

ENGLAND AND WALES / JUDGMENT

Brundle v Perry & Ors

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Neutral Citation Number: [2015] EWCA Civ 672 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM HIGH COURT - CHANCERY DIVISION COMMERCIAL COURT (His Honour Judge Hacon) Case No: A3/2014/1462 Royal Courts of Justice Strand London, WC2A 2LL Date: Tuesday, 3 February 2015 Before LORD JUSTICE LEWISON

- ----- Between: BRUNDLE
- and - PERRY& OTHERS
- ----- (DAR Transcript of WordWave International Limited A Merrill Communications Company 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 Official Shorthand Writers to the Court)
- ----- Applicant Respondents Mr Perry appeared in Person The respondent was not represented
- -----

Judgment

LORD JUSTICE LEWISON:

1. Mr Perry renews his application for permission to appeal against the decision of His Honour Judge Hacon in the Intellectual Property Enterprise Court. The judge decided that Mr Perry had made groundless threats of patent infringement and he granted an injunction restraining repetition of those threats. There is no doubt at all that Mr Perry did make threats, the issue before the judge was whether they were groundless.
2. Mr Perry was alerted to the possibility that his patent was being infringed by a series of emails received from an eager manufacturer who claimed to be manufacturing his products. He also received what apparently was an order for various items under his own name, but he himself had not placed that order. He was shown a design drawing produced by Better Fence which is the person against whom he made the threats and took the view that there was no coincidence between the apparent date of the drawing and the copyright drawing which was automatically generated by a computer and drew the inference that Better Fence were, as he put it, up to no good.

3. The way that he has presented his case this morning and, indeed, in his written material in support of his appeal does suggest that he might have had a claim in passing off, in that people were manufacturing products which they said were his and placing orders in his name when he had had nothing to do with it. That was however not the way he put the claim before the judge and it is therefore not open to him to advance that kind of claim on an appeal against the judge's decision.
4. The issue for the judge and the only issue for the judge was whether the claimants' product called the "Beam bracket" and the "Universal bracket" infringed Mr Perry's patent. Mr Perry's patent relates to a bracket for attaching a fence panel to a fence post and it is described in claim 1 of the patent on which all other claims depend. I should make it clear at this point that although one must of course look at the specification of the patent in order to be able to interpret the claim, the extent of the monopoly protected by a patent is determined entirely by the claim. Something which appears on the specification but which does not appear in the claim itself is not protected by the monopoly conferred by a patent.
5. The judge set out claim 1 of the patent which was the claim in question in paragraph 34 of his judgment. He divided it into 9 features as is conventional in analysing patent claims and they were as follows: "(1) A bracket for securing a fence panel to a fence post
 - (2) The bracket being adapted to embrace a corner of a fence panel.
 - (3) And comprising a main body having a rectangular central portion.
 - (4) Adapted in use to lie along the top of the panel.
 - (5) And two contiguous triangular portions.
 - (6) Adapted in use to lie one each side of the panel.
 - (7) With one apex adjacent the post and the other spaced therefrom.
 - (8) And flange means.
 - (9) Adapted in use to lie against and be attached to the post." (Quote unchecked)
6. Both the Intellectual Property Office and the judge decided that the accused products did not infringe. Although they had some of the features described by the claim, they did not have all of them. Unless they have all of them, they cannot infringe, as Mr Perry accepts. The question is therefore whether Mr Perry has real prospect of success in persuading the Court of Appeal that the judge was wrong in his interpretation of the claim.
7. As far as the beam bracket was concerned, the judge decided that it did not have features 2, 4, 6 or 7. The judge also considered the question of the use of the bracket with wooden post and panels but Mr Perry says that was a red herring and makes no complaint about the use of a bracket on wooden posts and panels. He is only concerned with wire mesh fencing. In his written material, although he does not repeat the submission this morning, Mr Perry submits that the benefit of the doubt should be given to the patentee but as Floyd LJ said in

refusing permission to appeal on the papers, there is no such principle of patent law. The claim must be fairly interpreted both for the benefit of the patentee and also for the benefit of those who wish to make rival products which do not infringe. In other words, as it is said in the jargon, one can design around the patent. This is all clearly stated in the Virgin Atlantic Airways case to which the judge referred to in paragraph 35 of his judgment. 8. In his skeleton argument Mr Perry made submissions about the judge's interpretation of the word, "Adjacent" which appears in feature 7 of the patent and he also made submissions about the meaning of the word, "Overlie", although that word does not appear either in the claim or in the judgment. His point on feature 4, in effect, is that it is present in the accused products when used in connection with a wire mesh. He has demonstrated this morning why he says that that is so. As I however pointed out to him when he was making his submissions, he has jumped over the judge's view that feature 2 and, indeed, features 7 and 9 were also not present in the accused' product. Therefore, even if I assume that Mr Perry is right on the points of interpretation that he has advanced this morning and in his written material, he has not demonstrated that it is arguable that the judge was wrong in relation to every single one of the features which he found were not in the accused product.

9. Accordingly, in my judgment looking at the matter overall, there is no real prospect of success in an appeal against the judge's judgment, even if some of the judge's conclusions can be chipped away at the edges. Consequently, I must refuse permission to appeal. Order: Application dismissed

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