

## EU Patent Law

A Paper for the Fordham 2012 Conference

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### **Session: EU Patent Law: Where has it been? Where is it going?**

I am going to talk about 2 things:

1. Judicial co-operation and growth of mutual respect over the last 20 years, and
2. What I see as problems for the so-called “unitary” court if it is enacted as presently proposed. Why it will be a bad system – worse than what we have now.

### **The Growth of Cooperation and Mutual Respect**

Twenty years ago, when the First Fordham conference took place, I was still a fighting barrister. I had never heard of the Fordham conference, nor indeed of Fordham. The name Hugh Hansen would have meant nothing to me. Nor did I know the names of any of the judges in other European countries, save for Ireland. Nor did I know much about either the substantive or procedural law of other European countries. I knew vaguely that the Germans had some sort of what seemed to me woolly rules for deciding infringement – using the claims as nothing more than a guide. And that they had separate courts for infringement and validity. But I paid little attention. How the French went about things I had no idea.

What is important to appreciate is that my profound ignorance of such things simply did not matter. I did not need to know any of them. I think the same would have been true the other way round of lawyers in other countries. German lawyers knew German substantive law and procedure and little else, French lawyers knew French substantive law and procedure and little else and so on. The patent world was essentially insular. And it was about to come to an end.

We had had a foretaste of the future with the *Epilady* case. I was involved in it briefly – unable to do the English case owing to a prior commitment but able to do the appeal in Hong Kong. It was and remains a perfect case for students. The question was whether a depilator using a slitted rubber rod infringed a patent claim which called for a “helical spring.” Basically the rod worked the same way as the helical spring of the patent. Some said it infringed and some not. But even though we knew that, we simply attributed different results in different countries as foreigners doing things by different rules for infringement. Hoffmann J put the difference this way:

The patent in suit is being litigated in a number of countries but the only one in which the action has come to trial is in Germany, where the

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*Landgericht* of Düsseldorf found in favour of the plaintiff. This naturally causes me concern because the *Landgericht* was interpreting the same patent according to the same Protocol and came to a different conclusion. \*198 It seems to me that the reason for the difference between me and my colleagues in Düsseldorf is that, having answered what I have labelled as Lord Diplock's first two questions in the same way as I have, they treated those answers as concluding the matter in favour of the plaintiff and did not find it necessary to ask the third question at all. The specification, they said, conveyed to the expert "the understanding that the configuration of the hair engaging portion as helical spring has to be understood functionally"<sup>24</sup> and that the expert to whom the patent was directed would have "no difficulties in perceiving and understanding this meaning of the teaching of the invention." This does seem to me with respect to be an interpretation closer to treating the language of the claims as a "guideline" than the median course required by the Protocol. I also detect some difference in approach between the *Landgericht* and the *Oberlandesgericht* (Court of Appeal) which had previously discharged an interlocutory injunction granted by the *Landgericht*. The Court of Appeal placed much more emphasis upon the language of the specification<sup>2</sup>.

Sadly from the point of view of comparative law and students *Epilady* settled before any Court of Appeal (save for Hong Kong), still less a Supreme Court got to rule on it. The US case had only just started. I think the patentees would have won – indeed they would probably win to day because US has an express doctrine of equivalents which probably applies at least to unforeseeable equivalents – which the rubber rod was<sup>3</sup>

Of course we also knew about the EPO and the fact that its Boards of Appeal were creating a case-law. And being common lawyers who both like case-law and believe in consistency of law through case law we recognised its significance. Just over 21 years ago this was recognised by our then supreme court, the House of Lords:

These decisions ..... are not binding in the United Kingdom, but they must carry considerable persuasive authority having regard to the provisions of [section 130\(7\)](#) and the desirability of avoiding, so far as possible, divergent jurisprudence on the interpretation of broadly parallel provisions<sup>4</sup>.

But the same could not be and was not said of the important national courts. They were regarded as largely irrelevant. Indeed during the course of oral argument in the Court of Appeal *Genentech*<sup>5</sup> case concerning t-PA (tissue plasminogen activator) I well remember one judge (Mustill LJ) saying that if we were to try to pay attention to all the decisions of national courts, "that would be the way of madness."

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<sup>2</sup> [1990] FSR 181 at p.198

<sup>3</sup> Indeed it was patented in its own right.

<sup>4</sup> *Asahi* [1991] RPC 485 at p. 540 *per* Lord Oliver.

