

# Kluwer Patent Blog

## Denmark – No infringement held in case between former business partners after inspection of the products at-issue by both the court-appointed experts and the court

Anders Valentin (Bugge Valentin) · Tuesday, August 7th, 2018

In a recent judgement rendered by the Danish Maritime and Commercial Court (SH2018.T-3-16 – Hexa-Cover A/S et al v. Kirk Plast A/S et al), the court heard an infringement case based on the alleged infringement by virtue of the marketing and sale of a system of so-called floating tabs, which serve to provide a cover for tanks containing liquids, e.g. slurry tanks. Hexa-Cover, the proprietor of patent no. DK/EP 1697234 T3, claimed that the defendants had infringed the patent-in-suit (as well as the Danish act on fair marketing practices by passing off).

The patent-in-suit concerned a special construction of a floating tab system used to cover a liquid surface, thus reducing evaporation, smell etc. The defendant's floating tab system had many similarities with Hexa-Cover's floating tab system, and visually the two systems appeared similar and as the defendant had previously manufactured the composite parts for a floating tab system developed by the patentee, the patentee brought suit against the defendant based on allegations of both patent infringement and passing off.

As the bench in the Maritime and Commercial Court seats not only legal expertise, but also technical expertise (most often EPAs), it is increasingly debated, whether in fact it is necessary to also ask the court to appoint independent experts of its own to consider the technical aspects of a case (based on questions posed by the parties), the argument being that the appointment of an independent technical expert may not only delay proceedings and increase costs substantially (raising the stakes to the detriment of the financially weaker party), but may also lead to an unnecessary lack of clarity.

On the other hand, some argue that by leaving the technical assessment to the bench only, the parties forfeit their opportunity to make sure that all technical aspects are considered and also, the parties cannot cross-examine the bench as they may the court-appointed expert in case they find it necessary to test aspects of the expert's technical report.

In the present case, the parties agreed that the court appoint an independent expert for the parties to pose technical questions to – as is still customary even in less complicated mechanical cases. Somewhat unusually, however, the technical judges of the bench also inspected the products at-issue, which is usually the exclusive domain of the court-appointed expert.

Having firstly stated that the court agreed with the court-appointed expert's answer to a question

considered pivotal to the outcome of the case, the judgement states that based on the (two) technical judges' personal inspection, they made a technical observation of their own, which the legal judge – according the written reasons of the judgement – explicitly concurred with. On balance, the court then held that there was no patent infringement.

It is unusual for the courts in Denmark to act in this manner, but it may be a welcome development for practitioners and perhaps a step towards a legal procedure in which a more proactive stance from the bench may in some cases render the appointment of an independent technical expert less, or perhaps in some cases even un-, necessary.

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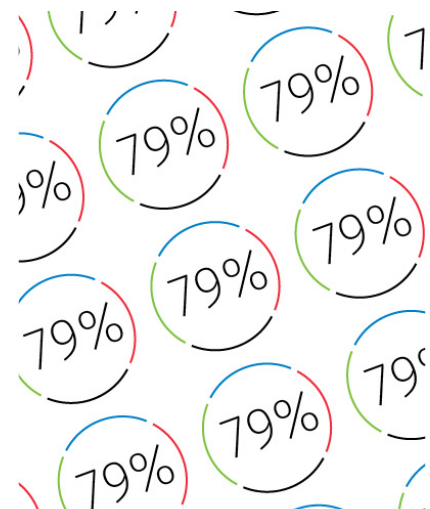
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This entry was posted on Tuesday, August 7th, 2018 at 7:36 pm and is filed under [Case Law](#), [Denmark](#), [Infringement](#)

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