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The skilled person – Lufthansa Technik AG v Astronics Advanced Electronic Systems

Elizabeth McAuliffe (Bristows) · Monday, August 3rd, 2020

Mr Justice Morgan handed down judgment on 22 July 2020 ([2020] EWHC 1968 (Pat)) in relation to two patent infringement actions brought by Lufthansa which were heard together. The first infringement action was against two defendants, Astronics Advanced Electronic Systems and Safran Seats GB Ltd. The second action was against Panasonic Avionics Corporation.

It is likely that the (former) frequent flyers amongst us will already be familiar with the product that is the subject of the patent in suit, EP (UK) 0 881 145 B1, which is for a voltage supply apparatus for providing a supply voltage for electric devices such as computers, consumer electronic devices and chargers in an aeroplane cabin. The intention of the patented invention is to enable an aeroplane passenger to plug his or her personal electronic device directly into a high voltage AC power supply in his or her seat, whilst maintaining a high level of safety. Before the invention, some aeroplane seats had a low voltage DC supply so it was necessary for passengers to use an adapter to plug personal electronic devices into the socket.

In response to Lufthansa's claims the Defendants, unsurprisingly, counterclaimed that the relevant claims of the Patent were invalid as they were not new and lacked inventive step.

The parties' experts, Professor Patrick Wheeler of Nottingham University for Lufthansa and Mr Douglas Hay Barovsky of Engineering Systems Inc. for the Defendants disagreed on many points, in particular the identity of the skilled person. Given that the identity of the skilled person was material to a number of other issues in the case, Morgan J resolved this point first, before going on to deal with the other points in issue (namely construction, validity and infringement).

Lufthansa's skilled person was a general electrical or electronic engineer who would probably not have any experience of working in the aerospace sector. He was described by Morgan J in the Judgment as follows:

"He would be a graduate with technical knowledge and experience of the design and implementation of power supply technology, together with the general safety considerations applicable to electrical devices. The skilled person would not be a new graduate acting alone. He would either have experience of power supply design and application in an industrial context from working for a couple of years in or with industry or would rely on another member of the team with corresponding experience. This skilled person would need an understanding of the relevant regulations and requirements applicable to power in an aerospace context. Although the skilled

person may already have such an understanding, it was more likely that he would acquire that knowledge when he was asked to involve himself in design an aircraft power supply. At that time, he could obtain relevant documents from the relevant regulatory body.

…[the] skilled person and any other member of his team would probably not have any experience of working in the aerospace sector." (paragraphs 10 and 11)

In contrast, the Defendants' skilled person was described by Morgan J in the Judgment as an:

"…electrical engineer with an interest in power supply systems on an aeroplane, including those in the cabin. He would have a degree or equivalent qualification in electrical engineering and three to five years' experience working in the aeroplane business, either for an aircraft manufacturer or component manufacturer. He would be assisted by other individuals, for example, a representative from the aeroplane manufacturer (if he was working for a component manufacturer) or a representative from a component manufacturer (if he was working for an aeroplane manufacturer). If the skilled person were in the United States, he would seek the assistance of a FAA DER who would be responsible for ensuring compliance with the relevant FAA regulations and guidelines. If the skilled person were in the United Kingdom, he would make direct contact with the Civil Aviation Authority ("CAA") or the Joint Aviation Authority ("JAA")." (paragraph 12)

In deciding which description of the skilled person he preferred, Morgan J provided a helpful summary of the established features of the skilled person at paragraphs 13 and 16 – 18 of the Judgment:

- The skilled person is the person to whom the claims in a patent are addressed and that would be a person with a practical interest in the subject matter of the claims in the patent and with practical knowledge and experience of the kind of work in which the invention was intended to be used (Catnic Components Ltd v Hill & Smith Ltd [1982] RPC 183 and Teva UK Ltd v Astrazeca AB [2012] EWHC (Pat)).
- Where there are specialists with a focus on the kind of work with which a patent is concerned, they are the relevant addressees of the patent and their specialist skills are attributed to the notional skilled person, even if the patent might also be of a broader application and of interest to non-specialists (Medimmune Ltd v Novartis Pharmaceuticals UK Ltd [2013] RPC 27).
- The skilled person has the common general knowledge with his skills. He shares the common prejudices or conservatism which prevails in the art concerned. He is incapable of scintilla of invention (Technip France SA's Patent [2004] RPC 46).
- Any technical prejudice must be a general one. It is not enough that some persons actually engage in the art at the material time laboured under a particular prejudice if a substantial number of others did not (Re Glaxo Group Ltd's Patent [2004] RPC 43). A prejudice or mind-set which is insufficiently widespread for it properly to be regarded as commonly shared will not be attributed to the skilled person.
- It may be the case that having identified the type of skilled person which is relevant, some persons who answer that description will be more skilled than others or have more knowledge than others. The relevant skilled person is the person who has the typical skill of that class of persons and who has the general knowledge common to that class of persons. One does not identify the skilled person as someone who has the highest level of skill in that class (Koninklijke Philips NV v Asustek Computer Incorporation [2018] EWHC 1224 (Pat))

In this case, the Patent refers to a voltage supply apparatus for providing a voltage for electrical

devices in an aeroplane cabin**.** Morgan J considered that the reference to an aeroplane cabin was a significant feature of the claim and the relevant art was the art of designing and installing a power supply apparatus in an aeroplane cabin. Accordingly, Morgan J favoured the Defendants' skilled person and considered that Lufthansa's skilled person was much too general and he would not have the specialist skill set for the area of art involved.

Once the skilled person had been identified, Morgan J carried out a detailed analysis of the appropriate construction of the relevant claims of the Patent, novelty and inventive step. In his analysis of the inventive step Morgan J considered the mind-set of the skilled persons should be considered as the mind-set of the skilled persons of the relevant kind, taken as a whole, and not just the mind-set of some of the skilled persons.

Ultimately, the patent was found to be valid and infringed by the Defendants.

The analysis of the skilled person and the skills of such a person is much more than an interesting academic side show. It will often be determinative of whether a patent is obvious or not. In reading the Lufthansa decision, readers may be reminded of the judgment of Peter Prescott QC in Folding Attic Stairs v Loft Stairs [2009] EWHC 1221 (Pat) where the Court noted that is important not to define the art too narrowly, limited to a small band of persons making the precise products in issue, or this could have the impermissible result that any prior user no matter how obscure could be deemed to be common general knowledge. The Judge in Folding Attic Stairs noted it was difficult to define the skilled person in that case, as there is no recognised profession of designing folding attic stairways. He said at [33]:

"*It is unfair to define an art too narrowly, or else you could imagine absurd cases e.g. "the art of designing two-hole blue Venezuelan razor blades", to paraphrase the late Mr T.A. Blanco White. Then you could attribute the "common general knowledge" to that small band of persons who made those products and say that their knowledge was "common general knowledge" in "the art". That would have the impermissible result that any prior user no matter how obscure could be deemed to be common general knowledge, which is certainly not the law.*"

In many cases, such as Lufthansa, there will be a balance to be struck between defining the skilled person or team in general terms and falling foul of the designer of the two-hole blue Venezuelan razor blade principle. In practice, it makes sense to engage with experts early and to ascertain what people in the relevant scientific community were thinking and doing or not doing around the priority date of the patent under consideration.

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