



INTELLECTUAL PROPERTY (GENERAL)

IPO Consultation: Setting The Limit on The Value of Claims Heard in The UK Patents County Court

On 22 October 2010, the Intellectual Property Office (IPO) launched a consultation entitled “Setting the Limit” to determine whether a cap of £500,000 should be put on the value of claims to be heard at the Patents County Court (PCC). In spite of its name, the jurisdiction of the PCC extends to the full range of IP rights and it has concurrent jurisdiction with the High Court in respect of IP litigation of any value. The consultation, which is available on the IPO website, closes on 3 December 2010.

BACKGROUND

The consultation arises out of the recommendations of Lord Justice Jackson in his *Review of Civil Litigation Costs* which was published in January 2010. In it, Lord Justice Jackson endorsed the proposals of the Intellectual Property Court Users Committee (IPCUC) for reforming the PCC, which had already been tested by consultation, saying “the fact that almost universal support for the IPCUC’s proposals was expressed... is compelling. My own experience this year suggests that it is rare for court users or lawyers to agree about anything which is on the reform agenda.” The aim of the proposals is to differentiate the PCC from the High Court, to reduce the cost of lower-value IP litigation, and to ensure that this falls within the jurisdiction of the PCC from the outset.

The PCC was created in 1990 by the Copyright Designs and Patents Act 1988 (CDPA), with a view to providing an affordable forum for IP litigation. Although there is provision in the CDPA for a limit on the value of claims that could be heard by the PCC, this provision was not implemented at the time and, as a result of the Woolf reforms, there has been little need to do so since. In more recent years, cases have been transferred regularly from the High Court lists to those of the PCC and *vice versa*, but in order to reduce uncertainty for litigants and to remove the wasted costs associated with transfers, the UK Government now proposes to impose a cap.

Following the *Jackson Review*, there has been broad support for the proposal from judges, legal practitioners, industry and

businesses. The aim of the current consultation is therefore to determine the level at which the cap should be set.

THE FUTURE OF THE PCC

The proposals of the IPCUC are to be implemented in stages and the current consultation is limited to the question of a cap on the value of litigation that the court could hear. It seeks views on whether interested parties agree with the recommendation of the IPCUC that the figure for the limit on the value of claims heard in the PCC should initially be set at £500,000 (excluding interest) and, if not, what the limit should be and why.

The final stage of the reform is likely to include (somewhat belatedly) primary legislation to change the name of the PCC to the Intellectual Property County Court.

PATENTS

Persons Skilled in the Art: Obviousness and Sufficiency

Reversing a High Court decision on the invalidity of two patents, in *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2010] EWCA Civ 819, Lord Justice Jacob has held that the person skilled in the art can differ, depending on whether the test is used to determine obviousness or in relation to sufficiency and claim interpretation.

BACKGROUND

Seismic techniques are used in oil and gas (hydrocarbon) exploration to identify layers in sedimentary rock that might contain hydrocarbon deposits. Prior to the invention of the patent for under-sea exploration, the only way to find out whether hydrocarbon was present in an identified layer was to drill an exploration well, costing around US\$25m and with a success rate of one in 10.

Controlled Source Electromagnetic (CSEM) surveying is a powerful geophysical tool for mapping electrical resistivity in geological structures beneath the sea floor. The patent, owned by Electromagnetic Geoservices (EMGS), described the use of CSEM on a previously identified (*e.g.* by seismic methods) layer to find out whether it contained hydrocarbon. Schlumberger claimed that the patent was invalid on grounds of obviousness and lack of novelty. At first instance, Mann J held

that the patent was invalid on the ground of obviousness. EMGS appealed this decision to the Court of Appeal.

PERSON SKILLED IN THE ART

Jacob LJ, giving the leading judgment of the Court of Appeal, first set about determining the person skilled in the art. He held that the kind of scientist who would be engaged actively by oil and gas exploration companies to find hydrocarbon reserves would be an exploration geophysicist. Such an individual would understand the use of seismics. An exploration geophysicist would have a vague knowledge of CSEM but would have no apparent use for it. An exploration geophysicist could not perform the method of the patent, as one would need the skills of a CSEM expert. Also, to determine the scope of the claims, it was common ground that you would consider them through the eyes of a notional team including both exploration and CSEM geophysicists.

The “person skilled in the art” is referred to in the European Patent Convention in Articles 69, 83 and 56. Articles 69 and 83 are concerned with the position post-grant of the patent; Article 56 refers to the person skilled in the art pre-grant. Jacob LJ rejected Schlumberger’s contention that the same phrase could not have different meanings and stated the flaw was to assume that “the art” was necessarily the same both before and after the invention is made. The assumption may be correct in most cases, but some inventions are themselves art-changing. If a patentee says “marry the skills of two different arts to solve a problem,” marrying may be obvious or it may not. If it is not, and doing so results in a real technical advance, then the patentee deserves and ought to have, a patent. His vision is out of the ordinary.

Jacob LJ held that this was not to say that a different construction was being given to the phrase “person skilled in the art” in the different Articles. It was because the phrase was being applied to different situations. As Jacob LJ explained, where the issue is claim construction or sufficiency, one is considering a post-patent situation where the person skilled in the art has the patent in hand to tell him how to perform the invention and what the monopoly claimed is. But *ex-hypothesi*, the person skilled in the art does not have the patent when considering obviousness and “the art” may be different if the invention of the patent itself is art-changing.

Jacob LJ held that, in this case, the issue should be approached in two ways. First, would it have occurred to the notional exploration geophysicist that using CSEM would solve the problem? Second, would the notional CSEM expert know of the exploration geophysicists’ problem and, if so, would the CSEM expert appreciate that CSEM had a real prospect of being useful to solve the problem? On the evidence, Jacob LJ concluded that the answer to both questions was in the negative.

Citing *Haberman v Jackel* [1999] FSR 683, Jacob LJ noted that *...there was no real explanation of why the idea was not taken up well before the date of the patent. The simplest explanation—indeed the only one that fits the known facts—is that the inventors hit upon something which others had missed.* After finding that none of the cited prior art invalidated the patent, the appeal was allowed.

