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Case No: CA-2022-001980

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

The Hon Mr Justice Meade
[2022] EWHC 2034 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LADY JUSTICE FALK

Between :

THE NOCO COMPANY **Appellant**
- and -
SHENZHEN CAR KU TECHNOLOGY CO. LTD **Respondent**

Andrew Lykiardopoulos KC and Adam Gamsa (instructed by Jones Day)
for the **Appellant**
Hugo Cuddigan KC and Edward Cronan (instructed by Powell Gilbert LLP)
for the **Respondent**

Hearing dates : 12/12/2023

Approved Judgment

This judgment was handed down remotely at 11.00am on 19/12/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether communications between The NOCO Company (“NOCO”) and Amazon amounted to a “threat of infringement proceedings” for the purposes of section 70 of the Patents Act 1977. Meade J held that they did. His judgment is at [2022] EWHC 2034 (Pat). Most of his judgment concerned the question whether the patent in suit was valid and infringed. He found that it was invalid for obviousness, and was therefore incapable of infringement. There is no appeal against his conclusions in that respect.

The facts

2. NOCO and Shenzhen Carku Technology Co Ltd (“Carku”) are rival manufacturers of, among other things, lithium-ion batteries for jump-starting a motor vehicle with a flat battery. NOCO was the proprietor of a patent (GB 2 257 858) in respect of such a product. On 6 June 2022 Carku launched proceedings for a declaration of non-infringement of the patent; a declaration that the patent was invalid; the revocation of the patent and relief against unjustified threats of infringement. NOCO counterclaimed for infringement of the patent. It was that patent that the judge held to be invalid for obviousness, although he also held that, if it had been valid, it would have been infringed by some of Carku’s products (although not the Carku products in issue in this appeal).
3. Carku supplies products to distributors, who market the products via Amazon. Amazon has an “Amazon Intellectual Property Policy” which states that it provides protection and safeguarding measures for intellectual property rights holders. Under this policy, any proprietor of intellectual property rights is able to file complaints with Amazon via its website using an “Infringement Form”. Amazon also operates what is called a “Brand Registry”, which companies have to register to use (i.e., it cannot be accessed by all rights owners as a matter of course). NOCO has a first party (“1P”) relationship with Amazon (meaning that Amazon buys products directly from NOCO to sell on Amazon’s own account) and is registered with the Brand Registry. NOCO’s status as a 1P partner also means that NOCO has been allocated a contact person at Amazon, referred to in NOCO’s evidence as a category manager. Amazon’s Brand Registry covers all intellectual property rights, including patents.
4. Amazon’s conditions of use and sale (as at 29 January 2020) provided:

“9. INTELLECTUAL PROPERTY CLAIMS

Amazon respects the intellectual property of others. If you believe that your intellectual property rights had been used in a way that gives rise to concerns of infringement, please follow our Notice and Procedure for Making Claims of Right Infringement.”

“19 NOTICE AND PROCEDURE FOR MAKING CLAIMS OF RIGHT INFRINGEMENTS

If you believe that your intellectual property rights have been infringed and you are eligible for Brand Registry, please sign up to that service and submit your complaint via Brand Registry. Otherwise please submit your complaint using our online Notice Form form. This form may be used to report all types of intellectual property claims, including, but not limited to, copyright, trademark, design and patent claims.

Upon receipt of a complaint we may take certain actions, including removing information or an item... All such actions are taken without any admission as to liability and without prejudice to any rights, remedies or defenses, all of which are expressly reserved. This includes forwarding the complaint to the parties involved in the provision of the allegedly infringing content. You agree to indemnify Amazon for all claims brought by a third party against Amazon arising out of or in connection with the submission of a complaint.”

5. The Q & A section of the Brand Registry policy includes the following:

“Amazon does not allow listings that violate the intellectual property rights of rights owners. For detailed information, please review Amazon’s Intellectual Property (IP) policy. We encourage rights owners who have concerns regarding the misuse of their intellectual property to notify us using the Report a Violation tool in Amazon Brand Registry. ”

