



REVIEW ARTICLE

***Yeda v Rohne*: House of Lords Rule on Patent Entitlement**

In a recent preliminary ruling in relation to *Yeda Research and Development Company Limited v Rhone-Poulenc Rorer International Holdings Inc and others* [2007] UKHL 43, the House of Lords were required to rule on whether Yeda was able to amend its pleadings so as to continue the case for entitlement. The case concerned a patent covering the drug Erbitan that had revenues of \$383.6 million in 2005.

Scientists at the Weizmann Institute of Science in Israel (Weizmann) invented a therapeutic composition involving an antibody and anti-plastic agent that had a synergistic effect in inhibiting growth of cancer cells. Prior to publishing their invention in a scientific paper, Weizmann scientists communicated the invention to Dr. Schelessinger. Dr. Schelessinger had assisted the scientists by providing two of the monoclonal antibodies used in the experiments relating to the invention. At that time, Dr. Schelessinger was on sabbatical from Weizmann and was working with Meloy Laboratories. Before the article was published by Weizmann's scientists, Meloy Laboratories were taken over by Rhone-Poulenc Rorer International Holdings Inc (Rorer). Subsequently, Rorer made an application to patent the invention in different jurisdictions, naming Dr. Schelessinger and his team at Meloy Laboratories as the inventors. Rorer was subsequently granted a UK patent that it licensed to ImClone for commercial exploitation.

Yeda Research and Development Co Ltd (Yeda) is a company exclusively responsible for the commercial exploitation and technology transfer of inventions created by Weizmann scientists. Once it was aware of the patent obtained by Rorer, Yeda made a reference before the Comptroller in the United Kingdom under s37 of the Patents Act 1977, in which it claimed that the invention was made by the scientists at Weizmann. As an assignee of Weizmann's rights, Yeda therefore claimed entitlement to joint ownership of the patent.

During the course of the entitlement proceedings, Yeda sought to amend its reference on two accounts: (i) to include a claim of sole ownership based on its experience in parallel litigations in

other jurisdictions; and (ii) to account for the requirement laid down by the Court of Appeal in *Markem v Zipher* [2005] RPC 31 that states that a person who claims entitlement to a patent which has been granted initially to another person must not only prove his entitlement to the invention, but also that the named patentee is guilty of breaching some other rules of law such as that of contract or of confidence. Rorer objected to the first amendment on the ground that a claim to sole entitlement is a new cause of action and could not therefore be made after the expiry of the two year limitation period as prescribed under s37 of the Patents Act.

The Comptroller allowed both set of amendments, but the High Court and the Court of Appeal disallowed them. Through the present appeal, two main questions were raised before the House of Lords: (i) what does a person claiming entitlement of a patent in someone else's name have to prove? and (ii) does the Comptroller have the power to allow an applicant to amend his claim of joint entitlement to that of sole entitlement after the expiry of the two year limitation period?

In answering the first question, the House of Lords unanimously overruled the principle of *Markem v Zipher* as stipulated above. According to Lord Hoffman, s7 of the Patents Act provides "an exhaustive code for determining who is entitled to the grant of a patent." The Lords were of the opinion that laying down additional requirements, such as those determined in *Markem v Zipher*, confuses the law relating to validity and entitlement. The only requirement for a person seeking joint entitlement to a patent is for him to merely prove that he has contributed to the inventive concept underlying the claimed invention. On the other hand, where a person seeks to be substituted as the sole inventor, he has the additional burden of proving that the inventor named in the patent has not made any contribution to the inventive step.

In relation to the second question, the Lords held that the proceedings for entitlement under s37 of the Patents Act are different from those under ordinary procedural rules, such as the Civil Procedure Rules. The latter requires issuance of a Claim Form and assertion of cause of action, while entitlement proceedings under ordinary procedure rules are exclusively governed through their own limitation period and rules. Therefore, once the Comptroller receives a reference made to him within the prescribed limitation period, the subsequent

amendment claiming a full entitlement would not render the present reference a new reference.

