

SOUTH AFRICA / JUDGMENT

Strix Limited v Nu-World Industries (Pty) Ltd (95/4779) [2014] ZACCP 1; 2014 BIP 36 (CP) (23 June 2014)

[2014] ZACCP 1

COURT

Court of the Commissioner of Patents

BEFORE

F G Preller

CASE / FILE NUMBER

95/4779

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IN THE COURT OF THE COMMISSIONER OF PATENTS

FOR THE REPUBLIC OF SOUTH AFRICA

Case No: Patent 95/4779

In the matter between

STRIX

LIMITED.....Plaintiff

and

NU-WORLD INDUSTRIES (PTY)

LTD.....Defendant

JUDGMENT

PRELLER J:

In this action the plaintiff claims an interdict and ancillary relief against the defendant based on an alleged infringement of the plaintiff's patent 95/4779. The plaintiff is a company with limited liability, registered according to the laws of the Isle of Man. The plaintiff manufactures and sells inter alia thermally sensitive controls for kettles.

The defendant is a company with limited liability registered according to the laws of the Republic of South Africa. The defendant imports and sells inter alia electric kettles. The action relates to some Sunbeam electric kettles, containing thermally sensitive controls, which allegedly fall within the scope of the patent. The kettles are imported by the defendant from the Republic of China. The Sunbeam kettles that form the basis of the action are: SSK2521A, SSK110A, 5CK3079, 5GK300, SSK170 and SCK 1713.

The invention of the plaintiff is described in the specification, which is attached to the Particulars of Claim. The patentee stated 45 claims in the patent. In this matter only claim 1 is relied upon by the plaintiff, it reads as follows:

"A liquid heating vessel comprising; a liquid container; an electrical heating element provided on or in thermal contact with the base of the said container; a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element; said thermally sensitive overheat control comprising at least two thermally responsive sensors arranged in good thermal contact with, and at spaced apart locations on, the base of the container or the element, said sensors individually being operable, in the event only of said element overheating when the vessel boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element"

During the trial the plaintiff divided claim 1 into the following 8 integers:

- (a) a liquid heating vessel comprising;
- (b) a liquid receiving container;
- (c) an electrical heating element provided on or in thermal contact with the base of said container;
- (d) a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element;
- (e) said thermally sensitive overheat control comprising at least two thermally responsive sensors
- (f) arranged in good thermal contact with,
- (g) and at spaced apart locations on, the base of the container or the element,
- (h) said sensors being individually operable, in the event only of said element overheating when the vessel boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element.

The defendant is in agreement with the plaintiffs identification of the aforesaid integers. The parties are also in agreement that integers

- (a) – (d), although part of the vessel, are not new. The plaintiffs case is that in order to prove infringement of claim 1 by the defendant it has to show that each one of the offending Sunbeam kettles relied upon, contains a control, which according to the specification is a mechanism providing overheat protection through a thermally sensitive switch that can be either one in the form of a bimetallic actuator which resets automatically or a "one shot device" such as a thermal fuse which will have to be replaced after it had operated, in claim 1 it is referred to as a "thermally sensitive overheat control". The parties were agreed that in the event of the plaintiff proving that any one of the offending kettles containing one of the four controls referred to in the particulars of claim fell within the scope of claim 1 of the patent any other kettle containing that control would also fall within the scope of claim 1 of the patent. The four controls are the Liang Ji LJ 06A, the Jia Tia KSD 688-A, the SID -105 IL and the Liang Ji LJ-G6.

The defendant denies that the plaintiffs 1995 patent is a valid patent and alternatively and in the event of the court finding that the patent is a valid one, it denies that it infringed the patent, it has a further defence namely that the plaintiff has granted leave and licence to the exporters of the kettles to sell them outside of the Republic of China.

As to the defence of invalidity the defendant relies upon section 65(4) of the Patents Act, No. 57 of 1978 read with section 61(l)(c) thereof. Section 65(4) provides that in any proceedings for infringement the defendant may, in the prescribed manner, apply for the revocation of the patent and by way of defence rely on any ground on which the patent may be revoked. In terms of section 25(1) a patent may be granted for any new invention, but in terms of section 25(5) it is specifically provided that an invention is deemed to be new if it did not form part of the state of the art immediately before the priority date. The priority date of the patent is 9 June 1994.

The court has been referred to the judgment of Murphy J In *Murray v Vodacom (Pty) Ltd* and Another 2.008 BIP 31 CP In which he quoted the judgment in the matter of *Monsanto Co v MD8 Animal Health (Pty) Ltd* (formerly MD Biologies CC) 2001 (2.) SA 887 (SCA) in which the rules for interpreting a specification are stated. The rules are:

- The specification is to be construed like any other document, but the interpreter has to be mindful of the objects of the specification and its several parts.
- What has to be ascertained is not what the patentee had in mind but what the intention was as conveyed by the specification, properly construed.
- The words must be read in their ordinary sense.
- Technical words must be given their ordinary meaning as understood in the particular art or science.
- If a word or expression is used not in its ordinary sense, but with some special connotation, it must be given that meaning.

- A word or expression is to be interpreted so as to conform with the rest of the specification and not to be inconsistent or repugnant to it.
- If it appears from reading the specification as a whole that certain words or expressions in the claims are affected or defined by what is said in the body of the specification, the language of the claims must be construed accordingly.

