

Operative clauses trump oral representations

- ▶ Claim that a party to a licence agreement was the victim of a misrepresentation as to the nature of the licensed patent rights
- ▶ The operative clauses of the agreement portray the true picture
- ▶ Reminder of the importance of checking that the licence terms match what was promised

What's it about?

The case concerns a licence agreement between Flood Control International Limited and others (**Defendants**) and Global Flood Defence Systems Ltd (**Global Flood**) for the use by Global Flood of a flood defence system (**the Agreement**). Subsequently, a dispute arose between the parties on a number of grounds, one of which concerned the nature of the patent rights owned by the Defendants.

In particular, Global Flood claimed that, before the Agreement was signed, the Defendants had represented orally (during meetings) that the licensed rights would comprise a granted patent. This representation was repeated in the recitals to the Agreement. Crucially, the operative clauses of the Agreement clearly stated that the licence was of a patent application only. Accordingly, the Defendants argued that, as the Agreement set out the true picture, Global Flood had not been induced to enter into the Agreement as a result of a misrepresentation.

Global Flood had sought legal advice prior to entering into the Agreement. However, the firm engaged did not have expertise in patent law, and did not flag the important issues to its client.

Why does it matter?

In *Peekay Intermark Limited v ANZ Banking Group Limited* [2006] EWCA Civ 386 the Court of Appeal decided that there is no misrepresentation if the final terms and conditions correct a misrepresentation made during pre-contractual discussions. The court in this case decided it was clear from the operative part of the Agreement that Global Flood would not be licensed under any granted European patent, therefore Global Flood could not be said to have been induced to enter into the Agreement by a misrepresentation.

On the recitals to the Agreement, the court said that an 'informed reader' would have realised that the recitals made no sense in the context of the operative provisions and would have realised that the only subsisting patent right owned by the Defendant was the patent application.

Now what?

It may seem obvious, but it is important for parties to seek specialist advice before entering into licence agreements. It is essential that agreements set out the deal which each party believes has been struck. In this case, the discrepancy between what had been discussed between the parties and the recitals to the Agreement on the one hand, and the operative terms of the Agreement on the other should have been raised and resolved prior to signature.

[*Global Flood Defence Systems Ltd and another v Johann Van Den Noort Beheer BV and others* \[2016\] EWHC 99 \(IPEC\)](#)

For further information on this or any other IP related matter please contact katie.kinloch@addleshawgoddard.com on 0161 9346305