6. In relation to some US patents Amazon also offers a neutral evaluation process. This a consensual process between patentee and alleged infringer which enables proprietors of certain US patents to obtain an evaluation of their patent infringement claims against third party sellers. It is a condition of use of this procedure that both parties waive all claims against Amazon, and agree not to sue Amazon. The evaluation is carried out by a neutral third party. The evaluator will produce a yes/no decision about whether the impugned product infringes the patent. If the evaluator concludes that an impugned product is covered by a patent, Amazon will remove it. But Amazon may allow relisting if the seller obtains a judgment or arbitration award to the effect that the impugned product does not infringe. This is not a procedure that was used in this case, although it is said to show that Amazon is both litigation aware and litigation averse.
7. Between January and July 2020, NOCO made a number of complaints via the “Infringement Form” in respect of certain Carku products, providing the following information:
- i) The type of intellectual property rights e.g. “patent infringement”;
 - ii) The marketplace (i.e. country);

- iii) The infringing ASINs (Amazon Standard Identification Number);
 - iv) The patent number;
 - v) The patent type (i.e. for those countries which have both design and utility patents); and
 - vi) The brand name.
8. The ASIN is used to identify the impugned product and can also be used to identify the seller of it. The form also has an “Additional Information” box of up to 3000 characters. There was a minor (and unexplained) discrepancy between the rubric of the standard form and the forms that NOCO apparently completed. In the standard form, the rubric was “Please provide more information on how the reported product(s) are infringing your patent right”. The rubric on the form completed by NOCO, however, was simply “Additional information.”
9. In the majority of cases NOCO filled in that box in one of the following forms:
- “These ASINs infringe on our utility patent, number GB2527858. Please remove these ASINs” or
- “The registration number for our utility patent is GB2527858. Please remove these ASINs”
10. In June 2020, however, different wording was used in the complaints. It took the following form:
- “These ASINs infringe on our patent. We have a legal letter from Amazon’s legal team stating the legitimacy of this claim. I will escalate [sic] this case to provide that letter. Please remove these ASINs.”
11. The reference to a letter from “Amazon’s legal team” is a reference to a letter dated 12 May 2020 sent by Hogan Lovells (solicitors for Amazon) to Carku’s solicitors, Powell Gilbert. This was sent following correspondence between Amazon and Carku (not all of which was shown to the judge), in relation to Amazon’s decision to delist the notified Carku products following the notifications made by NOCO. In this letter, Amazon indicated that it had “assessed the patent infringement and the other allegations presented by each party” and “concluded that those made by NOCO regarding the infringement of its patent (and the non-infringement of Car-ku’s [sic]) are sufficiently grounded...”.
12. The first (and largest) batch of complaints were made on 2 and 8 January 2020. The second batch came at the end of January. Further complaints were made between 3 and 13 February and again in mid-June; and the last were made in early July. While this series of complaints was in the course of being made, on 3 February 2020 Mr Nook of NOCO sent an email to NOCO’s designated contact at Amazon in which he stated that NOCO “do continue to file lawsuits against companies that infringe on our safety patent”. Having named relevant distributors who distributed the impugned Carku products, he went on to say that NOCO had won some cases against them and reached settlement in others.

13. As a result of the notifications made by NOCO, Amazon notified Carku distributors, beginning in January 2020 that it had removed some of Carku's products from sale because they had received a report from a rights owner that they infringed a patent (the number of which was given). They were also notified that they could "reach out to the rights owner" and ask for a retraction of the notice. The distributors, in turn, informed Carku. NOCO made no direct approach to Carku.
14. The consequence of the removal of Carku's products from the Amazon site was, according to Carku, a very substantial loss in sales.

The statutory provisions

15. As Mr Cuddigan KC correctly pointed out, neither a product nor a process infringes a patent. On the contrary, section 60 of the Patents Act 1977 provides that "a *person* infringes a patent" if, without the consent of the patentee, he does one or more of a number of things specified in that section. Where the invention is a product, they include disposing of or offering to dispose of the product. Section 61 prescribes the legal remedies which are available to a patentee whose patent has been infringed.
16. The origins of the legislation prohibiting unjustified threats go back to 1883, when Parliament decided to remedy a defect in the common law which had been exposed by the decision of this court in *Halsey v Brotherhood* (1881) 19 Ch D 386. In short, Mr Halsey and Mr Brotherhood were trade rivals each making steam engines. Mr Brotherhood was the proprietor of a patent. He persistently and systematically threatened potential customers of Mr Halsey that, in the event of their dealing with Mr Halsey, he (Mr Brotherhood) would take proceedings against them on the ground of patent infringement. No proceedings were ever started; but many of Mr Halsey's potential customers were deterred from doing business with him. On the basis that Mr Brotherhood's assertions of patent infringement were made in good faith, it was held that there was no cause of action by which Mr Halsey could prevent him from continuing to make those threats.
17. Parliament plugged that gap in the law by section 32 of the Patents, Designs and Trade Marks Act 1883. The legislation has since gone through many iterations and is now to be found in the Patents Act 1977, as amended by the Intellectual Property (Unjustified Threats) Act 2017. The 2017 Act was passed after a consultation and report by the Law Commission.
18. Section 70 of the 1977 Act, as amended, provides:
 - "(1) A communication contains a "threat of infringement proceedings" if a reasonable person in the position of a recipient would understand from the communication that—
 - (a) a patent exists, and
 - (b) a person intends to bring proceedings (whether in a court in the United Kingdom or elsewhere) against another person for infringement of the patent by—
 - (i) an act done in the United Kingdom, or