Tate & Lyle Technology Ltd v Roquette Freres: Claim Construction Destroys Novelty

The Court of Appeal of England & Wales in *Tate & Lyle Technology Ltd v Roquette Freres* [2010] EWCA Civ 1049 has held that, on the basis of the facts presented, the construction of a patent claim destroyed its novelty.

BACKGROUND

The Claimants, T&L, alleged that Roquette’s patent was invalid on the grounds of lack of novelty and obviousness. The claim in issue was “the use of maltotriitol to modify or control the form of maltitol crystals”.

At first instance, Mr Justice Lewison had held that the patent was anticipated by at least five items of prior art and also that the patent was unpatentable because it was a discovery.

DECISION

Roquette accepted that, if Lewison J’s decision had been correct on the construction of the patent, then its appeal would fail. The interpretation of the claim in the patent in suit turned on what was meant, in context, by “use”, “modify or control” and “form”.

Noting that the claim spoke of modifying or controlling the form of the crystals, not of modifying or controlling the maltotriitol, or the level of the maltotriitol, Lloyd LJ rejected Roquette’s contention that “modify” applied to crystalline maltitol whereas “control” applied to the pre-crystalline stages, stating that this was not supported by the description which referred to controlling the maltitol content both upstream and downstream of crystallisation.

Lloyd LJ accepted that the skilled reader is taken to know that the patentee is trying to claim something that the patentee considers to be new, so the skilled reader will be strongly averse to ascribe to the claim a meaning which covers that which the patentee acknowledges is old. In this case, however, Lloyd LJ held that

...the question is nevertheless one of construction, and whether what is claimed is or is not new will depend on, rather than be determinative of, the construction of the claim. There is no rule that because prior art is referred to in the specification, that prior art cannot be found to have anticipated the invention claimed.

In conclusion, Lloyd LJ upheld the decision of the High Court that

...the skilled reader would conclude that what was being described included not only the case where the level of maltotriitol is not that which is desired, so that it has to be adjusted, but also the case in which the analysis shows that it is suitable, and can therefore be left alone.

Since Roquette had accepted that the Court of Appeal's decision on construction would be decisive, the appeal was dismissed.

Grimme Maschinenfabrik GmbH & Co KG v Derek Scott (t/a Scotts Potato Machinery): Contributory Infringement and “Means Essential”

In *Grimme Maschinenfabrik GmbH & Co KG v Derek Scott (t/a Scotts Potato Machinery)* [2010] EWCA Civ 1110, Grimme's patent related to a machine for sorting potatoes from the by-products of the harvesting process, such as earth, stones and stalks. The significant part of Claim 1, for the purpose of this dispute, was to a machine with a number of rollers arranged in pairs on parallel that which rotated in opposite directions “characterised in that the roller bodies comprise an elastically deformable shell part”.

Mr Scott sold a competing potato-separator called the “Evolution” which had steel rollers. He separately sold rubber “spiral” rollers, which could be substituted for the metal rollers on the Evolution machine.

Jacob LJ rejected Mr Scott's submission that the supply of a complete machine with steel rollers could not be the supply of a “means, relating to an essential element of the invention, for putting the invention into effect”, because it was an entire unit capable of being used as supplied. The fact that a steel-rollered machine, so long as it remained steel-rollered, did not infringe and was capable of lawful use as a complete machine in that state was, in Jacob LJ's view, irrelevant. The requirements as to suitability and knowledge of intended use limited the scope of the statutory tort in relation to such products and it was not a question of whether the product itself was capable of lawful use without alteration, addition or adaptation. Furthermore, Jacob LJ held that there was no reason why a device to which a part could be readily added to make it fall within a claim should be a “means essential”, but a device from which a part could readily be removed or replaced to make it fall within the claim should not be such a means.

As to what was needed to satisfy the requirements of knowledge and intention for contributory infringement under Section 60(2), following *KCI Licensing v Smith & Nephew* [2010] FSR 740, Jacob LJ held that it was clearly the intention of the person supplied and not of the supplier himself that was key.

Accordingly, the Lords Justices upheld Floyd J's decision that the machine and its rollers were designed in order to enable the steel rollers to be replaced with rubber rollers and that, on the evidence, Mr Scott knew (and it was obvious to a reasonable person in the circumstances) that the machines were both suitable for running with at least two pairs of rubber rollers.

COPYRIGHT

Harry Potter v Willy the Wizard

In *Paul Gregory Allen (acting as trustee of Adrian Jacobs (deceased)) v Bloomsbury Publishing plc* [2010] EWHC 2560 (Ch) Mr Justice Kitchin denied a summary judgment application against claims that Harry Potter and the Goblet of Fire infringed the copyright in Willy the Wizard.

BACKGROUND

Willy the Wizard (WTW) was written by Mr Adrian Jacobs in 1987 and published in the United Kingdom by Bachman & Turner in the same year. Mr Jacobs was declared bankrupt in 1989 and died in February 1997. In 2004, the Official Receiver in Mr Jacobs' bankruptcy assigned the copyright in *WTW* along with any accrued causes of action to Mr Jacobs' son, Jonathan Jacobs. In March 2004, solicitors acting for Mr Jacobs wrote to Ms Rowling asserting that the five *Harry Potter* books that had then been published infringed copyright in *WTW*. The allegation was refuted and after three months of correspondence, the matter was not perused.

Mr Jonathan Jacobs appointed Mr Allen as trustee of Mr Jacobs' estate, and assigned the copyright and causes of action to him. On 2 July 2008, new solicitors instructed by Mr Allen and Mr Jacobs' estate wrote to Ms Rowling renewing the allegation of copyright infringement. While it was still asserted that the same five *Harry Potter* books infringed, the letter stated that Mr Allen only intended to pursue a claim in relation to *Harry Potter and the Goblet of Fire (Goblet)*. A claim was ultimately made against Ms Rowling and Bloomsbury Publishing Plc, the publisher of *Goblet* in the United Kingdom.

