

## Avoiding nosy neighbours

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A further interesting decision handed down by the Judges of the English Patents Court prior to the Easter break was a judgment from Nugee J concerning proceedings between *E. Mishan and Hozelock* relating to a UK patent and European patent, both entitled "Expandable Hose Assembly". E. Mishan (trading as Emson) claimed that Hozelock's expandable garden hoses, the Superhoze 1 and 2, infringed both patents and Emson counterclaimed for invalidity based on lack of inventive step. The Judge found both patents obvious, but that had they been valid, they would have been infringed by both products.

The most interesting part of the decision is that relating to an alleged lack of inventive step over the inventor, Mr Berardi's, experimentation with prototypes in his front garden. Two points arose here. The first was whether the various occasions on which Mr Berardi had worked in his garden could be put together via mosaicing (as the parties agreed that none of the individual occasions was enough for a case of obviousness). Applying the well-established principles that it is not permissible to put together two separate disclosures or prior uses except where one cross-refers to the other and where the second disclosure would cause the skilled person to consult the first, Nugee J found mosaicing was not permissible on the facts before him because it would not have been clear to the skilled person watching Mr Berardi on one specific occasion that what he was doing was testing the thing that he had made on another earlier specific occasion.

The second point that Nugee J explored (albeit obiter) was, if he was wrong on the mosaicing point, whether Mr Berardi's work in his front garden amounted to a relevant prior use. Finding the point to be a novel one, the Judge explored the case law on making available to the public, as per section 2(2) of the Patents Act 1977, at length and concluded: first, that if the public is given access to information, in whatever guise, it is made available to the public and it does not matter that no one in fact took up the opportunity (see *Folding Attic Stairs v Loft Stairs* [2009]), but, second, that the law does not treat information as available to the public when no member of the public in fact could have accessed it. Therefore, on accepting Mr Berardi's evidence that if anyone had stood watching him then he would have stopped his work or continued it out of sight, Nugee J found that Mr Berardi's garden activities were not made available to the public and that they did not amount to prior use.

Despite the fact that Mr Berardi's garden experiments did not invalidate the patents, they were both held obvious over a piece of prior art which described a self-elongating hose for supplying oxygen to an oxygen mask for aviation crew.

Of further interest is that, in December 2013, Birss J found the UK patent valid and infringed by Tristar, the seller of a different rival garden hose (this decision was later upheld by the Court of Appeal). Therefore, as he was entitled to do so on the basis of the evidence before him (as per *Hollington v Hewthorn* [1943] and reaffirmed in *Rogers v Hoyle* [2014]), in finding the patents obvious in the current proceedings, Nugee J came to a different conclusion to Birss J on the invalidating piece of prior art concerning oxygen masks.

This decision, from a Judge who does not regularly try patent cases, contains an interesting new nuance on the law of prior use. It seems that the "brightline" test for prior use, as it was termed in *Milliken v Walk Off Mats* [1996], may not be as rigid as previously thought. At the time of writing, it is not known if the parties are appealing the decision.