

“BRA-WARS” - An uplifting yarn

Stretchline Intellectual Properties Ltd v. H&M Hennes & Mauritz UK Ltd

This case raises three main areas of interest for patent litigators:

1. The effect of an settlement agreement on subsequent patent litigation;
2. The construction of a patent when a common general knowledge argument is raised; and
3. Good practice in relation to PPDs (product and process descriptions).

The Patent in issue described the inclusion of fusible yarn in a tubular fabric such as that used in underwired brassieres. The fusible yarn increases the ability of the fabric to resist penetration by the underwire.

There had been earlier patent infringement proceedings between the same parties in which H&M had challenged the validity of the same Patent. By a settlement agreement, the parties compromised all the claims between them and H&M agreed not to sell any products which fell within the claims of the Patent. On discovering such products were still being sold, Stretchline sued H&M for breach of the settlement agreement. In its defence, H&M denied that it was in breach. It also claimed that the Patent was invalid. However, the High Court struck out this invalidity defence because that issue had been settled. That decision was upheld by the Court of Appeal ([[2015](#)] EWCA Civ 516).

Accordingly, at trial, the settlement agreement prevented H&M raising validity and running the usual “squeeze” arguments. Nevertheless in relation to construction of the Patent, H&M argued that the skilled person would appreciate that, on Stretchline’s construction, the

If you would like to speak to someone about this news flash, please contact:

Briget Harrison, Chambers’ Director: bharrison@hogarthchambers.com

To unsubscribe to these newsflashes, please reply with “unsubscribe” Thank You

invention would be invalid over common general knowledge because the fusible yarn was being used for its well-known purpose of bonding/fusing fibres. On this basis, H&M argued that its construction should be preferred. Henry Carr J. rejected this argument on three grounds:

1. It was really an attempt to challenge validity and to raise a squeeze between non-infringement and validity. This was precluded by the settlement agreement;
2. In light of *Adaptive Spectrum v. British Telecommunications* [2014] EWCA Civ 1462, H&M was not entitled to use the common general knowledge argument as a basis to reject Stretchline's construction; and
3. In any event, the common general knowledge argument failed on evidence.

Having upheld Stretchline's construction of the Patent, Henry Carr J. concluded that H&M's products fell within the claims of that Patent and that H&M was therefore in breach of the settlement agreement.

As regards H&M's PPDs, these were criticised because:

- They were neither true nor complete. They were in fact inaccurate in various respects;
- They had been verified by an individual (H&M's expert) who did not have personal knowledge of the products and processes and who had relied on inadequate information provided by H&M's garment manufacturers; and
- That individual had not appreciated the importance of the PPDs and had not addressed their inadequacies when further information came to light.

The judge also made some general points regarding PPDs. He emphasised that, as the service of a PPD frees a defendant from certain disclosure obligations, it is essential that the PPD be true, complete, and sufficient to enable all issues of infringement to be resolved. It is also essential that the person verifying the PPD be made aware of its significance. Further, a defendant which does not know the relevant facts necessary for a PPD but which wishes to put forward a case of non-infringement, needs to find out those facts. To this end, it may be

sensible to obtain and to disclose samples. This may make it unnecessary to serve a PPD or it may allow the defendant to limit the scope of the PPD to information that cannot be ascertained from those samples.

Nicholas Caddick Q.C. and **Andrew Norris** represented Stretchline. They were instructed by Nelsons Solicitors.