(ii) an act which, if done, would be done in the United Kingdom.

(2) References in this section and in section 70C to a “recipient” include, in the case of a communication directed to the public or a section of the public, references to a person to whom the communication is directed.”

19. Section 70A (1) provides:

“(1) Subject to subsections (2) to (5), a threat of infringement proceedings made by any person is actionable by any person aggrieved by the threat.

(2) A threat of infringement proceedings is not actionable if the infringement is alleged to consist of—

(a) where the invention is a product, making a product for disposal or importing a product for disposal, or

(b) where the invention is a process, using a process.

(3) A threat of infringement proceedings is not actionable if the infringement is alleged to consist of an act which, if done, would constitute an infringement of a kind mentioned in subsection (2)(a) or (b).

(4) A threat of infringement proceedings is not actionable if the threat—

(a) is made to a person who has done, or intends to do, an act mentioned in subsection (2)(a) or (b) in relation to a product or process, and

(b) is a threat of proceedings for an infringement alleged to consist of doing anything else in relation to that product or process.

(5) A threat of infringement proceedings which is not an express threat is not actionable if it is contained in a permitted communication.

(6) In sections 70C and 70D “an actionable threat” means a threat of infringement proceedings that is actionable in accordance with this section.”

20. Section 70B defines “permitted communications” referred to in section 70A (5). It provides:

“(1) For the purposes of section 70A(5), a communication containing a threat of infringement proceedings is a “permitted communication” if—

(a) the communication, so far as it contains information that relates to the threat, is made for a permitted purpose;

(b) all of the information that relates to the threat is information that—

(i) is necessary for that purpose (see subsection (5)(a) to (c) for some examples of necessary information), and

(ii) the person making the communication reasonably believes is true.

(2) Each of the following is a “permitted purpose”—

(a) giving notice that a patent exists;

(b) discovering whether, or by whom, a patent has been infringed by an act mentioned in section 70A(2)(a) or (b);

(c) giving notice that a person has a right in or under a patent, where another person’s awareness of the right is relevant to any proceedings that may be brought in respect of the patent.

(3) The court may, having regard to the nature of the purposes listed in subsection (2)(a) to (c), treat any other purpose as a “permitted purpose” if it considers that it is in the interests of justice to do so.

(4) But the following may not be treated as a “permitted purpose”—

(a) requesting a person to cease doing, for commercial purposes, anything in relation to a product or process,

(b) requesting a person to deliver up or destroy a product, or

(c) requesting a person to give an undertaking relating to a product or process.

(5) If any of the following information is included in a communication made for a permitted purpose, it is information that is “necessary for that purpose” (see subsection (1)(b)(i))—

(a) a statement that a patent exists and is in force or that an application for a patent has been made;

(b) details of the patent, or of a right in or under the patent, which—

(i) are accurate in all material respects, and

(ii) are not misleading in any material respect; and

(c) information enabling the identification of the products or processes in respect of which it is alleged that acts infringing the patent have been carried out.”

