets and roofs may be attached to the structures. The reglets are secured to wooden forms prior to pouring so that when the forms are removed the reglets are firmly fixed in the concrete. The art cited failed to teach the patentable advance in the art.

Final Action: Reversed, but amendments to claims required.

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This decision deals with a request for review by the Commissioner of Patents of the Examiner's Final Action dated December 21, 1976, on application 224,537 (Class 72-59). The application was filed on April 14, 1975, in the name of Edward T. Berg, and is entitled "Reglet Structure." The Patent Appeal Board conducted a Hearing on May 17, 1978, at which Mr. H. Gerlach represented the applicant.

The application relates to channel structures which are known as "reglets" and are employed to support cover structures, such as flashings in a "seepage-tight" manner from walls, parapets and roofs. The reglets are secured to wooden forms prior to pouring concrete so that when the forms are removed the reglets are firmly secured in the concrete. The reglet is generally pre-filled with a sealing compound. Figures 2 and 3 shown below illustrate that arrangement:



The apron 15 can be severed at 22 for insertion of the flashing 25.

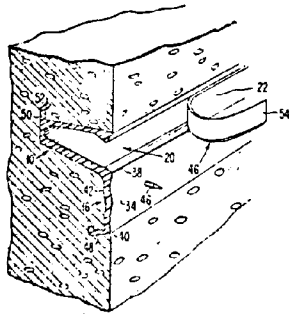
In the Final Action the examiner refused the claims because they are "directed to unpatentable subject matter" in view of the following applied references:

United States Patents

3,319,384	May 16, 1967	Berg
1,660,408	Feb. 28, 1928	Bayley
1,758,150	May 13, 1930	Elston
3,168,798	Feb. 9, 1965	Berg
1,177,916	Apr. 4, 1916	Alexander et al

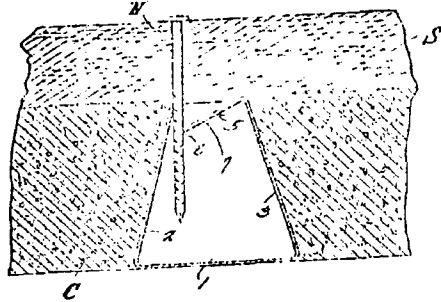
The examiner did add that he could find nothing in the disclosure that would amount to an invention.

The 3,319,384 Berg patent (same inventor as in the present application) discloses a reglet used in the same manner as in the present application. The reglet has two grooves in the front face 24 and 26 for ease of removing the tear-strip 22, after the reglet has been secured in the concrete. The object of strip 22 is to facilitate the addition of molding sections such as flashings. That invention is illustrated by Figure 3 of the patent.



The second Berg reference is similar to the above patent, but without the tear strip feature.

The Elston patent shows a reglet or a nailing strip which is adapted to be embedded in concrete. Figure 1 below of the patent shows that invention.



Both Bayley and Alexander show various forms of reglets which show the use of an apron or bight portions to frictionally grip a second member.

In the Final Action the examiner had, inter alia, this to say:

...

The patent to Elston shows a nailing strip adapted to be embedded in concrete. Converging side channels, a flat connecting bight portion and an apron adapted to lie against a form panel are shown. The apron, slit into fingers, is adapted to frictionally grip a nail. The use of such an apron for holding flashing is well known in the art as shown in the patents to Bayley and Alexander.

Applicant states that the interior of the channel-like strip of Elston is opened up so that wet concrete could readily enter the interior, however, such is not taught by the patent to Elston. In that patent, concrete is poured so that top of the concrete will be level with the top of the strip. Nail N is subsequently used to attach wood flooring strip S. The disclosure of Elston, however, is not limited to flooring but states

"...It is to be understood that it can be used wherever strips of material are to be attached to the exposed face of a concrete structure."

Means for attaching the nailing strip of the patent to Elston to the form board are not disclosed, however, J shaped nails, wire, or brackets are well known in the art. When the strip is pressed tightly against the form board, as in the patents to Bayley and Alexander the leakage of cement into the reglet is prevented to a sufficient degree to form an operative structure.

To form the structure of the patent to Elston from extruded plastic allows a design change obvious in view of the 1967 patent to Berg. A groove in an extruded plastic reglet is well known and its use to form a reglet such as shown in the patent to Elston or figure 9 of the patent to Bayley does not amount to invention. The principle of a pivoted apron to frictionally grip the flange is known from the patents to Elston, Bayley and Alexander and no invention is seen in its application in a known construction.

The 1965 patent to Berg shows a reglet filled with moisture-excluding material.

Again, the question is not one of anticipation but of obviousness in view of the prior art.

...

In response to the Final Action the applicant stated (in part):

...

