

When is a Patent Infringed – The Courts Beg to Differ

In a recent decision, the England and Wales Court of Appeal differed from the High Court when deciding claim construction and contributory infringement. The resulting decision gives guidance on how to decide if a patent is likely to be infringed.

Legal Background

The claims of a patent define the invention protected by the patent.

When a court decides if a patent is valid and/or infringed, it construes the claims, i.e. decides what each term in the claims actually means. In the UK courts, the basic test of claim construction is “What would a skilled person have thought the claim terms meant, at the patent date?”

A person infringes a patent by making, using, importing, supplying or offering to supply the invention, without permission. In the UK, if a person supplies or offers to supply essential parts of an invention, that can still be infringement, even if they do not deal in the whole invention.

For example, if the claimed invention were an apparatus, a person could sell the apparatus in the UK, with one of those components missing. That would not be direct infringement of the claim, because that person was not selling the whole apparatus. However, it would still be contributory infringement if the seller knew that the customer could easily obtain the missing element and make the apparatus.

The test that the courts use, for contributory infringement, is if the alleged infringer has supplied “means relating to an essential element of the invention”, when it is clear that those means are suitable for putting the invention into effect in the UK.

The Invention

This case related to negative pressure wound therapy (“NPWT”). NPWT treats open wounds with a screen over the wound, covered with a larger material such as a flexible polymer sheet. This forms a seal. A vacuum is then applied, to increase the blood flow, which speeds up healing.

The patentees (KCI Licensing Inc. et al. (“KCI”)) accused Smith & Nephew plc et al. (“S&N”) of infringement of two patents.

1. Claim Construction

The first patent was for using a disposable canister to collect material from the wound, to prevent contamination of the vacuum generating pump.

One of the claim terms was “means for detecting when the canister is substantially filled with liquid and generating a signal which causes the pump to be deactivated.”

The High Court found that, if the pump ceased to pump fluid, for whatever reason, it was “deactivated”. This differed from a German court’s construction of the same feature in the equivalent German patent.

S&N argued that the High Court was incorrect, because if the pump stops simply because the canister is full, that is not “deactivated”. The Court of Appeal agreed and therefore held that S&N’s system did not have a means for active “deactivation”. Therefore, the Court of Appeal held the claim not to be infringed, because it decided the claim had a different meaning from that used by the High Court.

2. Contributory infringement

The second patent was to a disposable canister with an outlet tube, with a bacterial filter, and an inlet tube.

KCI alleged contributory infringement by S&N of some claims. S&N sold a device which had all the elements of the claims except one (a clamp).

The High Court agreed that a medical practitioner (the end user) may have attached a clamp to S&N’s system. However, the judge decided that they would have done so on their own initiative and that the purchasers of the system did not buy the system intending to attach a clamp.

Subsequent to the High Court case, the law on contributory infringement changed.

The Court of Appeal in this case applied the new practice and found that, “There is no requirement that the ultimate users must have decided to use the means to put the invention into effect at the time they first take possession of the means.”

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The Court of Appeal found contributory infringement because it was likely that, from time to time, practitioners would apply a clamp to S&N's device.

This case is interesting because it shows that the High Court and the Court of Appeal can find different meanings of the same claims. The Court of Appeal's more liberal approach to contributory infringement will benefit patentees. This case shows the importance of accurately drafted patent claims, which are best achieved using an experienced patent attorney.