21. There are a number of points to be made about the legislation. First, the recipient of the communication must understand that a person intends to bring infringement proceedings against “another person”. That “other person” need not be the recipient of the communication. Second, a threat is not actionable if the allegation is an allegation of primary infringement (i.e. manufacturing or importing a patented product, or using a patented process) or if it is made to a primary infringer. I understand it to be common ground that if a patented product is made available by Amazon without the consent of the patentee, Amazon is potentially liable for infringement as a secondary infringer. Third, proceedings may be brought by “any person aggrieved by the threat”. That person need not be the recipient or, indeed, the person against whom the threat is made. Fourth, a threat is not actionable if it is not an express threat, and is contained in a permitted communication (i.e. one that is made for a permitted purpose, and all the information that relates to the threat is necessary for that purpose). Although the concept of a permitted communication is defined flexibly, a communication which requests a person to cease doing, for commercial purposes, anything in relation to a product, cannot be a permitted purpose. Thus, a request to a distributor to stop distributing a product or a request to a retailer to cease selling the product cannot be a permitted purpose.

The case law

22. Pumfrey J described the underlying policy of the threats provisions in *Quads 4 Kids v Campbell* [2006] EWHC 2482 (Ch), [2006] Info TLR 338 at [24]:

“It is entirely wrong for owners of intellectual property rights to attempt to assert them without litigation, or without the threat of litigation, in reply. If somebody goes around saying, “I will sue you for infringement of patent unless you stop buying your goods from X”, then the natural response of anybody to whom that statement is made was to stop buying the goods of X. The statement may be entirely truthful and it may also be made with the complete belief in its truth. In those circumstances, the action of malicious falsehood is not available. The action for threats was therefore invented to cover precisely the case where a bona fide statement which is untrue as to infringement was made and has caused the claimant loss.”

23. Previous case law (decided when the statutory provisions were different) established that a “threat” covered any intimation that would convey to a reasonable person that some person had rights under a patent and intended to enforce them against another person. It did not matter that the threat might be veiled or covert, conditional or future. Nor did it matter that the threat was made in response to an enquiry made by the person threatened: *L’Oreal (UK) Ltd v Johnson & Johnson* [2000] FSR 686, 693 (Lightman J dealing with trade mark infringement); *Best Buy Co Inc v Worldwide Sales Corporation España SL* [2011] EWCA Civ 618; [2011] FSR 30 at [21] (Lord Neuberger MR also dealing with trade marks).

24. The existence of the tightly defined “permitted purposes” in section 70B also suggests that the concept of a “threat” is a wide one: see *Zeno Corporation v BSM-Bionic Solutions Management GMBH* [2009] EWHC 1829 (Pat) at [95]; *Best Buy* at [20].
25. Both these points are reinforced by the current legislation. Section 70 (1) makes it clear that the applicable test is what the communication would convey to a reasonable person; and section 70A (5) plainly envisages a threat which is not an express threat. In addition, the explanatory notes to the 2017 Act confirm that (with one modification that is not relevant to this case) the test for what amounts to a threat follows previous case law.
26. The *Best Buy* case also establishes that, at least where the communication is in writing, it is to be interpreted in accordance with the same principles that apply to the interpretation of contracts and unilateral documents. Thus, the question is: what would a reasonable person, with knowledge of the circumstances at the date of the communication, have understood the communication to mean? This, too, is reinforced by the current legislation because the meaning of the communication is to be judged by reference to “a reasonable person in the position of the recipient”. What the actual recipient understood the communication to mean; and what the actual recipient did in response to it is not, therefore, directly relevant.
27. In considering how the communication would have been understood by a reasonable person, first impressions are important: *Brain v Ingledeu Brown Bennison and Garrett (No 3)* [1997] FSR 511, 521.
28. Despite the doubts, expressed *obiter* in *Best Buy*, where there is a sequence of communications, I consider that the communications must be looked at as a whole. A document which is not threatening when taken in isolation may well be when read in the context of the rest of a sequence of correspondence: *Brain v Ingledeu Brown Bennison and Garrett (No 3)* at 521.

Alternative dispute resolution

29. Mr Lykiardopoulos KC, for NOCO, placed heavy reliance on the existence of what he described as Amazon’s alternative dispute resolution process, and argued that a reasonable person in the position of Amazon would not have understood resort to that process by a patentee as amounting to a threat of infringement proceedings against Amazon. On the contrary, that process is designed to avoid litigation; and is one which Amazon encourages.
30. As the judge pointed out, this is the first case in the UK courts about Amazon’s IPR procedure. But similar questions have arisen at an interim stage in relation to eBay’s VeRO (Verified Rights Owner) programme.
31. Pumfrey J explained how that system worked in *Quads 4 Kids* at [11]:

“eBay provides something called VeRO, which is a programme intended to assist the owners of intellectual property rights in policing their rights. It is described in a page or two on the eBay website, which reveals that VeRO stands for Verified Rights Owner, and also reveals that the scheme,

apparently, counts amongst its participants over 10,000 companies and individuals representing every type of intellectual property. What VeRO is said to do in particular is to provide rapid response by eBay in ending listings reported by the right owner, as allegedly infringing pursuant to the VeRO programme notice of infringement.”