There must always, and not only in cases of ambiguity, be a purposive interpretation seeking to discover what were intended to be the essential elements, or the essence, of the invention, which is not to be found by viewing each word in isolation but by viewing them in full context in the light of the background to ascertain what the skilled addressee would have understood the claims to mean.

It is common cause that the plaintiff registered a prior patent during 1985 and one before that during 1980. It is therefore necessary to determine the problem in the prior art that the plaintiff sought to overcome and the solution proffered in the 1995 patent by interpreting the specification. There can be no dispute that a liquid heating kettle comprising a liquid receiving container with an electrical heating element provided on or in thermal contact with the base of the container and with a thermally sensitive overheat control that will become operative when the element overheats so that the supply of electrical energy to the element will be interrupted or reduced; was not new on 9 June 1995. It is the plaintiff's case that a combination of integers (e) to (h) with two individually operable, spaced apart thermally responsive sensors in good thermal contact with the base of the container, is a new invention.

In the matter of Marine Construction and Design Co, v Hansen's Marine Equipment (Pty) Ltd, 1972 (2) SA 181 AD at 193 B-C Botha JA explained that in such a case the test to be applied;

"...involves an enquiry into (1) the ambit of the relevant art or, into what, amounts to more or less the same thing, the identity of the persons who would have been faced by the problem solved by the invention; (2) the extent of the common knowledge in the art at the time; and (3) whether such persons would, having regard to such common knowledge, easily have solved that problem"

A reading of the plaintiff's 1985 and 1980 patents shows that by 9 June 1994 thermally sensitive overheat controls comprising two thermally responsive sensors, in good thermal contact with the base of the container or the element, individually operable in the event of the element overheating when the kettle boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element, were very much in the public domain, in the 1985 patent the specification provides for an overheat control and a back-up. The introduction of more than one overheat control was not novel by 9 June 1994. It follows that everything contained in integers (e), (f) and (h) was part of the prior art at that stage. It is only integer

- (g) that does not necessarily form part of the aforesaid summary of integers (e) to (h) in relation to the prior art as at 9 June 1994. It is specifically stated that the two thermally responsive sensors must be at "spaced apart" locations on the base of the container or the element.

It is necessary to ascertain what the problem is that was solved by the invention. On page 2 of the specification the patentee spells it out clearly that:

"The problem with the existing controls of this type is that the temperature of the container base, and thus indirectly the

temperature of the element, is sensed effectively only at a single occasion on the base. Thus if, for example, the vessel is accidentally placed on a work surface so that its base slopes, it is possible that as the vessel boils dry one part of the bottom of the container may still be covered by water, but another be uncovered. This part of the base will therefore overheat first, and if the overheat protecting means is arranged under the part of the vessel base still covered with water, severe overheating of the element may occur locally, which is potentially very dangerous "

One imagines that it will occur only rarely that someone who wants to boil water will position the kettle in such a manner that its base will be sloping. The specification is clear in the respect that in cases where the vessel is inadvertently placed in such a position the invention will be useful.

It is relevant to look at the way in which the sensors are to be mounted in terms of the specification. At page 3 of the specification it is stated that the two sensors should be spaced apart by a substantial distance and at page 5 that two actuators are most preferably spaced apart by substantially ISO® and that they are both to be mounted at opposite ends of a carrier with good spatial separation. If the problem to be solved is to provide for the unlikely event of a kettle standing at an angle being boiled, thus overheating that part of the element that is not in contact with the water, then it stands to reason that the two overheat controls must be positioned a substantial distance apart, if they are not, the very purpose of installing two of them will be defeated. It follows that spaced apart locations in integer (g) must be interpreted to mean substantially spaced apart locations.

The next question to be considered is who will benefit from the solution offered by the invention. It is evident that it will only be manufacturers of water boiling kettles and in particular their engineers like Mr Moorhouse. The relevant time is the priority date. The people faced with the problem would be fully aware of the state of the art at that stage.

It is difficult to imagine such a person not immediately saying that to provide for such an eventuality the two overheat controls must be mounted as far apart as possible. It is an obvious solution for the problem and requires hardly any ingenuity, it follows then that the invention did not add anything new to the prior state of the art and that the defendant's defence on this basis must be upheld.

As to the alleged infringement of the patent, if it is found that the patent added something new to the prior state of the art, the plaintiff's case is that the overheat controls in the offending kettles are spaced apart and therefore infringe the patent. As already pointed out a correct interpretation of the specification requires that the two overheat controls must be mounted at

substantially spaced apart locations. The whole idea is that there must be two different points on the base of the kettle where the overheat controls will be activated in the case of overheating. The two controls in each one of the offending kettles are mounted very close together. The argument on behalf of the plaintiff was that even so there is an infringement of the patent. The argument that there is in fact only one point of overheat detection in the offending kettles because of the close proximity of the two sensors is much more convincing. It follows then that the plaintiff failed to prove that there is indeed infringement of the patent.

In the light of the foregoing it is not necessary to discuss the question whether the plaintiff gave permission to Ningbo to sell

kettles outside the Republic of China.

In the result the plaintiff's case is dismissed with costs.

F G PRELLER

JUDGE OF THE HIGH COURT.

Heard: 19-23 November 2012

Judgement:

23 June 2014

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