The Defendants applied for summary judgment on the basis that Mr Allen had no real prospect of succeeding in the claim since the books were not similar save at the most generalised level and that any similarities between them had arisen by chance. Ms Rowling claimed never to have heard of *WTW* or Mr Jacobs prior to the publication of *Goblet*.

At the heart of Mr Allen's case, however, was an allegation that in 1987, Mr Christopher Little, who became Ms Rowling's literary agent some eight years later, was given copies of *WTW* and that he gave a copy to Ms Rowling before she wrote *Goblet* or any of the other books in the *Harry Potter* series.

THE ISSUES

The Alleged Similarities

Mr Allen's case was that WTW had five main plot elements and that the same elements were the theme of and important to the plot of *Goblet*. These five main elements of plot architecture were as follows:

- The main characters of *WTW* and *Goblet* are wizards who are to compete in a wizard contest that they ultimately win.
- The main characters are required to deduce the exact nature of the main task.
- The main characters uncover the nature of the main task covertly in a bathroom.
- The main characters complete the main task using information gained from helpers.
- The main task for the main characters involves the rescue of human hostages imprisoned by a community of half-human, half-animal creatures.
- Off this "spine" of main elements was said to hang the ribs of the sub-plots, themes and incidents of *WTW*. Each of these sub-elements was also said to be found in *Goblet*, making a total of 27 similarities.

Access and Copying

- Mr Allen's case on access was that Mr Little was given copies of *WTW* in 1987 and that Mr Little gave a copy to Ms Rowling at some point before she wrote *Goblet*, or any of the other of the *Harry Potter* books. On the evidence, the judge was not prepared to accept that Mr Allen had no real prospect of establishing that Ms Rowling did not have access to *WTW* as alleged and copied from it. There were inconsistencies in and issues with the Defendants' evidence, some of which Mr Allen had not been afforded an opportunity to test. Moreover Mr Allen's case was supported by two experts, whose evidence the judge was not prepared to discount outright.

REPRODUCTION OF A SUBSTANTIAL PART

Kitchin J was not prepared to grant summary judgment to the Defendants on the final issue, namely whether the similarities relied upon by Mr Allen amounted to a substantial part of *WTW*.

Applying *Baigent*, the judge accepted that copyright does protect the content of a literary work, including the selection, arrangement and development of facts, incidents and the like. In assessing the crucial question as to whether a substantial part had been taken, the court must have regard to all the facts of the case, including the nature and the extent of the copying, the quality and importance of what has been taken, the degree of originality of what has been taken or whether it is commonplace, and whether a substantial part of the skill and

labour contributed by the author in creating the original has been appropriated.

Applying these principles, the judge considered the similarities on which Mr Allen relied constituted ideas that were relatively simple and abstract and he strongly inclined to the view that they were at such a high level of generality that they fell towards the ideas rather than the expression. However, he did not feel able at this stage to say that Mr Allen's case was so bad that it could properly be described as fanciful. As *Baigent* made clear, a judgment has to be made as to where the line needs to be drawn in light of all the facts, including the degree of originality of the literary material taken and its importance to the original work. Mr Tucker's evidence was that the similarities comprised ideas and devices that were original and unusual and constituted what he described as plots and themes of *WTW*. Moreover, they constituted, on Mr Allen's case, the "spine" of five main elements and the ribs "of some 22 sub-elements" that ran right through *WTW*. While the judge had reservations about the repetition they involved, he accepted that there was a real prospect of establishing that collectively they represented the core of its architecture.

TRADEMARKS

Socks World International Ltd and Beko Plc: Intention and Unfair Advantage

Taking into account the judgment of the European Court of Justice in *L'Oréal v Bellure* C-487/07, Daniel Alexander QC overturned the hearing officer's decision rejecting an opposition by Beko against Socks World's application for the stylised trade mark BEKO SPORT, finding that use in the United Kingdom of the mark would take unfair advantage of the distinctive character or repute of Beko's earlier BEKO mark under Section 5(3) of the Trade Marks Act 1994.

BACKGROUND

Socks World applied for a UK trade mark in Class 25 covering "clothing, footwear and headgear" for BEKO SPORT.

Beko, part of a substantial Turkish-based group of companies supplying white goods throughout Europe under the BEKO mark, opposed the application under Section 3(6) (bad faith) and Section 5(3) (unfair advantage) of the Trade Marks Act 1994, basing its opposition on three UK registrations for BEKO in Classes 7, 9 and 11. Evidence showed that the mark was first used in the UK in 1991 as a word mark and in a distinctive, stylised font. Since then there had been substantial use on white goods. Beko also claimed a reputation in sport due to its sports sponsorship arrangements, in particular with Millwall FC which had featured the BEKO mark prominently on players' shirts.

The hearing officer, making the decision prior to *L'Oréal*, rejected Beko's opposition.

DECISION

On appeal, Mr Alexander agreed with the hearing officer's finding that BEKO's earlier marks would be known by a significant part of the relevant public and have a reasonably strong reputation.

Mr Alexander confirmed that the marks were "similar to a very high degree" as the only difference between the BEKO SPORT and the earlier BEKO marks was the addition of the word SPORT. In every other respect (particularly the font) the marks were virtually identical. Further, there was no explanation from Socks World as to why it had used the same font.

Mr Alexander agreed with the hearing officer that whilst Beko had promoted its marks in a sporting environment through advertising and sponsorship, it did not have a sporting reputation as such. However, the "heart of the objection" was that the Applicant sought to register the identical mark of the shirt sponsor of a football club. Accordingly, what mattered was the sporting connection with clothing that the sponsorship of the Millwall FC had produced.

Mr Alexander further found that the case based on Beko's reputation in the BEKO mark in respect of household goods had not been sufficiently analysed.

Following *L'Oréal*, the UK Intellectual Property Office (IPO) could now give greater weight to Beko's evidence that Socks World intended to benefit from the reputation of Beko's earlier BEKO marks, the "intention" factor now being relevant to the question of unfairness.