32. VeRO is initiated by a rights owner (in that case the proprietor of a registered design) completing an online form. The form contained three bullet points as follows:

““• I am the owner, or agent authorised to act on behalf of the owner, of certain intellectual property rights (“IP owner”).

• I have in good faith belief that the listings identified below (by item number) offer items or contain materials that are not authorised by the IP owner, its agent or the law and, therefore, infringe the IP Owner's rights according to English Law; and

• I make this declaration conscientiously believing it to be true and correct and in accordance with English law.”

Then a space is left for the rights owner and for communications. Right at the end, a list of types of notification which are acceptable is given with spaces to mark in the reason code and the item numbers. Under “Other Infringement” appears the words the “Reason Codes 5.2: Item(s) infringes a registered design right (requires design registration number).”

33. Pumfrey J went on to explain at [14]:

“eBay and VeRO do not check allegations of infringement. They are not in any position to do so, nor are they a judicial body. The effect is, therefore, that this notification to VeRO has the effect, and did have the effect, of causing a listing to be removed. The listings, as I have indicated, all have numbers, so Dr Campbell is enabled to give the number of the claimant's listings. In due course, the claimants received a notification from eBay — in not entirely friendly terms — telling them that the specified items had indeed been removed from the listing:

“Dear Quads4Kids, thank you for your recent listing on eBay. Unfortunately, we removed the following items”,

and they are listed. Then underneath that,

“The rights owner, Dr Colin Campbell, notified eBay that this listing violates intellectual property rights. When eBay receives a report of this type of violation, we remove the listing to comply with the law. The following information may help explain the reason for your listings removal”,

and there is no such information provided, but at the bottom it says

“We encourage you to contact Dr Colin Campbell directly if you have any questions. You can send an email to [a given address].”

34. There is a fuller description of VeRO in *L’Oreal SA v eBay International AG* [2009] EWHC 1094 (Ch), [2009] ETMR 53 at [79] to [86] (Arnold J).

35. The question before Pumfrey J was whether it was arguable that resort to the VeRO process amounted to a threat of infringement proceedings against eBay. As to that, he said:

“[26] The representation that was made to eBay is, it might be said, consensual in this sense, that eBay offer a service whose purpose is to avoid eBay being involved in disputes with right owners. eBay take the line of least resistance. They insist upon a proper notification but, once the proper notification is made, they remove the listing. They do not themselves check the bona fides or accuracy of the notification. They rely upon the notifying person for that, but they say if we get a well-constituted notification, then we will remove the listing.

[27] Mr St Ville argues, I believe with considerable force, that what can be described as an institutionalised avoidance of litigation is a response in fact to a threat. After all, he says, if there were no threat implicit in the statement that was made to eBay, why would they withdraw the listing even by way of a standard response to any notification of this description. On the other hand, it might well be argued, if you went to eBay and said ‘do you really fear being sued in relation to all these notifications?’, they would have to say no.

[28] I find this a remarkably difficult question. I have, however, come to the conclusion that Mr St Ville’s submission raises a seriously triable point. It may well be that we have to take a very slightly wider view of what amounts to an actionable threat than has previously been taken in the cases, but the nature of the potential abuse in this case is quite clear.”

36. Pumfrey J’s decision has been followed in other cases about the VeRO scheme: *Cassie Creations Ltd v Blackmore* [2014] EWHC 2941 (Ch) (Mr Richard Spearman QC); *T & A Textiles and Hosiery Ltd* [2015] EWHC 2888 (IPEC) (Mr Douglas Campbell). In neither case was it necessary to reach a final decision on the VeRO scheme, although in both cases the deputy judges were more inclined than Pumfrey J to consider the use of the VeRO scheme as a threat. But as far as I can see from the judgment in each case, the complainant did no more than fill in the VeRO form, with its three bullet points, as described by Pumfrey J.

