

Neutral Citation Number: [2019] EWHC 2450 (IPEC)

Claim No. IP-2018-000199

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 July 2019

Before :

His Honour Judge Hacon
(sitting as a Judge of the Intellectual Property Enterprise Court)

Between :

Kwikbolt Limited Claimant

-and-

Airbus Operations Limited Defendants

Ms H. Lawrence (instructed by **Williams Powell**) appeared on behalf of the Claimant

Mr H. Ward (instructed by **Allen & Overy**) appeared on behalf of the Defendant.

Approved Judgment

JUDGMENT

Judge Hacon:

1. This is an application to transfer these proceedings from IPEC to the Patents Court. Henry Ward appears for the defendant Airbus, which is applying for the transfer. Heather Lawrence appears for the claimant Kwikbolt, which resists the application. Kwikbolt is the proprietor of UK Patent number 2455635, which claims an invention entitled “removable blind fastener”. A blind fastener is a device for fastening one workpiece to another which can be inserted and fixed from just one side of one of the workpieces, as opposed to a nut and bolt type fastener which requires access to both sides. The patented devices are removable, which makes them useful when only temporary fixing is required.
2. The single example of their use, given at the start of the patent, is for applying a skin to an aircraft wing frame. As I understand it, this is exactly the sort of use which Airbus makes of removable blind fasteners at its plant at Broughton, North Wales, where the wings of Airbus aircraft are made. Airbus uses a blind fastener made by a US company called 'Centrix' Kwikbolt alleges that the keeping and use by Airbus of the Centrix fasteners infringes the patent.
3. In considering the merits of an application to transfer proceedings to the patents court CPR 63.18(2) requires that I must have regard to Practice Direction 30 . I summarised the principles which cover transfer from IPEC to allow list in the High Court in *77M Limited v Ordnance Survey Limited [2017] EWHC 1501 (IPEC)* beginning with para.9 of PD. I said this:

"[2] Next, practice direction 30, para.9 :

'When deciding whether to order a transfer of proceedings to or from the Intellectual Property Enterprise Court the court will consider whether –

- (1) a party can only afford to bring or defend the claim in the Intellectual Property Enterprise Court; and
- (2) the claim is appropriate to be determined by the Intellectual Property Enterprise Court having regard in particular to –
 - (a) the value of the claim (including the value of an injunction);
 - (b) the complexity of the issues; and
 - (c) the estimated length of the trial.

9.2 Where the court orders proceedings to be transferred to or from the Intellectual Property Enterprise Court it may –

- (1) specify terms for such a transfer; and
- (2) award reduced or no costs where it allows the claimant to withdraw the claim'.

[3] His Honour Judge Birss considered the relevant factors for transfer in *ALK-Abello Limited v Meridian Medical Technologies [2010] EWPCC 14* , there in the context of the predecessor of the IPEC, that is to say the Patents County Court. He said this:

'30. Pulling the various factors together, the points to consider are:-

i) the financial position of the parties (s.289(2) 1988 Act). This includes but is not limited to considering whether a party can only afford to bring or defend the claim in a patents county court (para.9.1(1) Practice Direction 30). This factor is closely related to access to justice. The Patents County Court was set up to assist small and medium sized enterprises in enforcing and litigating intellectual property disputes. Guidance on the nature of these enterprises can be found from the Commission Recommendation 2003/361/EC.

ii) whether the claim is appropriate to be determined by a patents county court. This involves considering:

a) the value of the claim, including the value of an injunction and the amount in dispute. (Para.9.1(2)(a) Practice Direction 30 and CPR 30.3(a))

b) the complexity of the issues (para.9.1(2)(b) Practice Direction 30 and CPR 30.3(d))

c) the estimated length of the trial. (Para.9.1(2)(c) Practice Direction 30). Related to this is CPR 30.3(b) - whether it would be more convenient or fair for hearings (including the trial) to be held in some other court.

iii) the importance of the outcome of the claim to the public in general (CPR 30.3(e)) albeit that a case raising an important question of fact or law need not necessarily be transferred to the Patents Court (s.289(2) 1988 Act).