Mr Alexander considered whether: (a) the evidence showed that use by Socks World of the application mark would obtain an advantage by benefiting from the power of attraction, the reputation and the prestige of Beko's earlier marks and exploit Beko's marketing efforts without making any such efforts of its own, without compensation for any loss caused to Beko or for the benefit gained by Socks World; and (b) Socks World was attempting to ride on the coattails of the reputation of Beko's earlier marks.

Allowing Beko's opposition under Section 5(3), Mr Alexander held that unfair advantage had been taken of Beko's marks. He emphasised the virtual identity of the respective marks, having particular regard to the specific font and design chosen by Socks World, which had been inadequately explained and the fact that it was not possible to think of any other reason for the adoption of that specific mark other than to signal a connection with Beko and the reputation in its earlier marks.

The fact that the sponsorship deal with Millwall FC meant that the BEKO marks were featured prominently on player's shirts brought Beko's reputation in white goods closer to sports clothing and consequently the goods covered by Socks World's application.

Although it was not strictly necessary to consider the bad faith aspect of Beko's claim, Mr Alexander found that the evidence showed that Socks World knew of Beko's marks and, specifically, that the mark was featured on football shirts. However, there was no evidence that Socks World intended to deprive Beko of use of the BEKO mark or to use the mark so as to extract money from Beko. Consequently, not all the ingredients for a finding of bad faith were present and the hearing officer's decision was upheld.

COMMENT

The lack of evidence as to why Socks World adopted the BEKO SPORT mark and used exactly the same font as Beko's registrations (*i.e.* an examination of Socks World's intentions at the time the application was made) coupled with the fact that the marks were virtually identical was key to Beko's success.

DHL Express (France) v Chronopost SA (Opinion of Advocate General Pedro Cruz Villalón): Injunction Effective Throughout the European Union

On a reference to the European Court of Justice (ECJ) for a preliminary ruling from the Cour de Cassation in France in *DHL Express (France) v Chronopost SA* [2010] C-235/09, Advocate General Pedro Cruz Villalón has opined that an injunction prohibiting an infringer of a Community Trade Mark (CTM) from continuing to infringe has effect throughout the whole of the European Union.

BACKGROUND

Chronopost issued proceedings for trade mark infringement against DHL Express (France) in the French courts, relying on its CTMs and French trade marks for WEBSHIPPING, covering services relating to the collection and delivery of mail. Chronopost acted when it discovered that DHL had used the word WEBSHIPPING in respect of an internet express mail management service.

The Tribunal de Grande Instance de Paris, acting as a CTM court, found that DHL had infringed Chronopost's trade marks and prohibited DHL from continuing to infringe. It also imposed a financial penalty on DHL should it fail to comply with the injunction.

DHL appealed to the Cour de Cassation and Chronopost cross-appealed, claiming that the injunction should apply across the European Union. The Cour de Cassation made a reference to the ECJ, requesting clarification as to the territorial scope of the injunction and financial penalties imposed by the French court.

OPINION

In the Advocate General's opinion, given that the CTM Regulation (40/94/EC, now replaced by 207/2009/EC) confers jurisdiction on competent national courts to assess whether a trade mark has been infringed in one or more Member States and that, where CTMs are concerned, any declaration of infringement from the competent national court applies, in principle, across the European Union, any prohibition on that infringement must apply across the European Union as well. However, this should be limited to a specific geographical or linguistic area if the infringement is found by the competent national court concerned to apply only to that specific area.

As for the financial penalty imposed by the French Court, such coercive measures should also have effect across the whole territory to which the declaration of infringement and the injunction applies. Therefore, if it concerns infringement across the whole of the European Union, any financial penalty imposed on the infringer, should also apply across the whole of the European Union.

Financial penalties, such as those imposed by the French Court, constitute an enforcement measure and take place at a later stage. It would be a matter for the national courts to enforce the CTM court's judgment. However, according to the Advocate General, national courts should be obliged to recognise the effects of the penalty imposed by the CTM court pursuant to the rules on jurisdiction and recognition set out in the Brussels Regulation (44/2001/EC). Therefore, if the enforcing court's national law allows, it should simply impose the same penalty as imposed by the CTM court and, if national law does not allow, it should achieve enforcement in accordance with its own national provisions.

COMMENT

The ECJ's press release states that the Advocate General had opined that, "in principle", a declaration of infringement has effect throughout the entire area of the European Union where it relates to a CTM. The use of the words "in principle" acknowledges situations where this may not be the case, but the statement does not elaborate.

As for the enforcement of coercive measures, where a national court's law does not allow the application of the same penalties as imposed by the CTM court, difficulties may well arise for that court in deciding how to achieve similar enforcement in accordance with its own laws. We await the ECJ to conclude their deliberations and give judgment.

DESIGNS

Dyson Ltd v Vax Ltd: Overall Impression, Design Corpus and Design Freedom

SUMMARY

Mr Justice Arnold held that Vax Ltd had not infringed a UK registered design owned by Dyson Ltd in relation to the latter's Dual Cyclone vacuum cleaner by importing and marketing the Mach Zen C-91 MZ vacuum cleaner. Although there were some similarities between the designs, there were also some significant differences, making the overall impression produced by the two designs different.

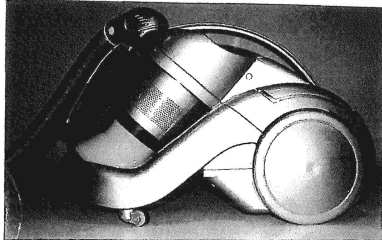
DECISION

The informed user was understood to be a knowledgeable user of domestic vacuum cleaners. The correct date for carrying out the comparison was the date of the registered design. Further, the relevant design corpus was that which existed at that date.

