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Copyright

1. FIVE YEAR INTERIM INJUNCTION IN COPYRIGHT CASE CONTINUES

In *Clarke v Artprints UK* [2006] All ER (D) 325, Artprints UK was a company involved in the reproduction and distribution of artworks in various formats, while the second defendant was the majority shareholder of the company. Artprints UK had been reproducing several works of the artist Francis Bacon and claimed that it had acquired a licence from the owner of the copyright of these works. However, the claimants argued that the licence was invalid and that they were the owners of the copyright of the works.

The Claimants applied for an interim injunction against Artprints UK to prohibit the reproduction and distribution of the Francis Bacon works pending final determination of the trial. The interim injunction was granted on 31 July 2001 and further directions were given in respect of the conduct of the proceedings including particular disclosure timetables.

During the next five years there was very little development. The initial trial date was vacated and disclosure was delayed for various reasons, including the death of one of the claimants. The defendants' solicitors eventually applied to have the 2001 injunction discharged. They argued that the claimants had caused inexcusable and unexplainable delay to the proceedings, and that it was the responsibility of the party benefiting from injunction to enable expeditious progress of the case. Therefore, as the claimants had failed to do so, the injunction should be lifted. The claimants responded that the delays had been predominantly caused by the defendants, specifically, the second defendant had refused to comply with the disclosure order making it impossible for the claimants to pursue the action further.

The Court dismissed the application, finding no fault with the claimants in respect of the delays. The defendants had consented to the delays. However, it was noted that this case should have been brought to final hearing much earlier and that the claimants were clearly benefiting from this overlong interim injunction, and rather than challenging the injunction, the defendants should have been complying with disclosure order.

Patents

2. YEDA RESEARCH V RHONE-POULENC RORER & COMPTROLLER OF PATENTS DESIGNS AND TRADE MARKS

On 31 July 2006, the Court of Appeal for England and Wales dismissed an appeal against the decision of Mr. Justice Lewinson in *Yeda Research & Development Ltd v Rhône-Poulenc Rorer Holdings, Imclone Systems and the Comptroller* [2006] EWCA Civ 1103.

The appeal pertained to a patent entitlement dispute between Yeda Research (Yeda) and Rhône-Poulenc (Rhône). The patent was granted to Rhône, and covered monopoly rights for a therapeutic composition containing monoclonal antibodies and anti-neoplastic drugs that together provide a cytotoxic effect (killing cancer cells), rather than a cytostatic effect (just preventing their replication).

Although Rhône had applied for the patent on 15 September 1989, it was not published in the European Patent Bulletin until as late as 27 March 2002. On 26 March 2004, just before the expiry of the two year limitation period prescribed for ownership disputes under s 37(5) of Patents Act 1977, Yeda made a reference to the patent office to claim joint ownership of the patent with Rhône. On 29 July

2005, and while the adjudication of the reference was still pending, Yeda sought to introduce amendments to claim sole ownership of the patent as an alternative to the joint ownership plea made earlier. Rhône objected to the amendments arguing the bar of limitation as prescribed under s 37(5) of the Act.

The patent office allowed the amendments, while Lewison J, on appeal [2006] EWHC 160 Ch, rejected the amendments on the ground that the new claims of sole ownership fell outside the limitation period.

Yeda appealed against this last decision in the Court of Appeal. The Court of Appeal dismissed Yeda's appeal holding that:

- section 37(5) has to be read in the light of s 130(7) of the Patents Act 1977, which requires that certain provisions of the Act should be given the same meaning as the corresponding provisions in the European Patent Convention, the Community Patent Convention (CPC) and the Patent Co-operation Treaty. Since section 37 is one such provision mentioned in s 130(7), it is necessary that the courts read the provisions of the CPC as the applicable law for the resolution of the dispute so as to remove any deviation or error that may arise due to the adaptation of the CPC provisions in the domestic legislation
- therefore, the court will construe section 37(5) as having the same meaning as Article 23, of the Community Patent Convention which prevents the bringing of entitlement claims that are more than two years old from the date when a patent was granted, even though the Community Patent Convention has not come into force. This is necessary to achieve harmonisation of law across Europe
- it makes no sense for section 130(7) to apply only when the Community Patent Convention will come into effect
- even taking the more customary and conventional route of statutory construction, the UK provisions have to be construed so as to have the same meaning as the provisions upon which they are based. This is because the Conventions mentioned in section 130(7) are part of the *travaux préparatoires* of the 1977 Act
- where a reference is made under s 37(1)(a) claiming only a relief of joint ownership of the patent, it can not be said to automatically include a claim relating to sole ownership of the patent. The claim of sole ownership has to be pleaded explicitly
- A pending claim of sole ownership of a patent can be amended to include an alternative claim of joint ownership even after the expiry of two-year limitation period mentioned under section 37(5). This is because the greater claim automatically includes the lesser one. However, an amendment pleading alternate relief of sole ownership of patent can not be allowed after two years where the original reference is merely for a joint-ownership.