There is a further important difference between the particular reglet of subject pending Berg Canadian patent application Serial No. 224,537 and the zipper front type reglet of Berg U.S. Patent No. 3,319,384, and that is, if the lowermost longitudinal external groove in the apron-like front wall 22 were severed without likewise severing the longitudinally extending groove 24, the front wall 22 could not be swung inwards in the same manner as the apron 15 of the reglet of Berg pending Canadian patent application Serial No. 224,537 because the flange-like lower side wall 14 extends downwardly and outwardly instead of inwardly and upwardly and, consequently, the lower edge portion of the front wall would in connection with inward swinging of the front wall wedge or jam against said lower side wall 14 in such manner as to prevent sealing compound or the lip of flashing to be inserted into the interior of the channel portion of the reglet. On the other hand, if it were possible to swing inwards the apron-like front wall 22 of the reglet of Berg U.S. Patent No. 3,319,384 as the result of severing or slitting of the lowermost groove 26 only and the front wall should crack or break away along the uppermost longitudinally extending groove 24, the front wall would not hold the sealing compound within the channel and would not function to lock in place the lip of the flashing without the use of wedges or auxiliary anchoring elements.

To my knowledge, since the advent by Superior Concrete Accessories, Inc. of its current Type A reglet like the particular reglet of subject Berg pending Canadian patent application Serial No. 224,537, the United States and Canadian sales of such reglets have been substantial and it is my opinion that the reason for this is that such reglets are structurally different from the zipper front type reglets as exemplified by the reglets of Berg U.S. Patent No. 3,319,384 and my U.S. Patent No. 3,512,318 and function in a wholly different manner due to the fact that the reglet has in its outer surface only a single longitudinal groove at one marginal portion thereof.

...

Relied-upon Patent No. 3,168,798 is another U.S. patent of aforesaid Edward T. Berg and the reglet disclosed therein has no bearing whatsoever on the reglet of subject pending Berg Canadian patent application Serial No. 224,537 because even though it is in the form of a plastic extrusion, it does not have a front wall or apron which is originally formed integrally with the front edge portions of the upper and lower flanges 16

and forms a positive barrier for prohibiting during a concrete-pouring operation the flow of concrete into the interior of the channel portion of the reglet, and which when the groove-equipped lower marginal portion is cut by a knife may be swung inwards and upwards in order positively to lock in place the lip of associated flashing without the use of a separately-formed wedge. The reglet of prior art Berg Patent No. 3,168,798 has an open front which would permit seepage of concrete into the interior of the channel part of the reglet and, as shown in Fig. 3, requires the use of a separately-formed wedge of a special cross-sectional contour in order to hold in place the lip of the flashing 18. Affiant's company, Superior Concrete Accessories, Inc., has discontinued the manufacture and sale of reglets like that of prior art Berg Patent No. 3,168,798 because of impracticability and insufficient results of use in the field and, as shown in the catalog constituting Exhibit A, now uses as its Type A "CUSHION-LOCK" reglet an extruded plastic reglet like that of pending Berg Canadian patent application Serial No. 224,537.

...

It is my opinion that the particular structural feature which imparts patentable vitality to the particular extruded plastic reglet of aforesaid pending Berg Canadian patent application Serial No. 224,537 is that the apron-like front wall of the channel part of the reglet extends between and is connected originally to the outer longitudinal edge portions of the upper and lower flanges, is provided in its outer surface and adjacent and parallel to the outer longitudinal edge portion of the lower flange with a single longitudinal groove, has its outer surface smooth and uninterrupted except for the single longitudinal groove and is adapted after removal of the form panel and longitudinal slitting of its longitudinally-grooved portion to be swung inwards and slightly upwards so that it extends inwards and downwards, provides such access to the interior of the channel as to permit entry therein of the lip of flashing, and serves so frictionally to grip the lip as to hold the flashing in place without the use of wedges or auxiliary anchoring elements. This particular important and novel structural feature is in my opinion neither taught nor suggested by the aforementioned prior art references regardless of whether the latter are considered together or individually, and constitutes an important step forward in the reglet art.

The first consideration by the Board is whether or not the applicant has made a patentable advance in the art.

At the Hearing Mr. Gerlach argued strongly that indeed an invention had been made and defined in the claims. He also argued that the product has "substantial commercial success." We will discuss this point later.

We also noted with care the contents of an affidavit which was made as part of the prosecution and signed by Mr. N.G. Turner.

Our first observation is that this is a very crowded art and the cited patents, at least at first blush, appear pertinent. We feel however, that in such a crowded art we should not expect a major step forward. This point was also argued by Mr. Gerlach.

We also find, after reading and rereading the disclosure, that it is replete with references to the sealing compound and its function and more particularly to the reglet being prefilled and the relationship of the apron 15 of the reglet to the sealing compound, e.g. the main object of the invention reads: "More particularly it is an object of the invention to provide a reglet structure wherein the sealing material or compound in its interior is protected from the deleterious effects of heat, sunlight and rain so that it will not seep from the interior of the reglet nor dry out and shrink and thus fail to fill out the interior of the reglet."