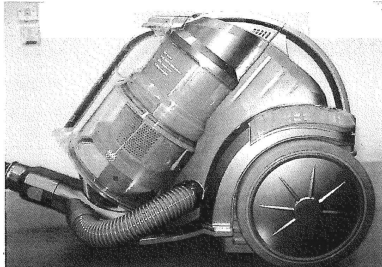
Dyson's novelty statement was as follows: "The features of the design for which novelty is claimed reside in the shape and configuration applied to the article as shown in the representations". Arnold J held that, whilst the novelty statement should be taken into account, it should not be read as if restricting the design only to those features specified in the statement. If it could be shown objectively that aesthetics had also been relevant to the question of design, then the feature could not be said to have been dictated solely by its technological function.

Arnold J agreed with Vax, which submitted that design freedom may be constrained by various factors: 1) the technical function of the product, 2) the need to incorporate features common to such products, and/or 3) economic considerations (*e.g.*, the need for an item to be inexpensive). The degree of freedom of the designer must also be judged by reference to the technical specification of the product being designed. In addition, a registered design should receive a broader scope of protection where the designer had a greater degree of freedom (as Dyson had here) and a narrower scope where the designer had a lesser degree of freedom.

Arnold J considered each of the nine similarities identified by Dyson, keeping the overall impression in mind. In most of the cases, he accepted that the degree of freedom of the designer of the Mach Zen had been restricted by technical considerations, thus resulting in an inevitable, but insignificant, similarity, thereby making minor differences more likely to make the overall impression different. Arnold J decided, therefore, that, whilst there were certain similarities between the designs, the informed user would not consider these to be particularly significant and would also notice the many differences between the designs.



Dyson Ltd's two-stage cyclone dust-separation vacuum cleaner



Vax Ltd's Mach Zen multi-stage cyclone vacuum cleaner

DATABASES

Beechwood House Publishing Ltd v Guardian Products Ltd: Sui Generis Right and Extraction of Substantial Part

The Patents County Court of England and Wales (*Beechwood House Publishing Ltd v Guardian Products Ltd & Ors* [2010] EWPC 12) has refused an application for summary judgment by Beechwood in respect of its claim for infringement of its *sui generis* database right. His Honour Judge Birss QC held that, due to a lack of evidence as to the exact extent of the use of data from the database, Beechwood had failed to show that the Defendants had extracted a substantial part of its database.

BACKGROUND

Beechwood brought a claim for database right infringement under Regulations 12 and 16 of the Copyright and Rights in Databases Regulations 1997/3032 (which implemented the Database Directive (96/9/EC)). Proceedings were issued after lengthy open and without prejudice correspondence in an attempt to reach a settlement. The Defendants' main defence to Beechwood's claim was that the matter had already been settled. Beechwood applied for summary judgment on its claim and/or strike out of the Defendants' defence.

The evidence Beechwood relied on was the use by Guardian of a fictitious entry, a so-called "seed", which did not correspond to a real person, but which did correspond to the real addresses of one of Beechwood's staff. A letter had been sent by Guardian to the address of the "seed".

DECISION

Settlement

HHJ Birss decided that, a letter from Beechwood's solicitors to the Defendants' solicitors, which the Defendants had construed as an offer of settlement, was not such an offer as it was "subject to contract".

Database Right

HHJ Birss decided that the *sui generis* database right subsisted in its database and that Beechwood was the owner of that database right. Accordingly, HHJ Birss decided that the Defendants had no real prospect of defending the issues of subsistence and ownership.

As for infringement, the issue was whether the data in the form used by Guardian represented a "substantial part" of the contents of Beechwood's database. HHJ Birss noted that there was no evidence as to how many entries used by Guardian had actually been derived from Beechwood's database. Accordingly, he could not find that the "substantial part" hurdle had been cleared. Summary judgment on the issue of infringement was therefore refused.

COMMENT

It is interesting that Beechwood thought that it could get summary judgment on its claim in the absence of the crucial evidence as to exactly which, and how much, data had been "extracted". Beechwood was essentially arguing that, based on the fact that one "seed" entry had been "extracted", the Court should infer that a substantial part had been so extracted. This was an argument that simply could not be accepted in the absence of clear evidence.

COMMERCIAL

European Parliament's Committee on the Internal Market and Consumer Protection Briefing Paper on the Proposed Consumer Rights Directive: Disharmony Over Full Harmonisation

In October 2010, the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) published a Briefing Paper on the Proposed Consumer Rights Directive, which recommends minimum harmonisation.

Although the Briefing Paper acknowledges that full harmonisation is desirable from a political and economic point of view, it notes that it would be difficult and expensive to achieve as a result of the existing divergences in national contract laws.

IMCO considers that full harmonisation can only be effective within the scope of Chapter V of the draft Directive and that it is therefore essential that boundaries to its scope are drawn clearly. The four factors it identifies as determining the scope of Chapter V are: i) the status of the contracting parties, ii) the

exclusion of individually negotiated terms (Article 30), iii) the exclusion of contract terms that reflect mandatory or regulatory provisions that comply with Community law or international conventions to which the Community or Member States are party (Article 30(3)), and iv) the exclusion of terms concerning the subject matter and price (Article 32(3)).

The Paper considers these areas in detail and analyses the impact of full harmonisation on Member States' substantive laws and on the workload of the European Court of Justice (ECJ). It also analyses a number of different models of harmonisation.

It is entirely clear that IMCO is against any form of full harmonisation, complete, targeted or unlimited. IMCO challenges convincingly the viability of full harmonisation in the area of unfair contract terms. In particular, it believes that as a matter of policy the new Directive should not be allowed to impact EU Member States outside the scope of the Directive, for example in relation to perceptions of consumer and trader. Nor should it be allowed to impact unduly Member States' laws as they have evolved within the scope of the unfair contract terms regime. The Paper also notes that complete full harmonisation would result in a significant burden on the ECJ in interpreting and controlling the application of the Directive.

The Paper concludes that complete full harmonisation cannot be recommended due to its extreme impact on all Member States' substantive contract law and the requirement of far-reaching changes and additions to Chapter V of the Directive, as currently proposed.

