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Will Danish courts adopt a more holistic approach on claim construction?

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In a recent Supreme Court decision from Denmark (*Dansk Mink Papir vs. Jasopels A/S*), the Supreme Court rendered a decision which could mark the inauguration of a more holistic approach by Danish courts in their assessment of patent protective scope.

The invention concerned a so-called pelt bag developed by Dansk Mink Papir which had also developed two machines for bags keeping in place mink fur on the pelt. The invention consisted in fat and moisture absorbing bags, extending to at least 1/3 of the holding area as opposed to the prior art which described only fat absorption explicitly, but moisture absorption only implicitly and with bags covering more than 1/3 of the holding area, so-called full-length bags.

Interestingly, in the first instance the court appointed experts (a highly experienced Danish patent agent and a technical expert from the fur industry), both of whom were of the opinion that the patent lacked novelty and the Maritime and Commercial Court, being the specialty court for inter alia patents, ruled accordingly to invalidate the patent-in-suit.

On appeal, the Supreme Court, consisting of 5 judges in this case, was divided.

A majority of the Supreme Court judges found that the literal wording of claim 1 did not block an understanding pursuant to which there would be no upper limitation of the length whereas the patent description and figure 1 indicated otherwise.

On that basis, the Supreme Court, inter alia, ruled

“We hereafter find that the patent claim must be construed so that the patented pelt bag must have a length which at least corresponds to 1/3 and as a maximum, the entire length of the holding area, and that the patent’s claim 1 for the pelt bags length is therefore novel over [the prior art]”.

Two of the Supreme Court judges, however, voted in favor of invalidity, arguing that there was no upper limit as to the length of the pelt bag and that the patent description contained no specific directions as to the length of the bag.

Not least because the Supreme Court was divided on its construction of the patent, it will be interesting to follow Danish patent jurisprudence after this decision, and in any event with this Supreme Court decision, it has become rather more difficult to offer a prognosis to clients considering the launch of products based on an invalidity defence.

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