On page 3, lines 7 f.f., we find:

In addition the presence of the comparatively stiff, solid apron if unimpaired with the protected sealing compound behind it, renders it unnecessary to provide special wedges to hold the flashing in position thus saving not only the cost of separate retaining components but most of all the cost of skilled labor in applying the wedges to the reglet-flashing combination.... After the pre-filled reglet has been installed in a wall, the lower marginal portion of the apron may be separated from the lower flange of the reglet channel and access be provided to the interior of the channel for the flashing, by slitting it along the groove with a roofer's knife and then swinging the apron inwards and upwards to a small extent [emphasis added].

We do not want to imply however, that the sealing compound when used with a reglet is novel per se.

On a complete study of the specification we do find some advantage over the prior art, e.g. by not removing the apron 15, as was done in his original 384 patent, he derives a two fold benefit. First, the apron 15 with the sealing compound behind it renders it unnecessary to provide special wedges to hold the flashing in position; and the apron 15 protects the sealing compound within the reglet for an extended period of time against weather, especially sunlight.

An advantage of the present reglet over, for example, Elston is that it is waterproof which prevents water or concrete from entering the reglet during installation or pouring of the concrete. Elston, as shown, could not achieve a moisture proof installation which is required in the present situation.

At the Hearing Mr. Gerlach, as mentioned, argued that the product has "substantial commercial success." It is trite law however, that it is the precise form of the invention claimed in the application or patent which is to be considered in gauging the effect of commercial success (see Wildey and Whites Manufacturing Co. Ltd. v H. Freeman and Letruk Ltd. (1931) 48 R.P.C. 405 at 414, and Omark Ind. (1960) v Gouger Saw Chain Co. (1964) 27 Fox P.C. 1 at 22).

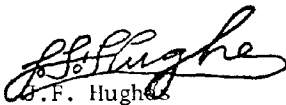
Mr. Gerlach drew our attention to sales literature which clearly shows the reglet pre-filled with a sealing compound and clearly states "no 'on-the-job' calking" is necessary. In the circumstances, therefore, we are not persuaded that the present claims define the precise form of the invention which must be considered in gaging the effect of commercial success. We find the sealing compound to be an integral part of the combination, yet no mention is made whatsoever of this in the claims.

We are satisfied, however, that the applicant has described in his specification a new combination which we considered to be a patentable advance in the art. But we are not satisfied that the claims clearly define the extent of the monopoly to which protection may be granted, and for that reason we agree with the examiner that the claims are too broad in scope.

In order to expedite proceedings Mr. Gerlach was contacted by phone and two amendments were suggested to claim 1 which would, in our view, more clearly define the scope of monopoly of the invention described. An amended claim 1 was submitted to the Board on May 25, 1978, which reads (amendments underlined):

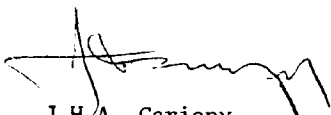
As a new article of manufacture, a one-piece reglet formed of extruded plastic material, prefilled with a sealing compound, adapted to be embedded in a concrete structure adjacent to one surface thereof and to hold lip-equipped flashing in place against said one surface of the concrete structure, and comprising a channel consisting of spaced apart upper and lower flanges, a substantially flat connecting bight portion extending between and connected to the inner longitudinal edge portions of the flanges, and an apron extending between and connected to the outer longitudinal edge portions of said flanges and disposed originally in substantially parallel relation with the bight portion, said flanges converging substantially uniformly in the direction of the apron, said channel being adapted in connection with formation of the concrete structure to have its apron fit flatly against a form panel while wet concrete is poured around it and against said form panel in order to form said concrete structure, and being also adapted upon hardening of the concrete and removal of the form panel to have its apron exposed as well as lie in the plane of the surface which is formed on the concrete structure by way of the form panel, said apron of the channel being provided in its outer surface and adjacent and parallel to the outer longitudinal edge portion of the lower flange with a single longitudinal groove, having its outer surface smooth and uninterrupted except for said single longitudinal groove, and being adapted after removal of the form panel and longitudinal slitting of its longitudinally-grooved portion to be swung inwards and slightly upwards against the sealing compound behind it, whereby it provides such access to the interior of the channel as to permit entry therein of the lip of the flashing, and serves so frictionally to grip such lip as to hold the flashing in place without the use of wedges or auxiliary anchoring elements.

In the circumstances, no further discussion is necessary because, in our view, claims 1 and 2 now properly define the extent of the monopoly to which protection may be granted. We recommend that the decision in the Final Action to refuse the present claims be affirmed, but that amended claim 1 and dependent claim 2 be accepted.



G.F. Hughes  
Assistant Chairman  
Patent Appeal Board, Canada

I have reviewed the prosecution of this application and agree with the recommendation of the Patent Appeal Board. Accordingly, I accept amended claim 1 and dependent claim 2. The application is returned to the examiner for the resumption of prosecution.



J.H.A. Gariépy  
Commissioner of Patents

Agent for Applicant

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Dated at Hull, Quebec  
this 12th day of June, 1978