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Shedding light on implied disclosure and secondary evidence

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Around this time last year, in *Edwards Lifesciences v Boston Scientific* [2017], His Honour Judge Hacon (sitting as a High Court Judge) had the opportunity to analyse two interesting aspects of UK patent law: (i) the law of implied disclosures and anticipation; and (ii) the importance of so-called secondary evidence in the evaluation of inventive step.

In a decision dated 23 February 2018, *Cantel v ARC Medical*, the same Judge revisited these issues in a case concerning colonoscopes. Specifically, the patents in suit belonging to ARC Medical related to devices which are attached to colonoscopes to aid the detection of polyps and cancerous adenomas in the lining of the colon. These devices work by stretching and elongating the colon during withdrawal so that any abnormalities can be better seen. The claimant, Cantel was a distributor of ARC's products but upon termination of the licence developed its own device and sought to clear the way in respect of it by alleging that the patents in suit were invalid and or not infringed. There were various design rights also in play which are beyond the scope of this short commentary.

Perhaps unsurprisingly, the Judge adopted largely similar reasoning in the *ARC* case as he had in *Edwards*. In relation to the issue of anticipation, the Judge reiterated the point that there will only be an implied disclosure in the prior art where the skilled person would inevitably have included the implied element. Thus, a prior art description of a bicycle implies two wheels, handle bars, and probably pedals but not lights and gears.

The second point of interest concerned the role of secondary evidence in the analysis of inventive step. The UK Courts have traditionally separated evidence on the question of obviousness into two categories: primary evidence from suitably qualified expert witnesses as to what the skilled person would have done or thought at the priority date of a patent; and secondary evidence which covers everything else such as how thought leaders in the field of the invention reacted to the invention described in the patent at the relevant time. The UK Courts have traditionally adopted a rather cautious approach to secondary evidence but there are signs that this caution may be receding. As he had done in *Edwards*, in *ARC* Judge Hacon placed some weight on the argument presented by the defendant that if the invention had been obvious, why had

it not been done before? In so doing the Judge relied on a list of 11 questions set out in the leading Court of Appeal decision from 2010: *Schlumberger v Electromagnetic Geoservices*.

It remains to be seen if the trend towards placing greater reliance on secondary evidence will continue. In the authors' opinion, events surrounding a new development or the opinions of thought leaders given without any influence of litigation or the benefit of hindsight can, depending on the circumstances, be of genuine probative value and the recent legal developments in this area are encouraging.

In the *ARC* case, the patents were held to be valid as proposed to be amended and infringed. It is not known if *Cantel* will appeal.

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