Having elucidated the law on the issue of patent entitlement, the House of Lords have now brought clarity and greater certainty to a subject that had become somewhat muddled after the decision of the Court of Appeal in *Markem v Zipher*. As with most patent entitlement cases, this again emphasises the importance of keeping clear and accurate records of who did what when developing new technologies, particularly when the technology arises out of a collaborative effort.

SPORT AND MEDIA

The FA goodwill in “World Cup Willie”

“World Cup Willie” is the name of the mascot used in the 1966 World Cup hosted in England by the Football Association (FA). The mascot at the centre of *Jules Rimet Cup Ltd v The Football Association* [2007] EWHC 2376 (Ch) consists of a “cartoon type lion dressed in a Union Flag shirt and white trousers”. In 2005, Jules Rimet Cup Ltd (JR) applied to register as trade marks, in respect of a range of goods, the words “World Cup Willie” and a lion device with the words “World Cup Willie”. Once the FA became aware of the applications, it indicated its intention to oppose them. This led to the dispute in which the Claimant, JR, sought, *inter alia*, a declaration that its two trade mark applications could not be successfully opposed by the FA.

The judge first considered the copyright issues arising from the Claimant’s applications. He accepted that the drawings for the World Cup Willie 1966 mascot belonged to the FA. He then focused on whether s52 of the Copyright Design and Patents Act (CDPA) could apply and therefore exclude the possibility that copyright infringement had been committed in the circumstances. Section 52 concerns the effects of exploitation of a design derived from an artistic work and prescribes that, 25 years after the relevant articles are first marketed by the copyright owner (in this case the FA), the work may be copied and this will not amount to copyright infringement. However, Article 3 of the Copyright (Industrial Process and Excluded Articles) (no. 2) Order 1989 excludes the applicability of s52 to certain specific articles such as wall plaques, medals, calendars and trade advertisements. It would therefore be an infringement to reproduce the artistic work on articles that appear on the list in Article 3 without the permission of the copyright owner. Naturally, JR also agreed that reproducing the work on paper would amount to copyright infringement. As a consequence, this would entitle only the copyright owner to apply to register a reproduction of the initial artistic work. Nevertheless, it was also submitted that JR’s drawings were not an exact reproduction of the FA’s works. Actually, the judge found that despite the causal link and the apparent similarities between the two works, the Claimant did not reproduce a

substantial part of the original work. Thus, JR did not infringe FA’s copyright.

However, JR’s claim in relation to its applications for the two trade marks failed in consideration of the residual goodwill the FA retains in World Cup Willie. In particular, the judge considered that, even if the FA did not directly produce the articles bearing World Cup Willie, the public would have considered that the FA was directly involved and responsible for the selection of the manufacturers of such articles. In addition, in the light of the cyclical nature of the allocation of the football World Cup, it was held that the goodwill had not been abandoned and was sufficient to succeed in a passing off action at the time of the applications. Finally, when considering whether JR acted in bad faith, the court found that the Claimant’s telephoning the FA and enquiring whether or not the FA knew of, or claimed any right in the mascot, was a sufficient indication that JR had a good idea that World Cup Willie may have belonged to the FA.

Given these facts, it was not enough for JR to show that it had sought legal advice from trade mark attorneys. The judge found that applying for the trade mark registrations while knowing that residual goodwill of the FA still existed amounted to bad faith. This victory obtained by the FA is likely to represent an important precedent now that an official application has been made for England to host the 2018 World Cup.

Court of Appeal Unbends “Bent Coppers” decision

On 11 October 2007, the Court of Appeal overturned the decision of the High Court in the case of *Michael Charman v Orion Publishing Group Limited, Graeme McLagan* [2007] EWCA Civ 972. The Claimant, a former detective constable in the Metropolitan Police force, claimed that he was defamed in a book called “Bent Coppers” written by Mr. Graeme McLagan and published by the co-Defendant. The action is being tried in stages. At the first stage, the High Court had ruled that the book had a defamatory meaning. At the next stage of the trial, the judge rejected the defences of qualified privilege, both common law and statutory. The Defendants were given leave to appeal.