The Consumer Rights Directive has fallen a long way from its heady initial aspiration of ironing out all the wrinkles of consumer law; each body that analyses it chips away a little more.

Gary Fearn (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Ltd: Operative Date for Set-Off of Damages in Different Currencies

In *Gary Fearn (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Ltd* [2010] EWHC 2366 (Ch), the date when the Claimant's damages and the sum he owed to one of the Defendants was to be converted into a common currency and set off to derive a net liability was the date of final determination of liabilities (*i.e.*, the date of judgment), not the date the claim arose.

Previously, the deputy judge assessed damages payable to Fearn, the Claimant, for the Defendants' infringement of his trade mark and passing-off, at approximately £440,000. He assessed the debt owed by Fearn to the second Defendant, De Beer, at approximately €600,000. It was common ground that

the damages awarded to Fearn and the debt to De Beer should be set off and judgment given for a net sum. The parties disputed the date at which the amounts should be converted to common currency. The claim arose in 2005 and judgment was given in 2010. In that time, the Euro/GBP exchange rate shifted substantially. The 2005 rate led to Fearn coming out approximately €41,000 in credit, the 2010 rate led to him owing De Beer €68,000.

As "set-off" has no uniform meaning in English law, the deputy judge set out the principles:

- Set off may be legal or equitable.
- A claim and cross-claim cannot be set-off to extinguish liability until agreement or judgement (which assesses liability).
- For a right of legal set-off to exist the claim and cross-claim must be for sums which are due and which are either liquidated or capable of ascertainment without valuation or estimation at the time of pleading
- Equitable set off will arise where the two claims are (i) reasonable and *bona fide* and (ii) so closely connected that allowing one party to enforce payment without considering the cross-claim would be manifestly unjust. Neither party may exercise rights contingent on the validity of its claim except insofar as it exceeds the other party's claim.
- Under CPR r.40.13 and the court's inherent jurisdiction, the court can order any judgment sum to be set off against any other such sum. The date for this set-off is the date when the existence and amount of the two liabilities is established.
- Where there are different currencies in a set-off, the court should (i) assess principal and add interest accruing up to the date of set-off, (ii) convert the smaller amount into the currency of the larger at that date's prevailing exchange rate, and (iii) order payment of the balance.

The deputy judge held that the date at which currency conversion should occur here was the date on which the amounts of those liabilities were finally determined: 2010, not 2005. The judge held that Fearn (who lost out) should have pleaded change in currency in his claim. However, the higher interest rate on the judgment debt meant that Fearn was ultimately £37,000 up.

The deputy judge held that the date on which a set-off ordered by the court will be effected is when the amount of the two liabilities is finally determined by judgment or agreement. Usually this will be the date of the order, but if it is not, the court has discretion to order the set-off to be effected at an earlier or later date.

As a final twist, because Fearn was insolvent and, ultimately, the Defendants were (viewing the case as a whole) adjudged the successful party, the deputy judge ordered that the £37,000 owed to Fearn be set off against the substantial costs owed to the Defendants on the basis of equitable principles and the court's inherent discretion.

COMMENT

This case provides a clear summary of the nature and operation of set-off, and of the principles involved in setting off when the amounts to be set-off are in different currencies.

***Oceanbulk Shipping & Trading SA v TMT Asia Ltd* – without prejudice negotiations and the interpretation exception**

In *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44, the Supreme Court of the United Kingdom has reversed a decision of the Court of Appeal of England and Wales and added a further exception to the general inadmissibility of without privilege communications—the “interpretation exception”—which brings without prejudice negotiations in line with the approach to pre-contract negotiations.

A dispute arose between two shipping companies over one party's alleged failure to comply with a settlement agreement in respect of a debt owed under freight forward swap agreements (FFAs). After a market-shift, TMT owed Oceanbulk approximately US\$70 million under these FFAs. Following “without prejudice” negotiations, the parties entered into a written settlement agreement. One clause of the settlement agreement required co-operation to close out their FFA contracts in a certain way. There was a dispute as to the interpretation of this clause. TMT alleged that the clause related to only certain types of deals and that representations made by Oceanbulk in the course of the settlement negotiations demonstrated that TMT's interpretation was correct. The upshot of the way the FFAs were closed-out was that Oceanbulk now owed TMT US\$86 million. TMT argued that without prejudice negotiations were admissible in evidence to confirm their interpretation. Smith J found for TMT at first instance and allowed admission. The Court of Appeal allowed Oceanbulk's appeal and ruled the evidence inadmissible.

The question in the Supreme Court case was: should one of the exceptions to the rule be that facts identified during the without prejudice negotiations, which lead to a settlement agreement of the dispute between the parties, be admissible in evidence to ascertain the true construction of the agreement as a part of its factual matrix or surrounding circumstances. Lord Clarke referred to the list of existing exceptions.

- Where the issue is whether without prejudice communications have resulted in a concluded compromise agreement.

- To show that a settlement agreement should be set aside on the ground of misrepresentation, fraud or undue influence.
- To establish an estoppel based on clear statement notwithstanding a failure to conclude settlement negotiations.
- If the exclusion of the evidence would aid perjury, blackmail or “unambiguous impropriety”.
- To explain delay or apparent acquiescence (in limited circumstances).
- In relation to whether the claimant acted reasonably to mitigate loss in his conduct and conclusion of negotiations for the compromise of proceedings.
- The “without prejudice except as to costs” exception.
- In matrimonial cases, confidential communications seeking matrimonial conciliation.

Lord Clarke held that a further exception should exist: a party to without prejudice negotiations can rely upon anything said in the course of them in order to show that a settlement agreement should be rectified. Lord Clarke noted that judges have to distinguish frequently between material that forms part of the pre-contractual negotiations, which is part of the factual matrix and therefore admissible to aid interpretation and material that forms part of a pre-contractual negotiation, which is not part of the factual matrix and is thus inadmissible. Settlement agreements should be treated the same as other contracts in this regard. Lord Clarke stressed that he was not seeking to erode the without prejudice rule or to extend the exception beyond evidence which is admissible in order to explain a factual matrix or surrounding circumstances to the Court.

