**PATENT INFRINGEMENT**

The infringement of a patent can have extremely serious consequences. For example, in the United States, incorrect advice led to a damages award of more than $900 million in *Polaroid Corp. v. Eastman Kodak Co.* 16 USPQ2d 1481 (D. Mass. 1990). The amount did not involve punitive damages though, as there was no “wilfulness”. Moreover, interestingly, it was reasonable for Kodak to have relied on the advice of their attorney, whose work “shows a patent clearance process that could serve as a model for what the law requires” (1538). In South Africa, the award of damages or reasonable royalties, issues often of great interest to clients, is dependent on a finding of infringement (section 45 of the Patents Act 57 of 1978; read with sections 65(3)(c) and (6)). A finding of infringement itself will relate to section 45. This section provides the patentee with the exclusive right to exclude third parties from making, using, exercising, developing, offering to dispose of or importing the invention. What do these concepts mean?

The term “making” simply refers to the situation where the patented article is manufactured. In this regard, it is not always clear what the position is with regard to the repair of articles. In some cases, it was stated that it is allowed to prolong the life of a patented article, but one may not, under the guise of repair, make an article that is essentially new. In *Dana Corporation v Rhobrake (Pty) Limited* 1992 BP 297 (CP), the patent related to a clutch for motor vehicles. The defendant purchased and reconditioned old clutch plate units, which were then sold. It was held not to be infringement. The view has, however, been expressed that the clutches assembled by the defendant were “second creations” of the patented clutches (Burrell *South African Patent and Design Law* (1998) 250). With regard to “using”, it can be noted that *bona fide* experimental use does not amount to use and, thus, is not infringement. On the other hand, use by way of demonstration, but for commercial purposes, would not be covered by this exclusion. In the context of contributory infringement, reference must be made to the decision in *Grande Paroisse SA v Sasol Ltd* 2003 BIP 11 (CP). This decision related to the construction, for the first defendant by the second defendant, of a tube reactor for producing certain chemicals according to a process contained in a claim of the patent, and the provision of maintenance services in respect of the reactor by the second defendant to the first defendant. It was held that contributory infringement was possible in the circumstances.

With regard to the issue of the evaluation of the existence of infringement, it appears that two approaches are followed (Burrell 260). These may be understood against the background of the contents of a patent’s specification. It includes a body, which has the function of instructing the public how to carry out the invention once the period of protection has expired. It also includes claims, consisting of “integers” (or features), which describe the area prohibited to competitors. Turning then to forms of infringement, it can be noted that the first form is “textual” infringement. This refers to the situation where the conduct falls within the specific wording of a claim and every “integer”. There are two exceptions to this rule, according to the important decision in *Gentiruco AG v Firestone SA (Pty) Ltd* 1971 BP58 (AD). On the one hand, when the body of the specification provides definitions of certain terms, the meaning attached to such terms may be used in interpreting the claim concerned. On the other hand, when the wording of a claim is ambiguous, one may look at the wording of the body of the specification to determine whether a particular meaning can be ascribed to the claim. In *Selero (Pty) Ltd v Chauvier* 1983 BP 175 (AD), a matter involving the well-known Kreepy Krauly/Barracuda pool cleaners, the court had to consider the meaning of a specific term (“suction passages”). The court held that in the interpretation thereof, the body of the specification of the patent had to be looked at (thus not only the claims). In the circumstances, the court disregarded the views of the experts concerned (this approach has been criticised though – Burrel 263). The second form of infringement is when the exact claims are not contravened, but indeed the “pith and marrow” thereof. This necessitates a determination of essential and non-essential features of the invention. In terms of the “purposive” approach, which our courts adopted from English law, an interpretation that is “sensible”, rather than literal, should be given to a claim. These principles are rather abstract and it is of value to look at a practical example of the application thereof. In the recent decision in *Sunsmart v Flag and Flagpole Industries* 2007 SCA 50 (RSA), a patent was registered for a “flag construction”, which was said to be substantially as depicted in the drawing below. As background to the invention, it was stated by the patentee (par 3) that:

[F]lags and banners are commonly used for advertising purposes but… both have certain drawbacks. Flags require sufficient wind before the material spreads out and in windy conditions the flapping of the material may make reading difficult. Banners on the other hand can be utilised in low or no wind conditions but are difficult to secure in strong winds which may cause them to tear. It is stated that the object of the invention is therefore… to provide a flag which does not suffer the above disadvantages and which is eminently suitable for transportable advertising.

Of interest is the facts in the Irish “Lipitor” case, also known as *Ranbaxy Laboratories Ltd v Warner Lambert Company* 2007 IEHC 256. Here, a patent was granted for an invention dealing with cholesterol treatment, which was titled *Trans- [2-(3-or 4-carboxamido-substituted pyrrol-1-yl) alkyl]-4- hydroxpyran-2-one inhibitors of cholesterol synthesis*. It seems clear that a patent can relate to matter that has varying degrees of complexity!

Last, what is also clear is that the manner in which a patent’s specification is drafted is of vital importance. One the one hand, if it is drafted narrowly, it may survive an attack on the basis that it is not inventive. On the other hand, the protection may then not be broad enough and a third party could more easily escape liability. If it is drafted too broadly, the protection could be wide, but it may be invalid because it includes, within the patent claimed, elements of the “prior art”: in other words, material already known at the time of the patent application (*Ranbaxy* case par 3.3). This process clearly requires specialised knowledge and technical skills and is best not undertaken by a client himself/herself. This should be impressed upon the client wishing to save costs. Instead, the practitioner should refer the matter to a patent colleague as soon as possible. As the *Polaroid* case proves, prevention is better than cure.

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