3. TO AMEND OR NOT TO AMEND?

On 7 July 2006, the High Court handed down a decision in the case *Vector Corporation v Glatt Air Techniques Limited* [2006] EWHC 1638 concerning a patent held by Glatt.

In March 1997, Glatt were granted a patent relating to a gas suspension technique used in fluidising beds. Vector sought to invalidate this, claiming the patent lacked

novelty and was obvious, based on four pieces of prior art, each being previously published patents, referred to as “Larson” “Suzakawa” “Kurita” and “Naunapper”, respectively.

In response, Glatt applied to amend the patent, specifically requesting permission to amend a number of the claims. Glatt maintained that the patent as granted was valid but sought these amendments to further distinguish the patent from the prior art. The request for amendment was opposed by Vector.

Section 75 of the Patent Act 1977 provides the court with the discretion to allow a patent holder to amend its patent in proceedings in which the validity of the patent may be put in issue. The case at hand was concerned with an application to amend the previously granted claims in order to render them valid in light of Vector’s prior art.

Vector asked the court not to accept the proposed amendments and to declare the patent invalid since:

1. Glatt failed to tell the court the whole story about the relevant prior art.
2. Glatt delayed in seeking to amend the patent.
3. The amendments added matter and extended the scope of the patent in one of the claims.

As to no. 1, the court deemed that the patent history and the knowledge of the relevant prior art, as presented by Glatt, had to be considered as complete, in particular due to the lack of evidence to the contrary. As to no. 2, the court said that amendment was permissible since Glatt had not delayed in applying to amend. This was despite the fact that both Larson and Naunapper had been known to Glatt for many years and indeed were referred to in the patent itself. However, the judge held that the patent agent responsible for drafting the patent clearly regarded the patent as distinguished over the prior art, as did the EPO. Further, Glatt had declared that they had only become aware of Kurita in September 2005 and of Suzukawa in 2006. The application for amendment became unconditional in January 2006. Therefore, it was held that Glatt had not delayed in applying to amend. As to no. 3, the court held that there was no added matter and that there was sufficient disclosure to support the amended claim and no widening of the scope of the claim.

The court, having permitted Glatt to amend the patent, went on to find the patent valid and dismissed the action.

Practitioners should note that the court, in an aside, emphasised the importance of paragraph 9(e) of the Patents Court Guide, which requires that all important documents, including skeleton arguments, witness statements and expert reports should be supplied to the court in electronic format, and that this should become a routine part of preparing trial bundles.

4. INVENTIVE CONCEPT: PREJUDICE AND FALSE PREJUDICE

In at least two House of Lords decisions Lord Justice Hoffman has overturned findings by tribunals as a result of mis-identification of the inventive concepts in the patents in suit. In *Biogen v Medeva* [1997] RPC 1, 34, he said that the inventive concept was the idea behind the patent, “If someone devises a way of solving the problem, his inventive step will be that solution, but not the goal itself or the

general method of achieving it”. Obviousness equates with an idea that would occur to the normally skilled person in the art who wants to achieve the goal *Molnlycke v P&G* [1994] RPC 49. So what happens when the only problem is a prejudice not to do something?

In the recent case of *Pozzoli v BDMO et al* [2006] EWHC 1398 (Pat) the issue was whether there was patent infringement. The claimant Pozzoli was an Italian company. The defendants were French and Belgian companies with offices in the UK.

The case concerned the packaging of CDs/DVDs allowing thinner cases for those containing multiple discs. The arrangement called for partially overlapping discs one elevated above the height of the other. Pozzoli’s counsel pointed out that simplicity must not necessarily be equated with obviousness. They argued that the claim to inventiveness lay in the prejudice that existed in the market to containing discs in an overlapping arrangement due the possible damage the edge of one disc might do to the other.

