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Virgin Atlantic v Delta, Patents Court, 30 November 2010

Brian Cordery (Bristows) · Tuesday, December 21st, 2010

The case concerned the question of whether the sale of an incomplete kit of parts to a customer outside of the UK could constitute infringement of a patent for the assembled device for the purposes of section 60(1)(a) of the Patents Act 1977 (based on Article 25 CPC). The judge (Arnold J) also provided some important insights into the possibility of obtaining summary judgment in patent cases.

The dispute related to an aircraft seat that converts into a flatbed, developed on behalf of Virgin for use on long haul flights. The product was the subject of a patent for a passenger seating system assembled and arranged on an aircraft. A series of parts were manufactured for Delta which were intended to be used in the manufacture of the patented product and which were subsequently exported outside the UK and used for that purpose. As the extra-territorial element precluded a claim for contributory infringement under section 60(2) of the Patents Act 1977 (based on Article 26 CPC), Virgin argued that the act of export of parts was sufficient to constitute patent infringement for the purposes of section 60(1)(a). The judge disagreed, holding that given that the missing parts were assembled into the final product outside the UK, Delta and its supplier had not dealt in the patented product in the UK. On that basis it was held that Virgin had no real prospect of successfully arguing infringement at trial and summary judgment was awarded to Delta.

While the judge stated that summary judgment was rarely appropriate in patent cases due to the importance of expert evidence both in relation to the construction of the patent and the assessment of whether infringement had occurred, he felt able to deviate from common practice and grant summary judgment in this instance due to the particular circumstances of the case. In particular: (1) the patent and the infringing seat had already been the subject of a trial and appeal where there was no substantial disagreement as to either the skilled team or the common general knowledge; (2) Virgin did not submit that the Court was not in a position to adopt the mantle of a person skilled in the art; and (3) Virgin's expert report prepared for the summary judgment hearing did not raise additional questions of construction and interpretation that would call into question the Court's ability to assess the issues from the position of a person skilled in the art.

In summary, this case is one that turned on the particular facts and legal circumstances in issue and summary judgment is likely to be granted very rarely in UK patent cases.

A **full summary** of this case has been published on **Kluwer IP Law**.

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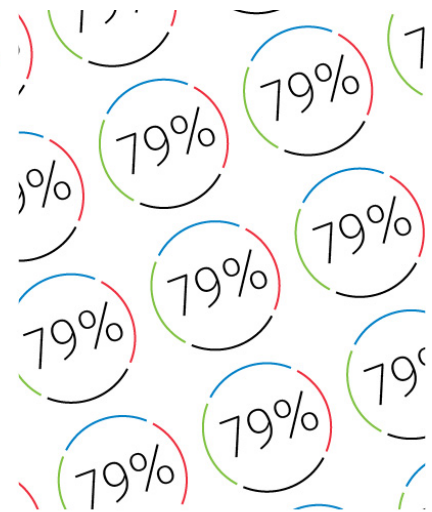
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