

Kluwer Patent Blog

Bed Dispute leaves Virgin with Nothing

Brian Cordery (Bristows) · Thursday, July 4th, 2013

Judgments from the English Courts are nowadays usually delivered in draft form and in strictest confidence from the Judge's clerk to the parties by way of an attachment to an email. This invariably causes an anxious lawyer to open the document and to hit "Ctrl/End" to find the conclusion of the Court, followed by a pause whilst the lawyer in question works out if his client has won or lost.

However, the lawyers representing the parties before the Supreme Court in the **Virgin v Zodiac** case (Judgment of 3 July [2013] UKSC 46) would have had no need to remember which key strokes would take them to the end of the decision in an instant. The result was clear from the opening sentence of the opinion of Lord Sumption: "*In this case, Virgin Atlantic Airways Ltd wishes to recover damages exceeding £49,000,000 for the infringement of a European Patent which does not exist in the form said to have been infringed*".

Many non-UK readers of this blog will scratch their heads that it was under contemplation that damages could be payable for infringement of patent claims which had subsequently been found invalid and therefore were deemed never to have existed. However there was clear authority from the Court of Appeal from recent cases such as **Unilin v Berry** [2007] and **Coflexip v Stolt** [2004] as well as the much older decision of **Poulton v Adjustable Cover** [1908] that if a patent had been litigated and found to be valid and infringed by the Court then the defendant would be bound to pay damages even if the patent were subsequently held invalid.

The landscape had of course been made more complicated in recent decades by the fact that an EP(UK) can be litigated even to an appellate level in the UK before the EPO Opposition Proceedings have concluded. This is exactly what happened in the **Virgin** case where none of the claims held valid and infringed by the English Court of Appeal had subsequently survived at the EPO.

In a unanimous decision, the five judges in the Supreme Court (Lord Neuberger, Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath) have overruled the decisions in **Poulton** and **Coflexip** and have held that the revocation of a patent has retrospective effect against the entire world. As Lord Neuberger stated: "*The revocation of the patent deprived the patentee of the rights which the patent had bestowed on him as against the world; furthermore it did so retrospectively. In other words, the effect of the revocation was that everyone was entitled to conduct their affairs as if the patent had never existed*". Thus Virgin will recover nothing. An interesting question, touched upon by Lord Neuberger, but not decided, is whether if a defendant had paid damages for infringement

of a patent which was later revoked, it would be able to recover these damages? What if the patent holder had already spent the money? Lord Neuberger commented that: *“it seems to me that an alleged infringer would have to try to raise a restitutionary claim if it wished to recover [these] damages ... I express no view on the strength of such a claim which may be highly dependent on the facts of the particular case”*. In other words, the question has been left for another day.

In its ruling, the Supreme Court has requested that the guidelines laid out by the Court of Appeal as to when to stay UK proceedings pending the outcome of an EPO opposition should be reviewed by the Patents Court and the Court of Appeal. At present, because the UK Courts are invariably much quicker than the EPO, and because the traditional view in the UK is that a patentee is entitled to enforce its patent as soon as it is granted regardless of any opposition, it is unusual for the Court to grant a stay. The Supreme Court has asked that this be revisited and is appearing to suggest that stays should be more readily granted so that the form of the claims of the patent will have been settled by the EPO by the time the UK designation is litigated in this country. As a matter of principle, this is clearly sensible, but unless and until the EPO opposition process is speeded up, it is deeply unsatisfactory for a patentee to have to wait for a final decision of the EPO which may take a decade to be delivered before it can enforce its rights. In consequence, if the UK courts change their practice and more often grant stays pending EPO decisions, there will be increased uncertainty in the UK. The response of patentees to stay applications may well be to apply for preliminary injunctions or security for damages pending the final EPO decisions.

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please [subscribe here](#).

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Thursday, July 4th, 2013 at 4:26 pm and is filed under [EPO](#), [United Kingdom](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. Both comments and pings are currently closed.