31. A factor which does not play a role is the one in CPR Pt 30.3(c) (availability of a judge specialising in the type of claim in question) since specialist judges are available in both courts.

32. Once those factors are considered I must bear in mind what sort of cases the Patents County Court was established to handle and that its role is to provide cheaper, speedier and more informal procedures to ensure that small and medium sized enterprises, and private individuals, were not deterred from innovation by the potential cost of litigation to safeguard their rights. The decision turns on what the interests of justice require, taking into account both parties interests and interests of other litigants'.

[4] Judge Birss expanded on what he had said in para.30 of *ALK-Abello* , with regard to the financial position of the parties, in *Comic Enterprises Limited v Twentieth Century Fox Film Corporation [2012] EWPC 13* . He said this:

'21. This case is one in which access to justice for SMEs is raised squarely. It is the key element of Miss McFarland's submissions that her client should stay in the PCC. Mr Malynicz submitted it was in effect just another factor to be weighed up like all the others. (I should note he does not accept the evidence on the point but I will deal with that below.) On the issue of principle, in my judgment Mr Malynicz is wrong. The Patents County Court has a specific role to improve access to justice for smaller and medium sized enterprises in the area of intellectual property. I described access to justice for small and medium sized enterprises as a "decisive factor" in *Alk-Abello* (para.55) and I stand by that observation.

22. However cases in which an SME seeks to sue a large defendant were always obviously going to present particular problems for a specialist court for small and medium sized enterprises in intellectual property matters. The fact that an IP right is held by a small claimant does not mean that the defendant will conveniently be a small enterprise as well. In the past small claimants were concerned that they could not afford to fight in the High Court and, more importantly, could not afford to lose. The costs order would bankrupt the company. The PCC's cost capping system deals with this problem and caps the claimant's downside costs risk at £50,000. That is one of the ways in which the PCC facilitates access to justice.

23. Many smaller business people perceive that their intellectual property has been stolen by large corporations. Hitherto there was little they felt they could do about it. The PCC is by no means intended to be a panacea but it is intended to be a forum to facilitate access to justice for

smaller IP rights holders and for that matter smaller organisations accused of infringing IP rights as well.

24. So what is the court to do when faced with a small claimant suing a large defendant? One thing is plain. As I have said already each case depends on its facts. A small claimant does not have an unfettered right to stay in the PCC regardless of the nature of the case any more than a large defendant has an unfettered right to demand that it be sued in the High Court'.

[5] He also went on to say this:

"48. I remind myself that the ultimate objective of an order for transfer is to do justice between the parties. The argument that the case should remain in the Patents County Court is a powerful one. Access to justice for SMEs is capable of being a decisive factor having regard to the purposes for which the Patents County Court was set up. The claimant in this case would be severely affected by an adverse costs order in the High Court. However set against that is the nature of this case itself and its value".

[6] On the facts in *Comic Enterprises*, Judge Birss was concerned with the behaviour of the claimant, the party opposing transfer out of the Patents County Court:

"55. I believe the decisive factor in this case is the claimant's approach to the litigation despite its being an SME. The claimant is not approaching the case as if it is a Patents County Court claim. The claimant's approach has been to run this case as a full scale High Court style action with a claim for an injunction with catastrophic consequences for the defendant. Since that is the claim the claimant wishes to advance, the correct forum in which to do it is the High Court".

[7] In *Environmental Recycling Technologies [2012] EWHC 2097 Pat* , Warren J referred to para.48 of *Comic Enterprises* and said this:

"56. Ms. Lawrence submits that the financial position of the parties is determinative. I think she gets that proposition in the sense that when an SME wants the Patents County Court and is poor, the factor is decisive and that was indeed what Judge Birss said. If you have a very poor defendant, SME or individual who wants a case in the Patents County Court, that is a decisive factor. For my part I would not say it was decisive but it is obviously an enormously important factor and may overwhelm others.