<sup>5</sup> [1989] RPC 147. The patent was revoked in its entirety. It took another 6 years for the EPO to reach a decision, upholding the patent with much reduced scope.

By 1994 I was a judge and went to my first European Patent Judges' Symposium in Newport, Wales. For the first time I met other European Judges.<sup>6</sup> Previous English patent judge had gone to the earlier Symposia but with the exception of William Aldous they had done little to forge links with other European judges. For me it was an eye-widening experience. When you get to know people and discuss things with them, your respect for them grows. We found that we got on, despite language difficulties. For instance I remember Judge Gisbert Steinacker saying in 1998 (Madrid Symposium) "Once when someone told me there was an English decision on the point, I said 'thank you' and put it down. Now I read it." And Judge Steinacker came from an older background and had but limited English. Change was happening across Europe.

I do not have time to track down any of the intermediate development. The fact had come to pass that European patent judges have formed firm links with each other. We have become friends and are now eager to learn from one another. We even informally ask each other whether we have any case law relevant to problem before us. Let me come to the present and quote from a recent judgment of mine:

*Grimme v Scott*<sup>7</sup>

[77] The debate (and exploration in the evidence) before the Judge about s.60(2) was short, not surprisingly given the mass of other issues placed before him. Before us the oral argument was rather fuller. Even then it was not as full as it should have been. Following oral argument we undertook some legal research of our own and the opportunity of asking judicial colleagues in Germany and Holland as to whether they had any case law on the equivalent provisions to s. 60(2). Indeed they had (and an unreported case of Jacob J also emerged). The Dutch Judge told us that his court had even considered the case of a man selling Mr Scott's very machine. We were astonished that the parties, particularly Grimme who were the Dutch plaintiffs, did not tell us about that case.

[78] Accordingly we sought further written argument on the point.

[79] Advocates should recognise that where a point of patent law of general importance, such as the construction of a provision which by Treaty (either the EPC or the Community Patent Convention) is to be implemented by states parties to those conventions, has been decided by a court, particularly a higher court, of another member state, the decision matters here. For, despite the fact that there is no common ultimate patent court for Europe, it is of obvious importance to all the countries of the European Patent Union or the parties to the Community Patent Convention ("the CPC"), that as far as possible the same legal rules apply across all the countries where the provisions of the

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<sup>6</sup> Interestingly on that occasion three Chinese Judges came; few realised how important china would be come in the next

<sup>7</sup> [2010] EWCA Civ 1110

Conventions have been implemented. An important decision in one member state may well be of strong persuasive value in all the others, particularly where the judgment contains clear reasoning on the point.

[80] Broadly we think the principle in our courts – and indeed that in the courts of other member states - should be to try to follow the reasoning of an important decision in another country. Only if the court of one state is convinced that the reasoning of a court in another member state is erroneous should it depart from a point that has been authoritatively decided there. Increasingly that has become the practice in a number of countries, particularly in the important patent countries of France, Germany, Holland and England and Wales. Nowadays we refer to each other's decisions with a frequency which would have been hardly imaginable even twenty years ago. And we do try to be consistent where possible.

[1] The Judges of the patent courts of the various countries of Europe have thereby been able to create some degree of uniformity even though the European Commission and the politicians continue to struggle on the long, long road which one day will give Europe a common patent court. [2010] EWCA Civ 1110.

So we have reached the current position of mutual respect. The consequence has been very significant. The room for divergence between different member states has been greatly reduced. Substantive European patent law has become more and more predictable. The recent *Occlutech* case<sup>8</sup> provides an example. Not only did every European court produce the same answer (no infringement) but their reasoning was much more closely aligned than it would have been in the past. In particular the German and English decisions almost read on to one another. The wording of the claims is becoming decisive. I wonder, for instance, whether *Eplilady* would go the same way in Germany now as it did just under 25 years ago.

### **The Unitary Patent: Troubles ahead**

In 1998 the judges at the European patent symposium formed what they called “the Madrid Group” to advance the progress of a European patent court – a common court in which parallel European patents could be litigated as one. We had no ambition for an EU patent, thinking (rightly in my view) that this was both too ambitious and not the primary problem for Europe. The problem, such as it was, was that of unnecessary parallel litigation. Experienced patent lawyers and the EPO picked up the running and the idea of EPLA (European Patent Litigation Agreement) was born and worked on. The idea is that a coalition of willing member states would in effect pool their patent courts.