The court accepted that a prejudice might be part of the inventive concept but noted the difference between a commercial prejudice (not part of the inventive concept) and a technical prejudice (possibly forming part of the concept). Further just because the prejudice was technical, it must exist as a substantial part of the common general knowledge, not just limited to the persons engaged in the development work. Nonetheless, the court accepted the submission of the defendants that such a prejudice can only be considered part of the inventive concept (and thus be considered for purposes of whether the patent in suit was obvious or not) if the invention shows that the prejudice was false. Merely sidestepping the prejudice that might not have been shown to be false would not allow the fact of that prejudice to be considered as part of the inventive concept.

The court questioned whether the prejudice against overlapping discs really existed, but even if it did the invention in the patent in suit did not overcome it. There still existed a prejudice that the overlapping discs shown in the patent could damage one another and it did not demonstrate otherwise. The result for the claimant was that his patent was obvious over the prior art as, leaving aside the evidence of prejudice, the remaining problem was whether the disc carrier of the resulting dimensions would sell.

This is a helpful clarification of how to arrive at identifying the inventive concept. In essence one has to look at what the patented technology is actually doing rather than the goal of the invention or a more general method. Despite Lord Justice Hoffman explanation in *Biogen*, in which he asked tribunals to exclude from their consideration matters extraneous to the inventor’s actual idea, problems with identifying the inventive concept in patents still arise.

Trade marks

5. “WARM WELCOMES” UNWELCOMED BY OHIM

In a recent OHIM Second Board of Appeal decision R 19/2006-2, Overseas Real Estate Limited applied to register a community trade mark WARM WELCOMES for services in classes 35, 36, 37, 39, 42, and 43 *inter alia* for ‘business management’, ‘real estate’, ‘transport’, ‘legal services’, and ‘provision of temporary accommodation’. In response, the examiner held that the trade mark was not eligible for registration as it did not fulfil the essential condition of registration under Article 7(1)(b). According to Art 7(1)(b) of Council Regulation (EC) No 40/94, “trade

marks which are devoid of any distinctive character shall not be registered”.

On appeal, the applicant argued that the words WARM WELCOMES are not commonly used for the contested services and are not directly descriptive of the services; thus, they are capable of being distinctive and can be registered. The applicant further argued that the examiner can only reject the registration of signs under Art 7(1)(b) when the sign has absolutely no capability or possibility of distinguishing services of the applicant from those of the other undertakings.

The court rejected these submissions and held as follows:

- Art 7(1)(b) is a ground to refuse registration of signs that are incapable of performing the essential function of a trade mark which is to identify the origin of goods or services
- the mere fact that the applicant’s mark conveys no specific information about the goods is not in itself sufficient to establish that the mark possesses distinctive character. “WARM WELCOMES” are English words encapsulating the ethic of being friendly, helpful, polite, and invited. The words do not allow consumers to mentally recognise them with the goods or services of the applicant. Rather, it reminds consumers of only the applicant’s business ethics
- in conclusion, the words ‘WARM WELCOMES’ fail to function as a trade mark within the meaning of Art 7(1)(b)

This case encapsulates the heart of trade mark law that the marks must be able to distinguish the goods or services of one undertaking from those of other undertakings, for being able to be registered. Therefore, if consumers see the mark in a promotional advertisement but cannot notice its commercial origin; or if such marks have no possibility of indicating the origin of products or services on which they are applied, they cannot be registered as trade marks because obviously the mark is unable to fulfil the necessary function of a trade mark.

Since the distinctiveness is a primary requirement for trade mark registration in every trade mark law, traders should be more concerned about distinctiveness while choosing trade marks in case that they want to register them in the future.

6. INTEL CORPORATION V CPM UNITED KINGDOM LTD

Intel owns a large number of United Kingdom and Community trade mark registrations for the word marks INTEL and INTEL INSIDE for goods in classes 9 and 16 and for services in classes 38 and 42. CPM, which has 4,000 staff across 10 countries, registered INTELMARK in 1997 for marketing and telemarketing services in class 35. In 2003, Intel applied for a declaration of invalidity on the ground that the use of INTELMARK by CPM without due cause would take unfair advantage of or be detrimental to the distinctive character or the reputation of its earlier INTEL marks under section 5(3) of the Trade Marks Act 1994.

