

United Kingdom

“Arrow Declarations”

Decision of the England and Wales Court of Appeal
(Civil Division)

12 January 2017 – Case No. [2017] EWCA Civ 1

*Fujifilm Kyowa Kirin Biologics Co., Ltd. v. Abbvie
Biotechnology Limited and Abbvie Limited*

UK Patent Act, Sec. 74

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Keywords Declaration of non-novelty and non-obviousness · Arrow declaration · Patent validity · Patent application · Opposition · Claim for injunction

1. A declaration that a product, process or use was old or obvious at a particular date (“Arrow declaration”) does not necessarily offend against section 74 of the UK Patent Act. Such a declaration may offend against the Act where it is a disguised attack on the validity of a granted patent. However, they do not offend against the scheme of the European Patent Convention or the UK Patent Act simply because the declaration is sought against the background of pending divisional applications by the counter-party.
2. The grant of an Arrow declaration is not inconsistent with the abolition of the right to oppose a patent in pre-grant opposition proceedings. The declaration will not prevent the European Patent Office from granting any patent.
3. The existence of pending applications cannot itself be a sufficient justification for granting an Arrow declaration. Whether such a declaration is justified depends on whether a sufficient case can be made for the exercise of the court’s discretion in accordance with established principles.
4. It is doubtful whether there will be a justification for the grant of an injunction to restrain the patent holder from threatening, commencing or pursuing in the United Kingdom any action for infringement of a patent against the patent user in respect of any act to which the Arrow declaration pertains. However, the claim for an injunction should not be struck out. An appropriately framed injunction may be an alternative to the declaration.