EPLA was sabotaged – by theoreticians who wanted a “perfect” unitary system for the EU. It was said that the Court of Justice had to be involved. And so

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<sup>8</sup> AGA Medical v Occlutech, German Supreme Court, 10 May 2011, Case No. X ZR 16/09; AGA Medical vs. Occlutech, Court of Appeal of The Hague, The Netherlands, 19 October 2010, Case no.: 200 020.925/01; Occlutech v. AGA, [2010] EWCA Civ 702 Court of Appeal of England and Wales. An Italian court came to the same conclusion.

the EU became involved. The commission put together a ridiculously small team to take on this giant project – contrast the 50 or 60 or so people who conducted the pharma inquiry for DG competition with the 3 or 4 people (under the direction of the brilliant Margot Froehlinger) for the European patent. The theoreticians and I am afraid very ignorant politicians have had a great input. The result has been what I regard as a fundamentally flawed proposal. Here are its outlines:

1. Regional Divisions and a Central Division. A regional division can be for one country only or for several. Whichever it is, the judges are to be two from the country or region of the division and one from outside.
2. Regional Divisions may “bifurcate” the case, deciding the question of infringement for itself and remitting the question of validity to Central. Or they may decide the whole case for themselves, calling in a “technical judge.”
3. Important aspects of patent law are to be the subject of ultimate rulings by the Court of Justice of the European Union (Articles 6-8 – concerned with what acts amount to infringement)
4. The language(s) of the case depend on the division, not the language capabilities of the parties and the judges.

What is the result likely to be? Firstly forum shopping. If you have a weak patent but a strong – even unanswerable – case of infringement you will chose a Division which bifurcates. Why wouldn't you? Especially if that Division will grant an injunction on principles other than those for the grant of an interim injunction (a good case on both validity and infringement and urgency being key prerequisites).

Secondly cost – both in translation requirements and administration. The cheapest and simplest thing to do would be to find out who the parties are (so minimal paper before then) and tailor the language(s) to the case.

Third delay. Anything which must go be reference to the CJEU will take years – one of the key objects of EPLA was to have a first instance decision within year and any appeal within two.

Fourth destruction of courts which have only local significance – SME v SME in one country disputes. The UK's Patents County court which is now under HHJ Birss proving that a small claim court for patents can work, would have to go

Fifth uncertainty of law. I make no bones about this. The CJEU has a very poor track record in commercial law – hardly surprising since few if any of its judges were ever commercial lawyers of any sort (judge, lawyer or academic). The fact that there have been about 125 decisions of the CJEU on references alone in only 10 years in the case of trade marks shows that fears for what might happen if patents fall within the same sort of regime. Industry does not want that and Europe does not need it. So far the Court's limited interventions in patents based on the biotech directive have been awful. In *Monsanto v Cefetra*<sup>9</sup> it came up with an illegitimate method of construing patents when there was a perfectly

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<sup>9</sup> Case C-428/8 [2011] FSR 6

conventional (and correct) way<sup>10</sup> to construe the claim so that it did not cover the imported soya meal containing fragments of DNA. If that sort of reasoning applied to claim construction generally the careful work by the European patent judges over the last 20 years would be in ruins. And in *Brustle v Greenpeace*<sup>11</sup> it has declared unpatentable subject-matter which although itself perfectly lawful and not itself falling within the prohibition of the Biotech Directive involved an upstream lawful destruction of a single human embryo, an embryo in any event destined for destruction<sup>12</sup>. I wish the Judges of the ECJ had been at the recent UCL event where Professor Peter Coffey described his work – work which needs funding and could be funded by the prospect of a patent – on a cure for macular degeneration. Currently 7 million people in the EU are blind or near by reason of this.

It is time to undo some aspects of the current proposals. Disputes about where the Central Division should go are holding them up, but that is not the heart of the problem. The problems go deeper. I think the whole concept of Divisions should go, and we should as far as possible go back to EPLA: judges should be judges of the Court, not of Divisions of the Court, the language(s) of the case should be adjusted when the linguistic abilities of the parties is known, the venue for sitting should vary according to the parties, there should be no possibility of forum shopping, there should be the possibility of local decision for what are in reality one country disputes and so on.

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<sup>10</sup> As adopted by Pumfrey J at first instance in the corresponding English case, [2007] EWHC 2257 (Pat) at paras. 72-80.

<sup>11</sup> Case C-34/10

<sup>12</sup> Pursuant to the applicable laws concerning retention and use of embryos.