DATA PROTECTION

Information Commissioner's Office Data Sharing Code of Practice Consultation: Draft Code on Lawful and Effective Data Sharing

On 7 October 2010, the Information Commissioner's Office (ICO) published a draft statutory Code of conduct for the sharing of personal data under its powers under Sections 52A and 52D of the Data Protection Act 1998 (DPA). The ICO is conducting a consultation on the content of the proposed Code. The Code will have statutory effect and, whilst it does not impose additional legal obligations and is not intended to be an authoritative statement of the law, it is designed to be used in evidence in legal proceedings and this is not limited to proceedings under the DPA.

The Draft Code

The draft Code is divided into 12 sections.

Data Sharing and The Law

This section looks at powers and obligations of data-sharers grouped into individuals and public and private sector organisations.

Deciding to Share Personal Data

This section prompts the data owner to consider the reasons for sharing data, the information that needs to be shared, the criteria for sharing and whether the objective could be achieved without sharing data.

Fairness, Transparency and Consent

The draft Code draws a distinction between situations in which users would expect data to be shared and those in which data-sharing would be unexpected or each has different requirements for fairness and transparency.

Security

This section sets out a series of good-practice measures that data controllers should follow, including assessing the value, sensitivity or confidentiality of the data and affording appropriate security.

Governance

The Code urges data sharers to undertake privacy impact assessments and encourages organisations to enter into data sharing agreements in order to set out a common set of rules to be adopted. The Code states that such agreements should be reviewed regularly, particularly where information is to be shared on a large scale or a regular basis.

Individuals' Rights

This section details subject access rights, individuals' rights to object to use of data that causes them substantial, unwarranted damage or distress and their rights to have queries or complaints about the sharing of their data dealt with.

ICO's Powers and Penalties

The Code sets out the ICO's powers in respect of compliance and enforcement, including Information Notices, requesting undertakings, Enforcement Notices and monetary penalties of up to £500,000 for serious contravention of the data protection principles.

Notification Under the DPA

This section provides a reminder that where several organisations share data, each one must be clear about the personal data for which it is responsible and include that information on its notification.

Freedom of Information

This section refers public sector data sharers to information on the ICO website about their obligations under the Freedom of Information Act 2000 and also to the INSPIRE Regulations 2009.

Things to Avoid

The list of things to avoid includes misleading individuals about whether their data is to be shared, sharing excessive or irrelevant information, needlessly sharing personal information, not taking reasonable steps to ensure that information is accurate before sharing it, using incompatible systems that result in the loss or degradation of the personal data, and having inadequate security.

Suggested Contents of Data Sharing Protocol

This section sets out guidance about the purpose of the data sharing initiative, the organisations that will be involved, the data to be shared, the basis for sharing, access and individuals' rights and information governance.

Case Studies

The Code ends with nine case studies applying the good practice principles to real life scenarios including commercial, public and private sector, healthcare and law enforcement (*i.e.*, sensitive personal data).

CONSULTATION QUESTIONS

The consultation seeks to understand whether the draft Code strikes the right balance between recognising the benefits of sharing personal data and the need to protect it, whether it is clear and understandable, adequately covers different types of data sharing, and whether the ICO's powers and penalties are explained clearly enough together with their relevance to data sharing. The Data Sharing Code of practice consultation closes on 5 January 2011.

COMMENT

The DPA has been much misunderstood but has also been the subject of some well-founded criticism, for example in relation to police forces that have been hampered by an inability to share data effectively due to misguided application of its provisions. This has resulted in a negative perception of the Act as pointless red tape and the new Code, if it is well used, may go some way towards redressing this.

SPORT

Giedo Van der Garde BV v Force India Formula One Team Ltd: Breach of Service Agreement, Restitution and "Wrotham Park" Damages

Mr Justice Stadlen in *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB), has found that Force India Formula One Team Ltd was in breach of its contract with Giedo Van der Garde by not providing him with the minimum number of driving kilometres for which Mr Van der Garde had paid US\$3 million in the hope of gaining enough experience to win a Formula One driving seat. Undertaking a thorough review of the law of restitution and total failure of consideration, Stadlen J held that restitution did not apply as the failure of consideration had not been total.

BACKGROUND

In February 2007, Mr Van der Garde, an aspiring Formula One racing driver, entered into a service agreement with Spyker F1 Team Ltd (now Force India Formula One Team Ltd) under which it was agreed that, in respect of the 2007 Grand Prix season, Mr Van der Garde would be permitted to drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000 kilometres.

Following the end of the 2007 Grand Prix season Mr Van der Garde, having only been permitted to drive a total of 2,004 kilometres, issued proceedings against Force India for damages for breach of the service agreement.

DECISION ON LIABILITY

Force India was liable to Mr Van der Garde by not providing the minimum number of kilometres under the contract. In fact, Stadlen J reduced the 6,000 figure to 5,734 kilometres as a result of Mr Van der Garde refusing to take part in one of the races offered by Force India. This meant that Force India was in breach of its obligations by leaving a shortfall of 3,730 kilometres and Mr Van der Garde was entitled to relief.

REMEDIES

Mr Van der Garde argued four alternative claims in respect of the damages and remedies that he was entitled to: 1) restitution of the net amount paid attributable to the kilometres of which he had been wrongfully deprived on the basis of a total failure of consideration, 2) damages for breach of contract consisting of the value of the performance that Force India had failed to provide, 3) damages for breach to compensate Mr Van der Garde for loss of income, and 4) “Wrotham Park” type damages.

Restitution and Failure of Consideration

Two questions arose.

Did the fact that the Defendant permitted Mr Van der Garde to drive 2,004 kilometres mean that the failure of consideration was partial rather than total, such as to exclude the availability of restitution?

If and to the extent that other benefits were received by Mr Van der Garde, does that fact and/or the fact that the consideration payable under the Fee Agreement was intended to cover additional benefits to the Claimant preclude the availability of restitution?

