

EIP

Latest on Virgin Atlantic flat-bed seat patent dispute

A recent judgment has clarified the consequences for a court order based on a successful UK finding of patent infringement when that same patent is later amended at the EPO.

This Court of Appeal judgment ([\[2011\] EWCA Civ 163](#)) is the latest in the battle between Virgin Atlantic Airways Limited ("Virgin") and aircraft seat manufacturer Premium Aircraft Interiors UK Limited (which is commonly referred to as "Contour"), regarding the infringement of Virgin's patent [EP\(UK\) 1495908](#) ("the Patent") for flat-bed aircraft seats. This judgment relates to an application made by Contour to vary the specifics of an Order made by the Court of Appeal in January 2010 following their earlier finding ([\[2009\] EWCA Civ 1062](#)) that the Patent was valid and infringed by the supply of certain aircraft seats manufactured by Contour.

By way of brief background to this judgment, the Court of Appeal had refused to delay making the Order despite there being pending Opposition Appeal proceedings at the European Patent Office (EPO) against the patent at the same time. The Opposition Appeal proceedings eventually resulted in the Patent being maintained in amended form. The amendments to the Patent resulted in claims that would no longer be infringed by Contour. The question then became whether the Order, as a whole or any of its specific terms, would still be enforceable as a result of the amendment to the Patent.

The Order imposed various restrictions on Contour including an injunction against further infringement of the Patent as granted, an order for an inquiry as to damages for infringement of the Patent and an order for delivery up of any infringing seats. The Order included a 'carve-out' allowing Contour to fulfil an existing agreement to supply a

number of the seats to Delta Air Lines Inc (“Delta”), subject to Contour making an interim payment to Virgin in respect of those seats and Contour procuring a contractual undertaking from Delta not to use any of the infringing seats on any transatlantic routes in competition with Virgin’s transatlantic routes. Contour applied to vary these terms as a result of the amendment to the Patent, with mixed success.

Virgin agreed to the discharge of the injunction as given that the Patent was now in amended form; the court emphasised that had this not been agreed it would have been ordered.

The Court of Appeal rejected the application to discharge the order for the inquiry as to damages based on a precedent set by earlier UK case (see *Coflexip v Stolt* (No 2) [2004 EWCA Civ 213]) which provides that an order for an inquiry as to damages for infringement of a patent is not discharged as a result of subsequent revocation of the patent. In this particular case, the Court of Appeal decided that Virgin should be no worse off for having an amended patent rather than a patent that had been revoked. Accordingly, the order for an inquiry as to damages was maintained. An order for delivery up of infringing seats was discharged on the grounds that there were no infringing seats other than those being supplied to Delta which were the subject of the carve-out.

Contour was also unsuccessful in having the undertakings for the interim payment and procurement of the contractual undertakings from Delta released from the Order. An interesting point of note is that the Order required the contractual undertaking to be in effect “whilst the patent remains in force”. Both Virgin and Contour agreed that the Patent remained “in force” notwithstanding its amendment, but Contour argued that the undertaking should only be enforceable while the injunction was enforceable, which was no longer the case. The Court of Appeal disagreed on the basis that, if that was the intention, the Order could have been worded accordingly. As a result, the contractual undertaking will have effect while the Patent remains in force.

This case clarifies that when a patent is judged infringed but later revoked or amended so that there is no infringement, retrospective relief such as damages will still stand, whereas prospective relief such as an injunction will be discharged. The judgement also serves as a stark warning of the importance of precisely wording such Orders, particularly where ongoing EPO proceedings make revocation or amendment more likely.