
Kluwer Patent Blog

UK Supreme Court Hearing takes place in *Schütz v Werit*.

Brian Cordery (Bristows) · Friday, January 25th, 2013

Hearings in the UK's highest Court concerning patents are rare. In fact, since the Supreme Court was established in place of the House of Lords in October 2009, there has only been one substantive decision namely the *Eli Lilly v Human Genome Sciences* case.

Last week the Supreme Court heard its second patents case, *Schütz v Werit* in relation to technology which could not be further from human genetics. The hearing was broadcast over live television although one suspects the viewing figures will not challenge Eastenders or Coronation Street. Schütz's patent in suit related to Intermediate Bulk Containers or "IBCs" which are essentially large plastic bottles in steel cages which are used to transport hazardous liquids by lorry. The main claim of the patent covered three parts – the cage, the bottle and the pallet on which the bottle rested although the inventive concept lay solely in the cage. The central question was whether replacing the plastic bottle – which wore out quicker than the metal cage – amounted to "making" the product which is an infringing act in the UK pursuant to Section 60(1)(a) of the UK Patents Act 1977.

Werit argued (based on the decision of Floyd J at first instance) that the test for whether the insertion of a new/replacement part into a product is an act of "making" will require an analysis of (i) whether the new part is a consumable (normally expected to be replaced within the lifetime of the product); and, if so, (ii) whether there is any technical contribution in the consumable part. If the part is a consumable and contains no technical contribution then there is no direct infringement by making. In other words, the correct approach is to ask whether, when the part in question is removed, what is left embodies the whole of the inventive concept of the claim.

Schütz argued (based on the Court of Appeal decision) that an analysis of the inventive concept plays no part in the statutory test under Section 60(1)(a). The question is simply whether the relevant act amounts to making the product claimed. Schütz also argued that implied licences and exhaustion played no part in that question.

It remains to be seen which way the Supreme Court will decide this potentially difficult issue. To the author, Floyd J's approach seems more just as it does not depend on the language of the claim. It is also closer to the German approach. However there are strong arguments in the other direction as well. A decision can be expected in about 4-6 weeks and will be reported on the Kluwer patent blog.

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