57. But even Judge Birss did not mean to be as prescriptive as that. For him, as is obviously correct, the overriding matter is the justice of the case and access to justice. It does not follow, and it is illogical, that just because a party can afford High Court litigation means that the case must be in the High Court (other factors pointing in that direction) especially if the party is an SME or individual".

[8] Mr. Riordan reminded me of the cautionary note provided by Judge Birss in *Destra Software Limited v Comada (UK) LLP [2012] EWPC 39* . This was a case concerning a dispute about computer software. The judge recognised that it could be factually complicated, but he said this at paragraph 34:

"34. However, in fact at the moment we do not know whether this case will be anything like as complicated as it might seem. That will depend on the process of disclosure and rounds of pleadings which are inevitable in a software copyright case. Although it sounds complicated, in fact it is inevitable that copyright cases of this kind have to be looked at this way. They do require more management than other intellectual property cases."

4. I will make some general observations before considering the facts of the case. First, I must take into account the complexity of the issues and the estimated length of trial. As these two issues are related, it will

usually be the case that if a trial can be heard in two or at the most three days it will be of a complexity that makes it suitable for hearing in IPEC.

5. There are some proceedings which have far too many issues and would plainly take too much time at trial to be heard in IPEC. Where that is the case, even important matters such as access to justice cannot assist a party who wants the case heard in IPEC. Unsurprisingly, applications to transfer into or out of IPEC rarely concern such cases. More characteristically, one side insists that the case will take four, five or six days, whereas the other side has no doubt that the trial can easily be completed within two. In assessing the time that the trial is likely to take, the court must take into account the extent to which the proceedings can fairly be case-managed to focus the issues between the parties, which will include preventing a proliferation of issues which are marginal at best and may even have been raised to improve the chances of having the case transferred out of IPEC or to resist it being transferred into IPEC.
6. Secondly, if the proceedings are of a nature such that they can be heard fairly within two or three days, possibly following some focussing of the issues, by far the most important factor is to ensure that parties with limited financial means are afforded access to justice. I refer to the authorities cited in the passage from 77M which I have quoted above. Where access to justice is likely to be possible only if the proceedings are in IPEC, that is a very powerful factor in favour of having the case heard in IPEC.
7. Thirdly, the value of the claim should not be confused with the cap on damages which applies in the IPEC. To take an example, it is possible that an injunction would cut the defendant's market share and increase the claimant's share such that the value of the injunction is well in excess of £500,000. However, it does not follow that the high value of a claim by itself means that it cannot be heard in IPEC. It would make no sense at all if an impecunious claimant could never seek to enforce his right in IPEC solely because the claimant can show that the injunction could have a large financial impact. Access to justice always remains important.
8. That said, the value of the claim, including the likely financial impact of the injunction, is of course relevant, and sometimes will be a matter of significance. Generally, that will be the case because a defendant who is facing the possibility of an injunction which could have high financial consequences will have a proportionately greater entitlement to ensure that all these reasonable arguments in their defence are taken. I emphasise that the arguments must still be reasonable in the circumstances.
9. Fourthly, the approach to the litigation taken by the parties seeking to have the case heard in IPEC is relevant. As Judge Birss said in *Comic Enterprises*, the claimant that pleads and otherwise approaches a case in a manner more appropriate for a case in a list outside IPEC: that case is liable to be transferred out of IPEC.
10. I turn to the facts of the case. The patent in suit claims a mechanical invention which is not at all complex. The body of the specification consists of six pages of double-spaced text, in each case occupying only half the page. There are seventeen product claims, and one method claim. Claims 2 to 16 are all dependent on claim 1. Kwikbolt has provided a claims chart. Claim 1 is divided into 21 integers, all said to be present in

the infringed class. Helpful annotated diagrams and photographs are provided showing where the integers are said to be found in the Centrix fastener. All the integers of all the other claims are also said to be present or used in the case of the method claim, except claim 17 which is not alleged to be infringed.