However, Intel's claim was rejected on the grounds that there would be no material damage to the distinctiveness or repute of INTEL if INTELMARK was used in a normal and fair manner in relation to the services for which it was registered by CPM. Intel appealed the decision on the grounds that the hearing officer failed to give due weight to the evidence of the reputation enjoyed by INTEL in relation to computers and computer-linked products, and of its distinctive character, and that he also failed to apply the "global appreciation" test required under section 5(3) when assessing whether the use of INTELMARK would lead to unfair advantage

or detriment.

In dismissing the case, ([2006] All ER (D) 399 (JUL)) Mr Justice Patten agreed with CPM's argument that its use of INTEL MARK was not in any way damaging to the distinctiveness or repute of the INTEL brand. He acknowledged Intel's brand strength, referring to a branding chart from 1993 which placed Intel third among the world's most successful brand names, behind Coca-Cola and Marlboro. However, Patten J concluded that the reputation enjoyed by the INTEL mark would be sufficient for the average consumer to focus on INTEL in INTEL MARK but that the addition of "MARK" in a single word created a degree of dissimilarity.

This judgment is a big blow for Intel and many other large corporations which assume that their registration accompanied by their reputation will always be enough to prevent the registration of similar marks. It is quite clear that the Patent Office will not be so easily persuaded by large companies and will review each application on its merits.

7. SERGIO ROSSI V OFFICE FOR HARMONISATION IN THE INTERNAL MARKET

On 18 July 2006, the Court of Justice of the European Communities dismissed the appeal made by Sergio Rossi in an appeal against judgment delivered on 1 March 2005 by the Second Chamber of the Court of First Instance (CFI) of the European Communities. (Case T-169/03 *Sergio Rossi v OHIM* [2005] ECR II-685 between Sergio Rossi SpA and the OHIM).

Back in June 1998, an application was made to register "SISSI ROSSI" as a community trade mark for goods in class 18 (leather goods and bags). Sergio Rossi opposed the application on the basis that there would be confusion with their earlier community and international trade mark "MISS ROSSI" registered for goods in class 25 (footwear).

The Opposition Division refused the registration in its entirety and held that the marks were similar. However, the First Board of Appeal of OHIM allowed registration, finding that the marks in question were only vaguely similar. A further appeal to the CFI resulted in a finding that there was no confusion between marks in question. During the hearing at the CFI, the opponent raised the argument for the first time that all of the relevant goods were sold through the same channels and were made of the same raw materials. That argument was rejected by the CFI as being too late.

The appeal to the ECJ was advanced on three grounds:

1. The CFI made an incorrect analysis of the relevant factors under Art 8(1)(b) of Regulation 40/94.
2. The CFI gave no reasons to reject the principle head of claim (contrary to Art 81 of the Rules of Procedure of the CFI).
3. The CFI wrongly denied the appellant a right to adduce evidence (contrary to Art 44(1)(e) of the Rules of Procedure and/or because it was based a breach by OHIM of Art 73 of Regulation No. 40/94).

The orders sought were the rejection of the CFI decision in its entirety, rejection in part (insofar as it related to leather and imitation leather goods) or referral back to OHIM or the CFI.

The Court held:

1. Rejecting the first argument: that appeals are restricted under the Statute of the Court of Justice to matters of law only. The appellant was effectively seeking a reappraisal of the facts.
2. Rejecting the second argument: the pleading said to represent the principle head of claim was rightly ruled inadmissible by the CFI and was therefore not part of the case.
3. Rejecting the third argument: the CFI was obliged to consider only the evidence put forward by the parties. Since the new pleading was not part of the case, the CFI was not obliged to consider it. Furthermore, any breach by OHIM of Art 73 of Regulation No. 40/94 was not argued before the CFI. Consequently, the CFI could not have made an error of law on this issue.

This decision serves to highlight the importance of preparation at all stages in a case and to present all arguments and facts in a timely manner. The appellant brought forward its argument relating to channels of trade and raw materials for the first time at the CFI hearing. By that stage, it was simply too late.

