The Court of Appeal affirms approach to plausibility

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by Brian Cordery

The Court of Appeal handed down its decision in Idenix v Gilead [2016] EWCA Civ 1089 in a dispute involving SOVALDI® (sobosbuvir), which is sold by Gilead as a treatment for chronic hepatitis C infection in adults. At first instance, Arnold J held (in an epic 621 paragraph judgment) that Idenix’s Patent claiming a family of nucleoside analogues for treating HCV and other Flaviviridae infections (“the Patent”) would have been infringed by the making and selling of SOVALDI® but that the Patent was invalid for lack of novelty, lack of inventive step, insufficiency and added matter. The Court of Appeal has upheld Arnold J’s decision on all material respects.

Introduction

Perhaps the most interesting element of the judgment concerns insufficiency, which was central to the Patent since it is a requirement for all of the compounds exemplified by the claims (since 1988) would be outside the person’s mind at the time of invention. To support its position, Idenix asserted that information formerly part of the OIB of the EPO is relevant, a position which Arnold J had reflected on as being unusual and partially attributable to an attempt to reverse normal ordering of statements.

A key finding which was subject to appeal was whether, if it was OIB that the potential family of nucleoside analogues had the potential to be efficacious in treating HCV. Arnold J noted that Arnold J had held in his provisional stance that legal title has been transferred from the priority applicant to the patentee during the priority year and that the priority must be to challenge a patentee’s right to claim priority in circumstances where the patentee is unable to show that legal title has been transferred. It appears therefore that there may be some materials and decisions that could challenge this orthodoxy. It appears therefore that there may be some materials and decisions that could challenge this orthodoxy.

At first instance, Arnold J followed two first instance English Court decisions which suggest that the transfer of equitable title to an earlier filed US application. The Court of Appeal did not consider that it needed to consider the reference to the question of whether the transfer of equitable title to an earlier filed US application. The Court of Appeal did not consider that it needed to consider the reference to the question of whether the transfer of equitable title to an earlier filed US application. The Court of Appeal did not consider that it needed to consider the reference to the question of whether the transfer of equitable title to an earlier filed US application. The Court of Appeal did not consider that it needed to consider the reference to the question of whether the transfer of equitable title to an earlier filed US application.

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Novelty/Priority

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Insufficiency

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As a result, the Court of Appeal confirmed that the same approach should be adopted when assessing plausibility within the context of inventive step, insufficiency and added matter. The Court of Appeal has upheld Arnold J in all material respects.

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