On appeal, the two issues to be resolved were:

- The extent of the privilege claimed for “reportage” and how this fits into the *Reynolds*’ type of qualified privilege developed by and after the case of *Reynolds v Times Newspapers Ltd* [2001] A.C. 127; and
- The proper approach for the court to take in judging whether the authors and publishers have acted responsibly in communicating the information to the public.

The Appellate Court ruled that the defence of reportage could be established where, judging the thrust of the report as a

whole, the effect of the report is not to adopt the truth of what is being reported, but to record the fact that defamatory statements were made. The protection would be lost if, from the point of view of an ordinary reader, the journalist adopts what has been said, makes it his own, or fails to report the story in a fair, disinterested, neutral way that does not meet the standards of responsible journalism as outlined in the *Reynolds* case. The burden of proof lies with the Defendant. The Court of Appeal concluded that looking at the whole of the book "Bent Coppers," it was hardly a neutral, disinterested report, even if the excerpts reported were factually true. McLagan was not simply reporting published material, but mixing that material with other information his inquiries had revealed.

On the second issue, the Court held that the defence is available to anyone who publishes material of public interest. The Court went on to rule that, for the defence to succeed, the alleged defamatory material has to be looked at as a whole to determine whether the matter was published in the public interest and whether the standards of responsible journalism had been met. There is no duty to publish and there is no public interest in publishing material that the publisher has not taken reasonable steps to verify as accurate. Once the public interest is proved, the inquiry shifts to the question of whether the Defendant acted fairly and responsibly in gathering and publishing the information. In determining whether the Defendant's actions were fair and responsible, weight has to be given to the professional judgment of the journalist, author or editor. The decision must also take into consideration the practical realities under which the judgment was made: these are different from those of a court acting with hindsight and leisure.

The Court of Appeal concluded that on the analysis of the facts and context as a whole, the defence of responsible journalism had been established.

TRADE MARKS

CFI Speaks Out for the Pencil-Shaped Loudspeaker

Bang & Olufsen A/S (B&O) has successfully registered the shape of one of its hi-fi speakers as a trade mark.

B&O had applied for a three dimensional community trade mark for tall, slim, stand-alone, pencil-shaped loudspeakers. The Office of Harmonization for the Internal Market (OHIM) rejected the application, holding that it was devoid of any distinctive character and that there was insufficient evidence of distinctiveness acquired through use according to Article 7(1)(b) and (c) of the Community Trade Mark Regulation 40/94 respectively. B&O appealed but the appeal was also dismissed. B&O then sought an annulment of the judgment of the decision of the Board of Appeal from the Court of First Instance (CFI).

According to the CFI, there are two criteria for assessing the distinctive character of a trade mark: i) a reference to the goods or services for which a mark has been applied; and ii) a reference to the perception of the well informed, reasonably observant and circumspect average consumers towards the company's goods and services. The "average consumers" in this case had a higher level of attention than average consumers in most cases as the speakers were top-of-the range, high value products marketed in an exclusive way. Based on the evidence, the CFI found that (i) the average consumers applied a particularly high level of attention when purchasing the goods; (ii) the mark applied was a striking design that could not be considered to be common; and (iii) the mark departed significantly from the usual designs and signs in the sector concerned. The Court concluded that, with such high attention exercised by these average consumers and having regard to the overall aesthetic result, the unique character of the pencil-shaped mark could be recognised as an indication of the commercial origin of the goods. The mark applied was distinctive, and the decision of the Board of Appeal was annulled.

It should be noted that elements such as the degree of care of consumers and the type of goods or services for which the mark is sought to be registered, are important considerations as to whether a mark is registrable. In addition, the case highlights that anyone who wishes to register a community trade mark should provide enough auxiliary information to maximise the probability that the application in a case like this could succeed.

Squeeze bottle lacked distinctive character

On 25 October 2007, the European Court of Justice (ECJ) gave its ruling in *Develey Holding GmbH & Co. Beteiligungs KG v OHIM*, [2007] C-238/06 P and confirmed the importance of distinctiveness for the registration of a three-dimensional shape as a trade mark.

