

EIP



Denial of Interim Injunction Favours Start- up Amid Concrete Delivery Patent Dispute

Cloud Cycle Ltd v Verifi LLC & Anor [2024] EWHC 233 (IPEC) (07 February 2024)

Summary

This action concerns a claim by Cloud Cycle Limited (“CCL”) for a declaration of non-infringement of EP (UK) 1 720 689 (the “Patent”), relating to a method for calculating the consistency of concrete mix in delivery vehicles, from Verifi LLC (“Verifi”). Verifi, in turn, counterclaim for infringement of the Patent.

This judgment revolves around two applications that were heard on 31 January 2024 (the “Hearing”):

1. Verifi sought an interim injunction against CCL; and
2. CCL applied for summary judgment to declare non-infringement of the Patent and, by extension, summary dismissal of Verifi's counterclaim.

Hacon J granted permission at the start of the Hearing for GCP Applied Technologies (UK) Limited (“GCP”), Verifi’s exclusive licensee under the Patent, to join as a second defendant and as a joint applicant for interim relief.

The Patent

The Patent in question addresses a method and system for calculating and reporting 'slump' in concrete delivery trucks. 'Slump' is a characteristic which relates to the workability of the concrete mix.

The patented method involves the use of sensors that measure the torque loading on the concrete mixing drum of the delivery vehicle as a means of measuring the slump. Data from these sensors can be stored and analysed later, enabling improved measurements of the slump.

One Test for Both Applications

The judge followed Morris J^[1] in treating the American Cyanamid threshold test^[2] for interim injunctions as equivalent to the test of "no real prospect of succeeding on the claim or issue/successfully defending the claim or issue" in CPR Part 24.3(a) for summary judgment. Consequently, CCL's summary judgment application determined the threshold test for the defendants' request for interim relief.

1. Summary Judgment

The Law

While the law on summary judgment is well established, ^[3] Hacon J summarised the key factors to consider in a patent action:

1. Summary judgment may not be appropriate due to the need to consider claim construction and infringement from the perspective of the skilled person, which requires expert evidence and cross-examination.
2. Expert evidence may be needed for issues involving the doctrine of equivalents, including the identification of the inventive concept.
3. If words of the claim can be interpreted based on their ordinary meaning without expert guidance, summary judgment may be suitable, especially for straightforward technology cases.
4. A party claiming the need for expert evidence must provide sufficient reasons why it is necessary.
5. Even in the absence of issues requiring expert evidence, the general principle applies that summary judgment is not appropriate if further investigation could alter the evidence and affect the outcome of the case.

Application

The defendants advanced two reasons, both largely turning on a single integer, for why they had a real prospect of establishing that CCL's system infringes claim 1 of the Patent:

1. A point on claim construction which, the defendants argued, would turn on expert evidence at trial. This was not considered further as CCL, while disputing the defendants' construction, were content to rely on a second argument below at the Hearing.
2. CCL asserted that its system falls outside this integer of claim 1 regardless of interpretation. The defendants disputed this for two reasons:
 - i. They questioned the credibility of this claim as it relied on evidence from a partner in the firm of the claimant's solicitors, who lacks expertise in the technical field. They further highlighted that the product and process description ("PPD") does not confirm this evidence.
 - ii. They suggested that even if CCL's system does not work exactly as required by claim 1, it could still be considered equivalent if expert evidence at trial demonstrates that the relevant integer is incidental and wholly irrelevant to the system's operation.

Hacon J dismissed CCL's summary judgment application. He agreed that there was uncertainty in the PPD and the evidence provided by CCL. As such, clarification would require expert evidence to be presented before the trial judge.

Furthermore, Hacon J stressed that the argument on equivalents requires a clearer articulation of each party's position regarding the inventive concept disclosed by the Patent. He found that the defendants have a real prospect, subject to expert evidence and a clearer PPD, of persuading the trial judge that CCL's system infringes claim 1 as an equivalent.

2. Interim Injunction

The Law

Hacon J had already established that there was a serious question to be tried following the parallel between CPR Part 24.3(a) for summary judgment and the usual principles in *American Cyanamid*. In assessing whether to grant an injunction, the focus then shifts to minimizing irreparable harm, as articulated by Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd (Jamaica)*. **[4]** The guiding principle is to choose the course of action that is likely to cause the least irremediable prejudice to either party.

Application

GCP have been exploiting the Patent under a royalty free exclusive licence. Therefore, they were joined to the proceedings being the only applicant which could suffer prejudice in the event of there being no injunction.

Consequently, GCP argued potential irreparable harm from CCL's alleged infringement, including price depression, damage to reputation and the potential of CCL not being able to compensate GCP in the event that there was no injunction and that the defendants were to win at trial.

On the other hand, CCL argued that an interim injunction would cause severe harm to its start-up business. They emphasized the critical need for maintaining investor support and meeting revenue and development milestones.

Hacon J dismissed the application and found that no injunction should be awarded. Weighing the potential harm to both parties, he decided that an injunction would significantly restrict CCL's ability to trade, potentially leading to business closure due to its vulnerability during a crucial period of development. Any damage to the defendants was likely to be limited and calculable.

~~Conclusion~~

This judgment emphasises the high threshold that needs to be met to establish a case for summary judgment in a patents action.

Furthermore, this is a lesson that the court will take into consideration the vulnerable nature of start-up businesses and the potentially fatal effects of any limitation of trade when considering whether to grant an interim injunction.

The judgment can be accessed [here](#).

[1] Create Financial Management LLP v Lee [2020] EWHC 1933 (QB) at [53]

[2] American Cyanamid Co v Ethicon Ltd [1975] AC 396

[3] Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]

[4] [2009] UKPC 16 at [17]