37. Like the judge, I am not able to derive much help from interlocutory or obiter observations about VeRO. Quite apart from anything else, the completion of the VeRO form did not ask eBay to do anything. In this case, the form actually filled in by NOCO went beyond simply providing additional information as contemplated by Amazon's Infringement Form. In this case the complaints both asserted infringement and also requested *Amazon* to remove the impugned products from sale, even before any investigation of the complaint. An allegation of infringement, as Mr Cuddigan submitted, is an allegation that a *person* has infringed the patent by doing one of the acts specified in section 60. At [220] the judge recorded and rejected the following submission:

“Carku suggested that *Zeno* was also authority for the proposition that a request to stop selling a product is a threat. I do not accept there is any black and white rule about that; the question is whether there is a threat. Such a request may well be a threat and the communication in *Zeno* plainly was.”

38. Put in that way, the judge was plainly right. A request to stop selling a product may be made for all sorts of reasons (it is unsafe; it is a breach of an exclusive distribution agreement; it is a cheap imitation etc). Moreover, on the facts in *Zeno* there was no request made to the retailers to stop selling the product; nor, indeed, was there an express allegation of patent infringement. That said, however, I find it difficult to see how an explicit allegation of patent *infringement*, coupled with a request to remove (i.e. stop selling) the product is not, at the least, an implicit (or veiled) threat that if the request is not complied with infringement will be pursued through the courts.

39. The judge said at [250]:

“The relevant communications assert the existence of patent rights, assert infringement of those rights, and call for action to be taken to end the alleged infringement. In most contexts they would be classic threats.”

40. I agree. But the judge was right to go on to consider “the present context” in order to see whether it led to any different answer. That context focussed on Amazon's IPR policy; and its response to the complaints. The judge concluded at [255]:

“Taking these matters together, I have little or no hesitation in concluding that the communications to Amazon were threats of patent infringement proceedings against Amazon in the event that it did not delist Carku's products.”

41. I agree that the complaints amounted to threats, as that expression is broadly understood. The reasonable recipient in the position of Amazon would surely ask: what happens if I don't remove the impugned products from sale? The answer must surely be: the patentee will enforce his rights by action. It was, at the very least, a veiled threat. Moreover, it seems to me to be implicit in the way that section 70B (4) (a) is drafted that a request to a potential secondary infringer to delist (or stop selling) a product amounts to a threat.

42. That accords with Mr Campbell's decision in *T & A Textiles* at [82] in which he said of a solicitor's letter sent to eBay:

"The relevant points here are that (a) it is written by the Claimant's solicitors on their headed notepaper (b) it specifically mentions the Claimant's registered design right (c) it specifically mentions that "*court proceedings have been issued against the manufacturer of the infringing items*" (d) it links such "*infringing items*" to "*the sellers who are selling the products on your website*", and (e) invites "*confirmation that the infringing items have been removed from your website*". The first impression of an ordinary reader in the position of this actual recipient would be that this was a clear threat – why else, such a person would ask, am I receiving a letter from solicitors talking about Court proceedings which have already been issued in the context of items which are being sold on my website, and what is likely to happen to me if I do not give the confirmation sought? Such a person would hope to avoid such proceedings by removing the items from listing but that does not make the letter itself any less of a threat."

43. I agree, particularly with the last sentence. A notification and take down procedure is an obvious way for the operator of an on-line market place to immunise itself against future liability.

44. Mr Lykiardopoulos said that the judge lost sight of a "key distinction;" namely that between:

- i) Whether the reasonable recipient in the position of Amazon knows that there is a dispute which could possibly lead to litigation in the future (and that it could not be ruled out that a claim could be made against the recipient); and
- ii) Whether a reasonable recipient in the position of Amazon would regard the particular complaints as threats against Amazon itself.

45. Although Mr Lykiardopoulos said that only the latter matter, I do not agree. In the first place the statutory scheme does not require that the communication be understood as a threat to bring proceedings against the recipient. It is sufficient that the threat is one to bring proceedings against "a person". It was suggested that there might be a difference in the scope of the inquiry into damages dependent on whether the threat was a threat against Amazon itself rather than against the distributors. I am bound to say that I cannot, at the moment, see why that should be. What caused the loss to Carku was the fact that Amazon delisted the impugned products; and Mr Lykiardopoulos accepted that Amazon delisted the impugned products as a result of the complaints. Whether Amazon took that action because it perceived a threat to itself or to someone else does not, on the face of it, alter the causative potency of the threat. Second, I agree with Mr Cuddigan that the former situation is simply a more conditional example of the latter (Compare *Bowden Controls Ltd v Acco Cable Ltd* [1990] RPC 427 where Aldous J placed some reliance on the fact that the communication in issue did not explicitly exclude the recipient from the threat).