Develey applied to register a three-dimensional sign in the shape of a bottle as a Community trade mark. The mark had already obtained registration in Germany. However, both the Examiner and the Board of Appeal of The Office of Harmonization for the Internal Market (OHIM) rejected the application on distinctiveness grounds and the Court of First Instance (CFI) upheld the refusal.

Develey contested that decision before the ECJ claiming, *inter alia*, a breach of Article 6 of the Paris Convention and Article 2(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Nevertheless, the Court held that those international agreements were not directly applicable and decided to examine the grounds of appeal only in the context of the Trade Marks Regulation No 40/94.

Develey argued that the CFI had failed to apply Article 74(1) of the Regulation, according to which OHIM must examine the facts of its own motion and establish whether or not a mark is distinctive. The ECJ, however, established that the burden of proof is on the Applicant to provide specific and substantiated information to show that the trade mark applied for has either an intrinsic, distinctive character or a distinctive character acquired by use.

Develey also submitted that, by endorsing that the mark applied for was not distinctive, the CFI had, in essence, invalidated its earlier national registration. The ECJ rejected that argument and stated that neither the validity, nor the protection, of the mark in Germany had been affected. It further confirmed that the Community trade mark regime is an autonomous system and applies independently of any other national system.

Finally, Develey alleged that the Court of First Instance, in assessing the overall impression produced by the bottle, had failed to examine its flattened and wide body which contributed considerably towards its distinctive character. The ECJ held that, in the examination of the individual features of the get-up of a mark, an applicant cannot demand to determine the order in which that examination takes place, the level of detail to which each feature is examined, or the terms used. In any case, even if one of the mark's features could be considered unusual, alone it was not sufficient to influence the overall impression given by the mark and did not automatically confirm that the mark was distinctive.

The case is significant because it confirms that the distinctiveness criterion is crucial for the registration of three-dimensional shapes as Community trade marks. The current approach adopted by the courts is that only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin, is not devoid of any distinctive character. This is true, even if the mark has already obtained national registration, since the European system is autonomous and can thus consider distinctiveness on different grounds.

DESIGNS

The informed user of air freshener

In *Procter & Gamble Co v Reckitt Benckiser (UK) Ltd* [200] EWCA Civ 936, the Court of Appeal examined, for the first time, the nature and scope of the Registered Community Design Right.

In February 2006, Procter & Gamble sued Reckitt Benckiser over the design of the container of its air freshener spray, Air-Wick, claiming that it infringed Procter & Gamble's registered Community design relating to a Febreze aerosol canister. Under Article 10.1 of Council Regulation EC 6/2002 regarding

Community Design Registration (the Community Design Regulation), Community designs are protected from infringement by "any design which does not produce on the informed user a different overall impression" to the Community design.

The High Court ruled in favour of Procter & Gamble, finding that the two designs were too similar. The Court of Appeal overturned this decision. Jacob LJ of the Court of Appeal provided general guidance on the application of Article 10.1. The "informed user" of design law should be considered to be more discriminating than the "average consumer" of trade mark law and be fairly familiar with design issues. The average consumer of trade mark law is considered to be likely to spend less time looking at an article in detail and may not remember fully the appearance of an article. As a result, the possibility of confusion is greater and features that might infringe a registered trade mark might not infringe a registered design.

The overall impression created by the two designs was what mattered in determining whether there was an infringement. The overall impression of a design is what strikes the informed user when they carefully look at the product, rather than their recollection of the product after the viewing. A product with a design that produces a different overall impression will be enough to avoid a charge of infringement.

That difference does not need to be a "clear" difference because an informed user would be able to discriminate that the difference was there. The main features of the design should be considered at a sufficient level of detail to properly consider what the overall impression given to an informed user would be. One example of such a feature would be the quality of the article.

In this case, there was sufficient difference of detail between the two aerosol cans for the Air-Wick can to be considered non-infringing. This case provides useful guidance on the interpretation of design law.

