

A Hoze-ing down

***Emson v Hozelock* [2019] EWHC 991 (Pat)**

This was a claim for infringement of two patents concerning expandable garden hoses. Hozelock denied infringement and counterclaimed for a declaration of invalidity of the patents.

Mr Justice Nugee held that the patents were obvious in the light of an earlier patent application for an expandable oxygen mask hose assembly (“**McDonald**”). An interesting feature of the decision is that in the earlier case of *Blue Gentian LLC v Tristar Products (UK) Ltd* [2013] EWHC 4098 (Pat) 746 Mr Justice Birss held that one of the two patents in issue in the Hozelock case was valid over the very same prior art. Mr Justice Nugee reached a different conclusion as to obviousness having heard different expert evidence in relation to the characteristics of the notional skilled person and the common general knowledge. He held that questions of fact were to be determined on the basis of the evidence admitted at the trial in question and that the conclusions of another judge on different evidence did not carry any particular weight.

The judgment is also notable for the Court’s discussion of a further validity attack by Hozelock based on a prior use by the inventor in his garden, which tested the boundaries of the “bright line” rule as to what constitutes a prior public use. The case also provides an interesting working example of the Court’s application of the *Actavis* questions to the question of infringement under the doctrine of equivalents, and for a defence to such infringement raised by Hozelock (although the Court did not

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have to decide on this defence in the light of its other findings). The defence, which was in the nature of the German *Formstein* defence, combined an attack on the priority of the second patent with an application of the *Merrell Dow* principle that a defendant should not be held to infringe a patent for doing something obvious as at the priority date.

[Michael Hicks](#) and [Nick Zweck](#), instructed by Wiggin LLP, appeared for the defendant, Hozelock.

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