Designs

8. HONDA GIREN KOGYO KABUSHIKI KAISHA (ALSO TRADING AS HONDA MOTOR CO. LTD)

On 30 August 2006, OHIM rejected the application for a declaration of invalidity of Registered Community Design No 163290-0002.

The applicant, Honda GIKEN KOGYO Kabushiki Kaisha (also trading as Honda Motor Co. Ltd), requested the invalidation of the registered design (owned by Kwang Motor Co.) on the basis of Art 25(1)(b) Council Regulation (EC) No 6/2002 alleging that it did not fulfil the requirements of novelty and individual character as set out in Articles 4, 5 and 6. In particular, the applicant claimed that excluding the parts that were not visible in normal use of the engine and the features having a shape solely dictated by the technical features of the product, the design was identical to a prior art design and produced the same overall impression on the informed user.

The Invalidity Division of OHIM held that:

- regarding novelty, according to Art 4(2) of Regulation 6/2002, features of a complex product which were not visible during its normal use, were to be left aside when considering novelty and individual character
- regarding individual character, the degree of freedom of the designer was limited because the internal combustion had to fulfil its function. However, the general impression of the design differed from the prior design

In a related case, the Invalidity Division of OHIM further declared the Registered Community Design No 000171178-0005 invalid due to lack of individual character.

In this application, the applicant, Honda Motor, requested the invalidation of a Registered Community Design owned by Wuxi Kipor Power Co. Ltd since it lacked both novelty and individual character. In particular, the applicant claimed that the characteristic feature of the design in suit was the approximately cubic shape of the generator housing and the flattened section/bevel formed on the upper corners, and there was conspicuous division into sections of bright and dark. Although these features had individual character, they were identical to the

applicant's known generators.

The Invalidity Division of OHIM held that:

- in respect of novelty, in contrast with the prior design, the Registered Community Design was for a generator mounted on wheels and the upper corners of the cubic form were rounded, whereas they were slanted in the prior design. Therefore, the design fulfilled the requirement of novelty
- in respect of individual character, the variation in the shape of the corners and the mounting did not alter the fact that both designs produced the same overall impression on the informed users. The design lacked individual character
- therefore, the Registered Community Design was declared invalid on the ground of Art 25(1)(b) Council Regulation (EC) No 6/2002 on Community Designs due to lack of individual character

**Confidential
Information and
Privacy**

9. HUGHES V CARRATU INTERNATIONAL PLC

In *Hughes v Carratu*, [2006] EWHC 1791 (QB) (19 July 2006), the claimant received notification from the Information Commissioners Office (ICO) that during the execution of a search warrant against an enquiry agent some of the documents that had been found concerned transactions from the claimant's bank accounts. They were being held in breach of the Data Protection Act 1998 and the ICO intended to initiate proceedings.

The claimant was later informed by the ICO that other clients of his solicitors had also been investigated by the same enquiry agent and on reviewing the documents shown to him it appeared that the enquiry agent had been commissioned by the respondent, a corporate investigation consultancy.

The claimant sought further information from the respondent but when this was not forthcoming he issued an Application Notice to seek an order from the court for disclosure by the respondent of all documents that were, or previously had been, in their control relating to his financial affairs. Moreover, with the application, disclosure of the parties for whom the respondent was instructed to gather this information was specifically requested.

The notice was sought under Civil Procedure Rules rule 31.16. The application was also based upon the *Norwich Pharmacal* principles under CPR rule 31.18 that, if a person becomes involved in tortious acts of others through no fault of their own, they are still under a duty to give the person who has been wronged full information and disclose the identity of the wrongdoers.

The respondent claimed that it had been instructed to obtain information lawfully, therefore on receipt of the unlawful information the respondent shredded the documentation without passing to his client, a London law firm.

Justice Tugendhat allowed the application as the threshold test of establishing an arguable cause of action against the respondent and the law firm had been met. The subsequent order entitled the claimant to know who had received the personal information and what had been done with such information. Finally, it was possible that the applicant would be entitled to a remedy under the Data Protection Act

1998.

The judgment reflects the legally required balance between the individual's right to privacy and the effectiveness of investigative measures. Organisations involved in investigations of this type will need to be particularly wary that if they obtain information by methods contrary to the Data Protection Act 1998 because then, under the CPR rule 31.16, they will not only need to disclose all the information that they hold, but they might also be asked to disclose the party for whom the information was acquired.

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