11. In its defence and counterclaim Airbus admits having done the acts alleged to infringe. Airbus says that the Centrix fasteners fall within none of the claims. Six of the twenty-one integers of claim 1 are said to be missing, although to some degree the arguments on missing integers are related. In its grounds of invalidity, Airbus alleges that the patent lacks novelty over one US application which is called the McClure 1. Airbus also relies on a prior use of product called the 'E-Nut', which is said to be one of the embodiments of McClure 1. Airbus says that the E-Nut was part of the common general knowledge. I suspect that the E-Nut's role at trial will be to serve as a model which makes the understanding of McClure 1 easier for the trial judge.
12. Airbus also alleges that the patent lacks inventive step over the three items of prior art including McClure 1 and what I take to be a related application referred to as McClure 2.
13. Finally, Airbus alleges that the patent specification is insufficient in that the only figures showing the patented fastener in operation do not, Airbus say, show a design which would work in practice, because it would not allow two workpieces being attached to be kept in alignment. There are validity claims charts.
14. Kwikbolt's reply pleads reliance on the doctrine of equivalents. This is somewhat under-pleaded at present, particularly in that Kwikbolt has not stated its case on what constitutes the invented concept. This is something which needs to be remedied by the time of the CMC, whether heard in this court or in the patents court. Mr Ward has told me today that Airbus might wish to rely on a pleaded Formstein defence in due course.
15. I have no doubt that this is a case which could easily be heard in this court. Nor do I have any real doubt that it could be heard in two days, giving both sides every opportunity to advance their respective cases fully and fairly. It is possible that at the CMC the court may be persuaded that a three-day trial is needed, but at the moment I doubt even that is required.
16. Two day trials which were significantly more complex than this one have been heard many times in IPEC without any difficulty at all. I bear in mind the possibility that there may be properly pleaded allegations of infringement under the doctrine of equivalents, and possibly a Formstein defence in due course. Such arguments are familiar in this court.
17. However, that is not an end to the matter because Airbus makes two overall points. The first is that Kwikbolt has not established on the evidence that it could not afford to litigate in the Patents Court. The second concerns the potential harm which would be caused by an injunction should Kwikbolt win at trial. Airbus say that the potential harm is such that this case must be heard in the Patents Court.
18. Airbus is part of the Airbus Group, which on the evidence has annual revenues of £55.4 billion. Its ability to run any patent action is in practice limited only by how much money it wants to spend. That cannot be said

for Kwikbolt. Christian Wenczka, who is a director and company secretary of Kwikbolt, has filed a witness statement. It seems that Kwikbolt has five employees; it is a micro-entity within the meaning given that term by the UK government's accounting advice to companies. According to Mr Wenczka, this means that it has a turnover of less than £632,000, and balance sheet total of less than £316,000.

