

Trigger-happy Saab achieve success in the Court of Appeal

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There has been much excitement and comment amongst the UK patent profession following the Supreme Court's decision in **Actavis v Eli Lilly** [2017] UKSC 48 (see previous comment [here](#)) on patent claim construction. However, the Court in that case did not clarify how "normal" principles of claim interpretation are now to be applied, and whether the validity of a patent is tested against "normally" interpreted claims or the full scope of protection under the doctrine of equivalents. A recent case before the Court of Appeal on claim construction, **Saab Seaeeye v Atlas Elektronik** [2017] EWCA Civ 2175, does not provide immediate clarity as to what will be the correct test for validity, but suggests that the Court is likely to rely on pre-Actavis authorities when applying "normal" principles of claim construction.

The two patents in suit belonging to the respondent Atlas are in the field of underwater mine clearance. At first instance, the judge (who decided before the Supreme Court's decision in **Actavis v Eli Lilly**) had held that all the relevant claims of the first patent were valid and infringed by one of Saab's devices, and that although two claims of the second patent were invalid, the remaining claims of relevance were also valid and infringed. The validity decisions were appealed to the Court of Appeal (which sat in a numerically unusual judicial panel of two, Floyd and Kitchen LJ).

Notwithstanding the recent decision of the Supreme Court in **Actavis v Eli Lilly**, there was no dispute between the parties about the correct principles to apply to construction of patent claims, being that set out in the Court of Appeal's pre-Actavis judgment in **Virgin Atlantic v Premium Aircraft** (which had been accepted by the judge at first instance). These are worth setting out again here, notwithstanding that they are well known to English patent litigators:

"(i) The first overarching principle is that contained in Article 69 of the European Patent Convention.

(ii) Article 69 says that the extent of protection is determined by the claims. It goes on to say that the description and drawings shall be used to interpret the claims. In short the claims are to be construed in context.

(iii) It follows that the claims are to be construed purposively - the inventor's purpose being ascertained from the description and drawings.

(iv) It further follows that the claims must not be construed as if they stood alone - the drawings and description only being used to resolve any ambiguity. Purpose is vital to the construction of claims.

(v) When ascertaining the inventor's purpose, it must be remembered that he may have several purposes depending on the level of generality of his invention. Typically, for instance, an inventor may have one, generally more than one, specific embodiment as well as a generalised concept. But there is no presumption that the patentee necessarily intended the widest possible meaning consistent with his purpose be given to the words that he used: purpose and meaning are different.

(vi) Thus purpose is not the be-all and end-all. One is still at the end of the day concerned with the meaning of the language used. Hence the other extreme of the Protocol - a mere guideline - is also ruled out by Article 69 itself. It is the terms of the claims which delineate the patentee's territory.

(vii) It follows that if the patentee has included what is obviously a deliberate limitation in his claims, it must have a meaning. One cannot disregard obviously intentional elements.

(viii) It also follows that where a patentee has used a word or phrase which, acontextually, might have a particular meaning (narrow or wide) it does not necessarily have that meaning in context.

(ix) It further follows that there is no general 'doctrine of equivalents'.

(x) On the other hand purposive construction can lead to the conclusion that a technically trivial or minor difference between an element of a claim and the corresponding element of the alleged infringement nonetheless falls within the meaning of the element when read purposively. This is not because there is a doctrine of equivalents: it is because that is the fair way to read the claim in context.

(xi) Finally purposive construction leads one to eschew the kind of meticulous verbal analysis which lawyers are too often tempted by their training to indulge."

The Court of Appeal noted that sub-paragraph (ix) above had to be read in the light of the Supreme Court's judgment in **Actavis v Eli Lilly**, i.e. that there is in fact a doctrine of equivalents. However, as Saab did not rely on any doctrine of equivalents when arguing for an expansive scope of claim in the context of validity, Floyd LJ limited himself to noting that the issue of determining the full scope of a patent claim for the purposes of considering validity would have to wait until a case where the Court of Appeal was asked to decide the question. Although the Court of Appeal did not expressly endorse the **Virgin** principles, the fact that the Court did not expound any alternative test suggests that the Courts will continue to apply them.

Floyd LJ also made some observations on the use of dictionaries in claim construction. The judge at first instance had informed his judgment by reference to dictionary definitions. However, Floyd LJ warned that dictionary definitions are acontextual, and the dictionaries' authors are unlikely to have had the patentee's specific purpose in mind. In this particular case, the Court of Appeal was of the view that the person skilled in the art would understand that the "trigger mechanism" in the claim was not limited to purely mechanical arrangements. Under this wider construction, the claims of the first patent were invalid. For completeness, the Court of Appeal also overruled the first instance judge on construction of the second patent in suit, although this had no bearing on the claims previously held to be invalid for obviousness.