46. Mr Lykiardopoulos placed emphasis on the fact that NOCO has a first party (“1P”) relationship with Amazon. That meant that NOCO had a contact person at Amazon referred to as a “category manager”. It was unlikely, he said, that a seller with a 1P relationship would use Amazon’s IPR procedure to threaten Amazon with infringement proceedings, and unlikely that Amazon would understand the use of that procedure in that way. The difficulty with that submission, to my mind, lies in the very fact that NOCO *did* resort immediately to the notification and take down procedure, instead of, for example, contacting the category manager with a potential problem. In other words, use of the IPR notification and take down procedure bypasses the category manager. In addition, of course, as it is constantly necessary to remind oneself, the statutory question is not what Amazon would have understood the communications to mean, but what a reasonable person in the position of Amazon would have understood them to mean.
47. In addition, this is not a case in which NOCO were content to await the outcome of an alternative dispute resolution procedure before requesting removal of the impugned products from sale. Nor is this a case in which dispute resolution is undertaken by a wholly neutral third party with nothing to lose. On the contrary, it is a case in which Amazon itself is potentially liable for secondary infringement. To put it colloquially, Amazon has skin in the game.
48. In so far as it is relevant, this is borne out by the terms of Amazon’s policy. First, it states that any action it takes will be “taken without any admission as to liability and without prejudice to any rights, remedies or defenses, all of which are expressly reserved.” The use of the word “defenses” plainly indicates that proceedings are contemplated and moreover, envisages the prospect of proceedings being instituted against Amazon itself. Second, one of the actions that Amazon may take is to forward the complaint to the alleged infringer. The possibility of a dispute between the complainant and the third party is obvious. Third, Amazon requires an indemnity from the complainant. The point of that must be to protect Amazon from any legal claim. Although NOCO said that it would never sue Amazon (and that it would be commercial folly to do so), as the judge said, that is not something that Amazon (or a reasonable recipient in the position of Amazon) must be taken to know.
49. Mr Lykiardopoulos argued that the result of the judge’s conclusion is that, objectively viewed, every one of the communications that Amazon receives under its IPR complaints procedure would be understood by Amazon to be a threat of IPR litigation (whether of trademark, patent or copyright) against Amazon itself. There are, in my view two flaws in this argument. First, the question is not (at least directly) what Amazon would have understood. The question is what a reasonable person in the position of Amazon would have understood. Second, mere resort to the IPR complaints procedure may or may not be so understood, depending on what the complaint actually says. The “boilerplate” part of the “Infringement Form” simply invites provision of neutral information, the provision of which is capable of being a permitted communication. In this case, it was the Additional Information that went further by positively requesting Amazon to remove the impugned products before any investigation had been carried out.
50. Mr Lykiardopoulos also argued that all that this shows is that Amazon will know that there is a potential dispute between the patentee and a third party which might end up in court. It does not show that Amazon contemplates that it itself will be a defendant.

But even if he is right about that, I do not think that it matters. As I have said, the statutory scheme is satisfied if a reasonable person in the position of the recipient would understand that the patentee intends to bring infringement proceedings against “another person”, not necessarily the recipient of the communication. As the judge correctly said at [265]:

“Even if I were wrong about [the threat against Amazon itself], the position in relation to third parties is absolutely clear given the communication of February 2020 quoted above. NOCO had no rational answer to it. Amazon would understand that if it carried on selling, NOCO would be ready willing and able to sue the relevant third party distributors.”

51. I have reached my conclusion that the judge was right without the need to consider the email of February 2020. If the notifications were not threats against Amazon, they were threats against the distributors (all of whom could be identified from the ASINs specified on the complaint forms). I would accept that (without more) the email could not be an aid to the interpretation of free-standing communications that preceded it, but I see no reason why it should not inform the interpretation of later ones.

Result

52. I would dismiss the appeal.

Lord Justice Arnold:

53. I agree.

Lady Justice Falk:

54. I also agree.