Intellectual Property Magazine
www.intellectualpropertymagazine.com

THE PATENT FILES

Jonathan Radcliffe,
Nabarro LLP

Cutting the cost of justice down to size

What would it take to make patent litigation affordable for all without jeopardising justice?

English patent litigation has always been expensive. And it's not hard to see why. Patent actions can be a heady mix of complex technical facts combined with complicated questions of law. They require specialist lawyers and expert witnesses who are usually at the top of their professions. Most patent cases are fought for high stakes. All of this provides every incentive to prepare cases thoroughly but, inevitably, that comes at a price.

Many attempts have been made to address this, but with mixed success. Effort has been lavished on the quality and sophistication of the process, but at the cost of over-engineering.

"These reforms represent a dramatic shift in the way less complex cases are litigated. The reformed PCC should now offer a realistic forum for small and medium-sized enterprises."

The current system is dysfunctional. The Patents Court gives a world class service to litigants for major cases, but the system in the Patents County Court (PCC), the venue for smaller cases, results in such litigation being prohibitively expensive.

The English judiciary has recently published a major review of the costs of civil litigation. This makes extensive recommendations for reforming the civil litigation system, designed to promote justice at proportionate cost.

The review recognises that the Patents Court is working well, and provides a high quality forum for complex high value litigation. But the report also recognises that small and medium-sized enterprises are priced out of the system and that larger companies are reluctant to litigate their smaller cases. Although the PCC was established to offer a fast and cheap forum, this objective has been frustrated by the general procedural reforms of the last ten years which have imposed identical rules on both the PCC and the Patents Court.

The momentum for change created by judicial recognition of the strengths and weaknesses of the English system has come at a time when the recession has forced many companies to take a long hard look at why – and in many cases, whether – they should be embarking on patent litigation. Hard questions are being asked about the potential benefits and potential costs, especially in a system where the loser pays the winner's legal costs.

Can England's world class system be reformed to marry its range of sophisticated tools for litigating high value cases with greater cost-effectiveness, so that smaller cases can benefit? The current proposals are encouraging. They look likely to improve the system for smaller cases immeasurably. This should in turn better inform the way high value cases are litigated and whether that process could also benefit from reform.

The review recommends significant changes to the way smaller cases are fought in the PCC. These will apply to all smaller intellectual property cases, not just patent cases. The major proposals are that:

- The parties must set out their cases in full in writing at the outset (this must include evidence as well as legal arguments);
- There will be no automatic document disclosure. The Court will only allow or require document disclosure, product or process descriptions, experiments, further factual evidence and expert evidence where it is directed to specific, identified issues. Such further material must satisfy a cost-benefit test (the value of the material as an aide to resolving issues versus the cost of producing and dealing with it);
- Trials will be limited to a maximum of two days, divided equally between parties so far as possible and any cross-examination will be strictly controlled; and
- There will be a cap of £50,000 on the costs that can be recovered from the losing party, and a cap of £500,000 on damages.

These reforms represent a dramatic shift in the way less complex cases are litigated. The reformed PCC should now offer a realistic forum for small and medium-sized enterprises to resolve their disputes and for larger companies to litigate their smaller cases.

If successful, it is inevitable that equivalent reforms will be strongly mooted for complex high value cases. These proposed reforms were largely driven by the English patent judges. It would be unrealistic to suppose that they were doing so without having considered the consequences for complex high value cases and without being supporters of what may be a transformational process generally.

Whilst the PCC reforms will be a test-bed for complex cases, there is no reason why some changes could not be made now that would keep the best of the current system but bring about immediate and worthwhile change. Some suggestions are:

- More active case management by the future trial judge to narrow the issues earlier on (for example forcing the parties to explain their stance on the common general knowledge);
- Doing away with automatic document disclosure where in practice it is not necessary and achieves little; an obvious category is disclosure of inventors' records in connection with inventive step. Similarly, reforming the UK approach to experiments which also rarely achieves anything of significance in most cases; and
- The adoption of US-style *Markman* hearings to establish claim interpretation.

Where appropriate this would have the double benefit of crystallising the issues for the remainder of the case and being a catalyst to encourage parties to settle.

Jonathan Radcliffe is a member of the Nabarro intellectual property group, and is based in London.