

Kluwer Patent Blog

English Court underlines importance of Mindset and the Common General Knowledge

Brian Cordery (Bristows) · Thursday, February 20th, 2014

Eugen Seitz AG v KHS Corpoplast GmbH and Norgren AG [2014] EWHC 14 (Ch) is an interesting case relating to the valves in stretch blow moulding machines used to make plastic bottles. The patent was alleged to be invalid for both lack of novelty and obviousness, although the Defendants denied that the relevant prior art had actually been made available to the public. In the alternative, the claimants sought a declaration of non-infringement in relation to certain claims of the patent. The trial judge was Roth J, who does not hear many patent cases but is gaining experience all the time.

The sole novelty citation was a fax sent around nine years before the priority date from the head of design for customised components at the Second Defendant, Norgren (Mr Rymann) to the Head of Engineering (Mr Vogel) and the Quality Control Manager (Mr Wagner) at the First Defendant, KHS. At the time, Norgren was supplying KHS with valves for use in its rotary stretch blow moulding machines pursuant to a business relationship that went back over ten years. The first question the Court had to consider was whether this fax was confidential or whether it had been disclosed to at least one person who was free in law and equity to use it. In particular, the Court considered whether the information was “*imparted in circumstances importing an obligation of confidence*” in accordance with the test in *Coco v Clark* [1969] RPC 41. The Defendant alleged that the fax was confidential as between Norgren and KHS on the basis that the two companies were part of a joint development programme for the particular type of blowing valve. The Judge agreed, holding that “*it would have undermined the commercial basis of this work if either Norgren or KHS had been free to disclose information about those products to third parties*” especially considering the fact that it was “*a project relating to the development of customized products specifically for KHS, designed to give it an advantage over its competitors in a very competitive industry with few major players.*”

The case on obviousness related to the supply of four linear stretch blow moulding machines manufactured by a company called Soplara (a small player in the stretch blow moulding machine market) to two Alpla group companies (Alpla being a large multi-national group with bottling and packaging plants around the world) a few months prior to the priority date. The first issue for the Court to consider was again whether this supply constituted disclosure to the public. The evidence was that Alpla was

Soplar's only customer and they had a close relationship. The patentees submitted that the supply by Soplar to Alpla was akin to an intra-group supply. However, the Judge held that they were always independent companies and that there was no indication of common ownership. He noted that even if there was a contractually exclusive supply arrangement, Alpla was clearly free to purchase, and did purchase machines from other manufacturers. This was therefore an independent supply and thus a "disclosure to the public". As the supply was held to be non-confidential, the Judge then had to consider whether the invention was obvious in light of the machines supplied. The invention related to the valves which control the high pressure blowing air in the blowing station of a rotary stretch blow moulding machine and provides that both the piston head and piston shaft are completely plastic. It was common ground that the CGK involved a perception that metal had to be used, and that plastic would be unsuitable. Some of the valves used in the cited prior art had some plastic incorporated in the piston, but were largely enclosed by metal pieces. Moreover other valves used in the same prior art system were still made entirely of metal. The Judge held that this prior art supply "*would not have displaced the mindset of the skilled person that... the piston could not be made entirely of plastic*". One of the influencing factors was the particularly conservative nature of the industry where the consequences of failure or defects in the blown bottles were commercially very significant. The patent was therefore held to be inventive.

The Judge then went on to consider infringement and held that on either of two possible constructions of claim 1, the Defendants infringed (the Defendants had already admitted infringement based on one of these constructions). The patent was therefore valid and infringed.

The decision is interesting as it provides a further instance of importance of the common general knowledge and the mindset of the skilled person, particularly when addressing the issue of inventive step. This case turned at least in part on the perception that metal had to be used for the valves because of the very high pressure and repeated wear involved. The Court relied upon a typically pithy statement of Jacob LJ from the Union Carbide case from 1997: "*invention can lie in finding out that that which those in the art thought not to be done, ought to be done*".

It is noteworthy that the main trial took place over 12 months before judgment was handed down. The delay was said to be due to an "unfortunate misunderstanding" although what that could be remains a matter of mystery.

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