19. Neville Cordell who is a solicitor and partner at Allen & Overy, who have conduct of these proceedings on behalf of Airbus, says that two of those criteria need to be satisfied to be a micro-entity. Mr Cordell has apparently looked at Kwikbolt's accounts, because he says that it has total net assets of £34,890. Oddly, neither side has exhibited those accounts.
20. Mr Wenczka says that he believes that Kwikbolt would have to drop this action if it were faced with the higher costs associated with the patents court.
21. I do not believe that I am entitled to assume on the evidence that it would be impossible for Kwikbolt to raise any extra money necessary to run an action in the Patents Court, and indeed to pay Airbus' costs should Kwikbolt lose. But I believe it is fair to infer that this would put a serious financial strain on Kwikbolt's business, and it might, as Mr Wenczka suggests, be too great a burden for Kwikbolt to bear.
22. There can be no doubt whatever that there is an overwhelming imbalance of resources as between Airbus and Kwikbolt. Experience also teaches that statements of costs in the Patents Court tend to branch out and blossom marvellously when compared to statements of costs for equivalent proceedings in IPEC. It is not unrealistic to suppose that the costs may increase by some hundreds of thousands of pounds. In fact, this is even part of Mr Ward's argument. He made a point of asserting that the Patents Court is seen as providing the Rolls Royce of English proceedings, to which Airbus is entitled. Rolls Royces are no doubt reassuringly expensive to run.
23. A very small enterprise like Kwikbolt is bound to be prejudiced if it has to face the higher costs of the Patents Court. In closing Mr Ward said that Airbus would undertake to accept that if this case were transferred to the Patents Court the cost caps applicable in this court would continue to apply as if the case were continuing in IPEC. That was a helpful offer on the part of Airbus, but does not deal with the likely increase in costs that Kwikbolt would have to face in running its own case in the Patents Court against such a well-funded opponent.
24. I turn to the potential damage that an injunction would impose on Airbus. Airbus makes much of the potential damage to its business that could be caused if Kwikbolt were to win at trial, and the injunction were to be granted. I have seen a witness statement from Johnathan Jones who is General Procurement Category Manager at Airbus. He estimates it would take nine weeks to switch to alternative fasteners, and the delay in production at Broughton could cost Airbus up to £9 million. This point at least seems to have fallen away because, as I understand it, Kwikbolt is prepared to accept that no immediate injunction should be granted if it were to win at trial. Kwikbolt would accept that there should be a stay of any injunction for a reasonable period to allow Airbus to change from the infringing fasteners to non-infringing fasteners.

25. Airbus says currently, on the evidence, the only alternative fastener that it could use, were Kwikbolt to succeed at trial, is the old-fashioned nut and bolt fastener. Airbus believe that there will be substantial losses attached to having to use this old type of fastener. The evidence of Mr Jones was that it would cost around £25 million to switch to the old-fashioned fasteners. He says in addition to this there would be loss of sales of aircraft, and therefore loss of profits of £100 million per aircraft. If this evidence is accurate, this would no doubt be a relevant issue if Kwikbolt were to win at trial. However, in my view the trial judge after the trial would be in a better position than I am today to assess the evidence on this, and to decide on the relief appropriate should Kwikbolt succeed at trial.
26. I can see there may be a formidable argument to advance that an injunction would not benefit Kwikbolt because the old fasteners which would then be used by Airbus would not infringe. On the other hand there would be disproportionate damage to Airbus caused by the injunction if their evidence is correct. If Airbus's argument is good, I must assume that it will persuade the trial judge after the trial and, should it prove necessary, it would persuade the Court of Appeal thereafter. On the other hand, if Airbus's argument is not a good one, then the argument falls away, whether advanced after the trial or now. Either way, the trial judge is going to be in a better position to assess this at trial than I am today.
27. In any event, it seems to me if an injunction would be damaging, it does not follow that this case must be heard in the Patents Court. Exactly the same damage would be caused by an injunction granted in the patents court. As I have already indicated, the effect of an injunction would only be relevant to the issue of transfer if there was a realistic risk that Airbus' ability to argue its defence to the claim for patent infringement would be significantly limited if the case were heard in this court. I have no doubt that it would not.
28. More than that, the question of whether an injunction would constitute a disproportionate relief is a matter that will certainly be considered in the event that Kwikbolt wins at trial, for the reasons that I have already stated.
29. For those reasons, I take the view that these proceedings should not be transferred to patents.

MR WARD: My Lord, firstly, I imagine this will be short, but I will seek permission to appeal that judgment on the basis that my Lord's judgment, with respect, completely failed to address the central question on this application, which was the actual justice which the (inaudible) being deprived of, particularly in light of my later offer, which my Lord did not address at all.

JUDGE HACON: Okay, well, that is a matter for you to take up with the Court of Appeal, Mr Ward.

MR WARD: Yes.

JUDGE HACON: (Inaudible) a matter of case management.