PATENTS

How micro is a micro-emulsion?

On 18 October 2007, the England and Wales Court of Appeal (the Court) handed down a decision in *Novartis (AG) v IVAX Pharmaceuticals UK Limited* (IVAX) that concerned an appeal lodged by Novartis against a decision of Pumfrey J declaring IVAX's "Equoral" product as not infringing Novartis' UK patent no. 2,222,770 (the patent). A cross-appeal was advanced by IVAX on the basis that if the patent did cover Equoral, it would be invalid. This cross-appeal was not heard as the Court dismissed the appeal after hearing Novartis's argument in relation to infringement.

The patent is for cyclosporin galenic formulations in the form of an oil-in-water micro-emulsion pre-concentrate. The relevant invention allows the preparation of solid, semi-solid and liquid compositions containing sufficiently high concentrations of cyclosporin to permit oral administration and improved efficacy.

The Court highlighted that a key point was the definition given to the formulation. The expression “oil-in-water micro-emulsion pre-concentrate” means a system that is able, on contact with water, to provide an oil-in-water micro-emulsion. Moreover, micro-emulsions meant micro-emulsions comprising a dispersed particular phase, consisting of droplets or particles having a size of less than 2,000 Ångstrom (Å).

IVAX’s product, Equoral, is a formulation containing cyclosporine, available in the United Kingdom in the form of an oral solution and gelatine capsules. The controversy before Pumfrey J, in the first instance, was in relation to whether, and if so, how much, of Equoral consisted of a micro-emulsion. He found that, by taking 2,000Å as the maximum size for an emulsion to be considered as micro, the vast majority of particles by number falls below this limit.

However, importantly, less than 14 per cent of the active ingredient was present in the particles of a size greater than 2,000Å. More than 86 per cent of the active ingredient was present in particles of less than 2,000Å.

Novartis’ main argument was based on the fact that the amount of 14 per cent cannot be considered trivial and it is irrelevant that larger particles are present as, if the larger particles were removed one would still be left with a micro-emulsion.

The Court rejected this argument in light of the fundamental teaching of the patent. That is, to avoid the problems of the prior art by carrying the cyclosporin in micro-emulsion sized particles that, over time, do not turn into emulsion-sized particles. That said, it was inconceivable, in the Court’s view, that the patentee would have also covered products in which the active ingredient is carried by emulsion-sized particle. As a result, Equoral seemed to be exactly what Novartis sought to avoid.

The case was therefore decided by: (i) considering how a skilled person would have understood the language of the patentee; and (ii) deeming the low percentage in Equoral of active ingredient contained in micro-emulsion-sized particles as being irrelevant to the fundamental teaching of the patent, which shows how micro-emulsion sized particles can carry the active ingredient to improve its efficacy.

Post-grant amendments: discretion after trial

Vector Corporation v Glatt Air Techniques Inc [2007] EWCA

was an appeal by Vector Corporation, following proceedings in which Vector Corporation sought to revoke Glatt’s Patent EP (UK) 0 570 546. Glatt responded by seeking unconditional amendment but was opposed by Vector on several grounds including discretionary and allowability. The trial judge held the amendments allowable, but granted permission to appeal with regards the allowability of the proposed amendment to claim 13.

The technical field of the patent is fluidised beds and the main point in question was whether the proposed claim amendment would add matter. Jacob LJ believed that there was support for claim 13 as it stood, but Glatt further sought permission for deletion of a phrase within the new claim.

The Court refused. A court is allowed to exercise its discretion in allowing amendments, even if the new drafting itself is not objectionable. This is because allowing an amendment post-grant may have serious implications for others relying upon the content of the original application. In this case, Jacob LJ raised another serious consideration— that of endless litigation.

The validity of patents is, by their nature, dictated by their detailed drafting. Each amendment may result in objections raised on grounds of lack of novelty, inventiveness or support. A previous decision of the Court of Appeal in *Nikken v Pioneer* [2005] EWCA Civ 906 had laid down a general rule that, where there had already been a trial on the validity of patent claims, further applications to re-write claims should be refused because of the possibility of fresh trials being held.

