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Arrow strike out applications: Hit or miss?

Craig Lumb (Bristows) · Friday, June 29th, 2018

After a decade-long hiatus, so-called *Arrow* declarations are now firmly back in fashion after the Court of Appeal's judgment last year in **Fujifilm Kyowa Kirin Biologics Co, Ltd v Abbvie Biotechnology Ltd & Anor** [2017] EWCA Civ 1. To recap, what are now known as *Arrow* declarations originate from the decision in **Arrow Generics Ltd & Anor v Merck & Co, Inc** [2007] EWHC 1900 (Pat), in which the High Court held that it had the discretion to grant a declaration that a medicinal product was obvious at the priority date. In **Fujifilm**, ten years later, the Court of Appeal agreed that there was no reason in principle why *Arrow* declarations could not be granted in appropriate cases, and went on to discuss the circumstances in which such a declaration might be granted (at [98]).

The advantage to the applicant of obtaining an *Arrow* declaration is that the applicant can then rely upon it for the purposes of a *Gillette* defence (**Gillette Safety Razor Co v Anglo-American Trading Co Ltd** (1913) 30 RPC 465). The essence of the *Gillette* defence is that it sets up an obviousness/non-infringement squeeze: if by virtue of the *Arrow* declaration the product was obvious at the priority date then either the product does not infringe the patent or the patent is invalid.

In the recent case of **Glaxo Group Ltd & Ors v Vectura Ltd** [2018] EWHC 375 (Pat), His Honour Judge Hacon (sitting as a High Court Judge) was faced with an application from Vectura to strike out part of GSK's claim seeking an *Arrow* declaration. In addition to claims for a declaration of non-infringement and revocation of five of Vectura's patents, GSK also argued that it should be entitled to an *Arrow* declaration that its processes for manufacturing its respiratory drugs for inhalation (and products resulting from those processes) were obvious at the priority date of Vectura's five patents in issue.

In arguing that it should be granted an *Arrow* declaration, GSK pointed to other patents held by Vectura that may also cover GSK's products, and also the fact that Vectura had divisional applications pending. GSK argued that even if it was successful in revoking the five patents in issue, the existence of other patents and pending applications meant that *Arrow* relief was necessary in this case. HHJ Hacon referred to Lord Justice Floyd's comments in **Fujifilm** that the existence of pending applications cannot in itself be a justification for *Arrow* relief, concluded that GSK had not demonstrated that there was a sufficient reason why an *Arrow* declaration should be granted, and accordingly granted the application for strike out of the claim for *Arrow* relief.

GSK appealed, arguing that the claim for *Arrow* relief should have been allowed to go to trial in

order to be decided alongside the other issues. On 28 June 2018 the Court of Appeal handed down its decision on GSK's appeal with Floyd LJ delivering the leading judgment (**Glaxo Group Ltd & Ors v Vectura Ltd** [2018] EWCA Civ 1496). GSK submitted that Vectura's strategy of filing further divisional applications from the patent families in question and allegedly targeting GSK's products meant that an *Arrow* declaration would provide GSK with valuable commercial certainty. Vectura argued that *Arrow* relief should be confined to unusual cases and not simply where there were pending patent applications, and GSK had not provided the requisite "something more" to justify why an *Arrow* declaration should be granted in this case.

Floyd LJ held that at the preliminary stage the question to have been considered was whether or not the pleaded facts and arguments gave rise to a realistic claim for *Arrow* relief which should go to trial. Floyd LJ explained that the discretion to grant the *Arrow* relief lies with the trial judge and not the judge hearing the strike out application and that it was not appropriate to ask, at the interim stage, whether or not the facts relied on are sufficiently "unusual" to justify *Arrow* relief as this test was too difficult to apply so early on in proceedings. Allowing GSK's appeal and overturning the strike out decision, Floyd LJ held that GSK's claim for an *Arrow* declaration was sufficiently realistic to be allowed to proceed to trial.

The impact of this decision is likely to be that it will be difficult to make interim applications to strike out claims for *Arrow* relief in the future. It remains to be seen whether or not GSK will be granted the relief it seeks following the trial in the autumn.

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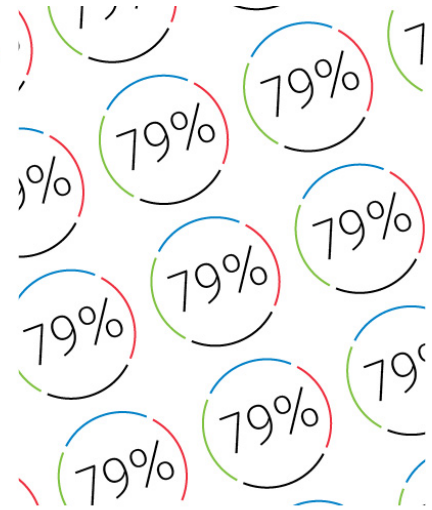
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