Kluwer Patent Blog

Summary judgment procedure for patent disputes: Court of Appeal overturns Patent Court's decision in Virgin v Delta

Brian Cordery (Bristows) · Tuesday, March 8th, 2011

Summary judgment decisions are unusual in patent cases in the UK. The court will generally only be prepared to determine a claim for patent infringement in very clear cases which do not require oral evidence to be heard. In order to succeed on an application for summary judgment, the applicant must demonstrate that the respondent has "*no real prospect of success in his claim or defence*" as the case may be. In determining such prospects, the court is not entitled to conduct a trial on documents without disclosure or cross-examination.

The difficulty for litigants seeking summary judgment on a question of patent infringement has been illustrated recently in the case Virgin Atlantic Airways Ltd v Delta Air Lines Inc [2011] EWCA Civ 162. The dispute concerned aircraft seats manufactured by third party Contour. In an earlier decision from the Court of Appeal, Contour had been found to infringe Virgin's patent (Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group Ltd [2009] EWCA Civ. 1062). Subsequently, in opposition proceedings in the EPO, the patent claims were amended, such that they only contained claims to *"A passenger seating system for an aircraft…"*.

Delta alleged that neither they nor Contour infringed the amended claims. The seats concerned were manufactured in Wales and supplied to Delta with detailed instructions for their assembly on the aircraft. At first instance, the judge (Arnold J.) held that

(1) Contour did not infringe because claim 1 required a seating system comprising a plurality of seat units assembled and arranged in an aircraft. The system was only assembled abroad.
(2) As a matter of law it was arguable that the manufacture in the UK of a complete kit of parts for assembling a patented device outside the jurisdiction could infringe a patent.
(3) But as a matter of law it was not arguable that the manufacture in the UK of an incomplete kit of parts subsequently exported could infringe.

Commenting on the use of the summary judgment procedure in patent disputes, the Court of Appeal (leading judgment by Jacob L.J.) took the view that in a case such as the present, where the technology was relatively simple to understand, there was really no good reason why summary procedure could not be invoked. No one should assume that summary judgment was not for patent disputes; it all depended on the nature of the dispute. However, the Court of Appeal considered that the judge had been wrong on point (1) above, for the following reasons.

As usual, the language of the claim was to be construed on familiar Kirin-Amgen principles: what

would the person skilled in the art have understood the language of the claim to mean? It was classical patent law that "*for*" claims were normally construed as meaning "*suitable for*". The EPO guidelines were consistent with this. The Court was aware of no case law which contradicted this approach. Accordingly, the construction of "*system for an aircraft*" should be approached with a very strong predilection for understanding it as meaning "*suitable for*". The claim should only be read as restricted to a "*system on an aircraft*" if one was compelled to do so when reading the claim in light of the specification as a whole. As it was, the later claim elements were inconclusive. They pointed in both directions and so did not compel the judge's construction.

Consequently, Delta had not discharged their burden of showing that Virgin had no real prospect of success at trial.

As for Arnold J's second and third points above, the Court of Appeal considered it not appropriate to decide these rather abstract questions of law on summary judgment. Pointing to cases and lawyers' opinions from Germany, Holland and some other countries, Jacob L.J. commented that the position across Europe was not well settled and that there was room for development of the law. Since the question would in any event be highly fact sensitive, it was better to decide the matter on the basis of concrete facts.

So while the claims (and technology) of a patent dispute might be simple enough for the summary procedure to be invoked, this will not guarantee that the application of legal principles on construction will be simple enough for the Patents Court and Court of Appeal to agree!

Co-author: Ailsa Carter
Associate, Bristows

This entry was posted on Tuesday, March 8th, 2011 at 1:17 pm and is filed under Extent of Protection, Procedure, Scope of protection, United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and pings are currently closed.