

# Kluwer Patent Blog

## Excel-Eucan Limited v Source Vagabond Systems Limited – the importance of “the clever bit” in the doctrine of equivalents

Selina Badiani (Bristows) · Wednesday, December 4th, 2019

The leading Supreme Court case of *Actavis v Eli Lilly* [2017] UKSC 48 introduced a doctrine of equivalents into UK patent law for the first time in many years. Since then, the Court of Appeal has given further guidance on this doctrine in *Icescape Limited v Ice-World International BV & Ors* [2018] EWCA Civ 2219 and there have been several cases post *Icescape* from the High Court which have applied the new approach. In November 2019, the Patents Court handed down another judgment, *Excel-Eucan Limited v Source Vagabond Systems Limited* [2019] EWHC 3175 (Pat) in which infringement was found under this doctrine.

Excel developed an ammunition bag for holding linked rounds of ammunition, known as the “Link-Tail”, which was protected by a patent, GB 2 489 116 (GB 116). Source developed its own bag – the “2017 bag” – and sought a declaration of non-infringement of GB 116. As validity of GB 116 was already being challenged in the UK IPO, the parties asked the court to assume the validity of GB 116 for the purpose of these proceedings.

An “openable closure”, namely a zip, was an integer of all independent claims of GB 116. The 2017 bag did not feature a zip, or any form of “openable closure”. Excel accepted that the 2017 bag did not fall within the claims as a matter of normal interpretation, but argued that the 2017 bag constituted an immaterial variation of, or was equivalent to, the invention disclosed by GB 116. Accordingly, the doctrine of equivalents was engaged.

Having accepted that the 2017 bag did not fall within the “normal interpretation” of the claims (as required by *Actavis*), Her Honour Judge Melissa Clarke applied the reformulated Improver questions, as outlined by Lord Neuberger in *Actavis*.

**1. Does the variant achieve substantially the same result in substantially the same way as the invention?** HHJ Clarke determined that the 2017 bag achieved substantially the same result as the Link-Tail, as she held the inventive concept (which she also referred to as “the clever bit”) to be the “plug and play” aspect of the ammunition bag. This meant that when the firearm was in use, the linked round could be fed from the bag into the firearm without the need to first remove the linked round from the bag. She rejected Source’s argument that the invention should be determined by reference to the patent itself and the claims, which all required an “openable closure”. HHJ Clarke did not agree that loading the bags vertically without an openable closure, as opposed to horizontally through the openable closure, meant that the result was achieved in a substantially

different way – the different methods of loading were held to be “no more than a matter of convenience and preference...and a substantially similar way of working the invention”. The figures of the patent also did not disclose how the linked round was loaded in the Link-Tail, and the claims could have equally applied to horizontal or vertical loading.

**2. Would it be obvious to the person skilled in the art, reading the patent at the priority date, but knowing that the variant achieves substantially the same result as the invention, that it does so in substantially the same way as the invention?** HHJ Clarke determined that the skilled user would consider it to be obvious that the 2017 bag utilised a method of loading which did not require an openable closure, and that vertical loading could be used in the Link-Tail without utilising the openable closure.

**3. Would such a reader of the patent have concluded that the patentee nonetheless intended that strict compliance with the literal meaning of the relevant claim(s) of the patent was an essential requirement of the invention?** For the reasons given above, HHJ Clarke was satisfied that the skilled person would not have concluded that the openable closure was an essential requirement of the invention.

This case confirms that the new approach taken by English Patents Courts to the issue of equivalence by immaterial variants is quite generous to patent holders. Rather than focussing on the language of the claims, parties now need to focus on the inventive concept of the patent which, at least sometimes, might not be so easy to ascertain. Further guidance on this issue from higher courts would in the author’s view, be highly desirable.

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