Stadlen J provided a detailed review of the law of restitution encompassing several pages of what was a lengthy judgment. It was with regret however that he found he could not provide damages on this basis as the failure had not been total.

I am bound to say that I reach this conclusion with considerable regret, joining as I do the growing list of judges and academic writers who have expressed the view that the

requirement of proof of total failure of consideration as a necessary condition for an award of restitution is unsatisfactory and liable in certain cases to work injustice.

Loss of the Value of the Performance Due

In the event of the claim for restitution failing, Mr Van der Garde claimed for the value of Force India’s promised performance that had been wrongfully denied. This was defined as the value of the right to test drive the outstanding kilometres as well as the value of the sponsorship rights and paddock passes to which Mr Van der Garde had been entitled. Here, it was the normal measure of damages that applied, *i.e.*, the market value of the service not provided, less the market value of what had been received.

Stadlen J found that, although the negotiations showed that there was no standard or going rate, it did not follow that there was no market value or market rate for testing kilometres. It was a matter of evidence and here, on the strength of the expert evidence, Stadlen J decided that the correct value of a kilometre test was US\$500. The expert evidence had also shown that extra benefits, such as paddock passes, were normally thrown in with the kilometres as part of a test driving package. Therefore, Stadlen J awarded US\$1.865 million to compensate Mr Van der Garde for Force India’s failure to provide 3,730 kilometres of test driving and associated benefits.

Career Damages

Here, Mr Van der Garde claimed consequential losses arising from the loss of the opportunity to obtain a salary in remunerative Formula One testing and racing competitions, as well as the loss of opportunity of obtaining sponsorship and merchandising income.

The expert evidence had shown that competition to obtain a race seat in a Formula One team was intense. However, the experts differed as to Mr Van der Garde’s prospects. In the end, Stadlen J accepted the Claimant’s expert evidence that Mr Van der Garde’s chances of ultimately obtaining a paid Formula One race seat would have been doubled had he been able to complete the 6,000 kilometres to which he had been entitled. Therefore, Stadlen J said, Mr Van der Garde had been deprived of a real and substantial chance of obtaining financial benefit as a result of Force India’s breach. Further, although it was difficult to put a financial figure on this loss, it did not follow that only nominal damages applied. Having said that, however, due to the large number of imponderables, the court had to exercise caution and restraint in assessing an amount. In Stadlen J’s view, US\$500,000, as contended by Mr Van der Garde, was too high and he awarded US\$100,000.

Wrotham Park Damages

This claim was relied on only as an alternative to the primary claim for restitution and the secondary claim for loss of the

value of the benefits said to be wrongly withheld by Force India.

Stadlen J observed that in *Wrotham Park*, damages had been awarded on the basis that awarding a nominal sum, or no sum, would have resulted in a manifest injustice. Instead, a sum, which could reasonably have been demanded in exchange for releasing the wrongdoer from the covenant under the contract, was awarded. Stadlen J referred also to *Attorney General v Blake* [2001] 1 AC 268, in which Wrotham Park damages had been awarded and measured as against the benefits gained by the wrongdoer from the breach, and held that, on these authorities, it was open to him to make a Wrotham Park damages award.

The question was, therefore, how much would Mr Van der Garde have obtained following a hypothetical negotiation in which he had made reasonable demands as a *quid pro quo* for releasing Force India from its obligation to provide 3,730 further kilometres and associated benefits?

In conclusion, Stadlen J found that Mr Van der Garde would have sought a sum of money that reflected the value of the outstanding kilometres and associated benefits. Expert evidence had shown this to be US\$500 per kilometre. Therefore, the likely outcome of these hypothetical negotiations was US\$500 multiplied by the 3,730 outstanding kilometres amounting to a total of US\$1.865 million

Olympics, Paralympics and London Olympics Association Rights: Remedies for Infringement

The Olympics, Paralympics and London Olympics Association Rights (Infringement Proceedings) Regulations 2010/2477 set out the remedial orders that a court can make, with effect from 8 November 2010, in relation to goods, materials or articles that infringe the London Olympics association right (LOAR).

BACKGROUND

The Olympic Symbol, etc., (Protection) Act 1995, as amended, confers exclusive rights on the London Organising Committee of the Olympic Games and Paralympic Games (LOCOG) and the British Olympic Association in respect of specific Olympic-related properties, such as the Olympics rings symbol, the Olympic motto and certain protected words. Any of these can be infringed by the use, in the course of trade, of a representation of any of those properties. They can also be infringed by a representation so similar as to be likely to create an association in the mind of the public. Association in this context includes any kind of contractual, commercial, corporate or structural connection.

The London Olympic Games and Paralympic Games Act 2006, amongst other things, created LOAR, conferring on LOCOG the exclusive right to use representations that create an association between the London Olympics and goods or

services. LOAR is not, however, confined to specific elements of the Olympic brand, but applies to the London Olympics as a whole. In assessing infringement, the court may consider whether the advertiser has used certain expressions such as “games”, “2012” or “Twenty Twelve”, either in combination with each other or with any word or words from a second category of expressions, including “gold”, “medals”, “London” and “summer”. There may still be infringement, however, if none of these expressions is included. LOCOG, as the proprietor of LOAR, has the right to take enforcement action against individuals or organisations that infringe the right, including by issuing court proceedings.

REMEDIAL ORDERS

The new Regulations specify the remedial orders that the court can make in relation to goods, materials or articles that infringe LOAR. Regulation 2 provides that the court may order the erasure of an offending representation from any offending goods, material or articles or the destruction of the infringing goods, material or articles in question. Under Regulation 3, LOCOG may apply to the court for an order that any infringing goods, materials or articles be delivered up to it (or such other person as the court directs). Additionally, under Regulation 4, LOCOG may apply for an order that any items delivered up under Regulation 3 may be destroyed or forfeited. It also confers a power to make rules of court to provide for the notification of any persons who might have an interest in any such items.

ACKNOWLEDGEMENTS

The European IP Bulletin is produced in association with

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