Glatt said that this was an exceptional case with no need for a further trial. The trial at first instance had covered validity, albeit on a wider premise, but the new claim 13 would have been covered in the judge’s considerations.

Jacob LJ was not convinced by this argument but based his decision on Vector’s argument that there may be a new issue of “insufficiency”, if the patent failed to explain what structural device could be used to achieve the result in claim 13. This matter had not been brought before the judge at first instance. Jacob LJ was therefore of the opinion that there was the distinct possibility of a fresh trial. He noted, “If parties were allowed to change their position or add new points from time to time after trial, then there will never be an end of patent litigation.”

It is important that the courts get a firm grip on patent litigation as patents are detailed, technical documents requiring the gathering of extensive evidence. In addition, there is always the possibility of small amendments leading to large-scale commercial consequences. While Jacob LJ blamed delays in the European Patent Office procedures for a lack of control over amendments, this case does show the need for a robust Patent Office review of applications before patents get to trial.

LEGISLATION

Further changes to the Patents Act

Following the revision of the European Patent Convention (EPC) in 2000, sections 1-5 of the Patents Act, 2004 will be brought into force on 13 December 2007, the same day that the revised EPC enters into force. The changes are concerned primarily with: patentability of substances for the use in methods of treatment or diagnosis; amendment of patents after grant and the automatic designation of states on filing of an EP application; and the prior art effect of EP applications in the UK.

European Community Accedes to International Design Treaty

The European Community has recently acceded to the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs. The Geneva Act is aimed at providing procedural uniformity for the registration of designs with those of countries, such as Japan and the United States, where protection of industrial designs is contingent on examination to determine the acceptability of an application. The European Community is the only intergovernmental organisation to have acceded to the Agreement so far.

Swiss Parliament ratifies WIPO internet Treaties

The Swiss Parliament has passed two bills ratifying the World Intellectual Property Organization internet treaties and amending the Copyright Act adapting changes necessitated by the treaties. The amendments follow closely the EU directive on copyright in the information society and provides for protection of works and technical measures in the digital environment.

Companies Act 2006 and Registration of a Company Name

The new s69 of the Companies Act 2006 provides that a person can object to the registration of a company name if the objector has any goodwill in the same name, or believes that the name sought to be registered is so similar that it is likely to be misleading. The term "goodwill" is given an inclusive definition to include a reputation of any description.

NEWS

DEFRA consultation—protection of Scotch whisky

The UK Department for Environment, Food and Rural Affairs has announced that, towards the end of 2007, it will run a consultation with the aim of drafting legislation for better protection of Scotch whisky. The consultation is a proactive step to eventually enhance measures against counterfeiting and

passing off. The introduction of secondary UK legislation is planned for spring 2008.

€ 12 million administrative fine for illegal downloads in Italy

In an operation led by the Financial Police in cooperation with FPM (the Italian Federation against Music Piracy), 1.05 terabytes of protected material (amounting to 121,566 protected works) were found on six computers belonging to four Italian citizens. The material had been regularly uploaded and exchanged over the internet via file-sharing networks. The operation led to the seizure of six computers, seven external hard discs and thousands of CD/DVDs. Administrative fines were also imposed, starting with a minimum amount of €12,521,298, in accordance with Article 174-bis of the Italian Copyright Law.

Gambling Commission—Position Paper of integrity in sports betting

Following its Issues Paper on integrity in sports betting (May 2007) and the subsequent consultation, the UK Gambling Commission has now published a Position Paper that summarises the results of the measures adopted so far. It also details the next steps to be undertaken to support integrity in sports betting.

EU web security—ENISA concerns over MySpace and other online social networks

The recently established European Network and Information Security Agency (ENISA) has issued a Position Paper that identifies 15 specific security threats arising from the use of social networks such as MySpace. The ENISA paper contains recommendations to tackle such threats that include "digital dossier aggregation". Third parties can easily download and store the profiles of online social network users. Suggestions include running campaigns to raise awareness of the risks associated with the use of online social networks.

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