

## **PATENTS ACT 1977**

IN THE MATTER OF a reference  
under section 8 by Cerise Innovation  
Technology Limited in respect of four  
UK Patent Applications in the name of  
Melih Abdulhayoglu

## **DECISION**

### **Introduction**

1. This decision is concerned with the question of entitlement to four unpublished UK patent applications.
2. Cerise Innovation Technology Limited ("the claimant") has referred to the Comptroller under section 8(1)(a) of the Patents Act 1977 the question of entitlement to the grant of patents in respect of inventions made by Melih Abdulhayoglu ("the defendant"), which were the subject of four UK patent applications numbered 9801764.3, 9801765.0, 9801767.6 and 9801768.4.
3. All four of these applications have been withdrawn before publication. As a result, the claimant has not had the opportunity to see the contents of the applications, but has concluded from their titles, which are a matter of public record, that they must relate to work which the defendant is alleged to have been doing on behalf of the claimant. That led it to initiate these proceedings. The claimant claims entitlement to the patent applications on the grounds that it employed the defendant, that the inventions were made in the course of his duties, and that the inventions therefore belong to the employer under section 39(1) of the Patents Act 1977.
4. After the usual rounds of evidence, the matter came before me on 27 January 2000 at a hearing at which the claimant was represented by Mr Stuart Cardwell of Roystons and the

defendant by Mr Iain Purvis, instructed by Appleyard Lees. None of the deponents was cross examined, so I am obliged to take their written evidence at face value.

## **History**

5. I will first summarise those parts of the historical background to these proceedings which are not in dispute.

6. Mr Abdulhayoglu is a Turkish citizen. Prior to 1991, as an undergraduate at Bradford University, he conducted research in electronics, sponsored by the British Technology Group. He graduated in 1991. He continued his research and in August 1992 applied for a patent for a means of communicating with a PC and preventing the use of unauthorised copies of software. This device became known as a SMEC<sup>TM</sup> (Smart Memory Emulation Circuitry). The patent application became PCT/GB 93/01835, and is not in itself a subject of these proceedings.

7. In 1992, he met a Mr Barry Brogan. Mr Brogan offered to organise the financing of the application of his inventions, namely the SMEC and a later invention, a fraud-proof credit card. They formed a partnership which, a short while later, became a limited company called Cerise Innovation Technology Limited. It is this company which is the claimant. Mr Brogan also arranged for a work permit to be granted for Mr Abdulhayoglu.

8. Messrs Brogan and Abdulhayoglu each owned 50% of the shares in this company, until, in 1994, two further shareholders, Gary Cooper and Richard Scragg, came on the scene to finance the PCT patent application. Each of these acquired a 10% shareholding in the company, reducing the shareholdings of Messrs Brogan and Abdulhayoglu to 40% each.

9. Mr Abdulhayoglu continued to develop his inventions relating to computer security, and extended them into other areas. One important application was in the games rental market, and another company, Gamester Multi-Media Limited, was established to exploit that market. Mr Brogan and Mr Abdulhayoglu owned equal shares in this company too. The

claimant was left to concentrate on development of the inventions for the corporate market - "Corporate SMEC" as it became known - and a business plan was commissioned. It is the Corporate SMEC which the claimant believes is the subject of the four patent applications to which these proceedings relate.

10. Mr Abdulhayoglu was supposed to be the technical brains behind the company with Mr Brogan providing the business know-how. However, it is not in dispute that the claimant company has never traded. This is in any case clear from the company's published accounts for 1993 to 1996 and from its cash book for the period thereafter. It has received various monies in the form of grants or loans, has spent money on administration and the like but it has not got to the point of deriving any income from any source. Indeed, at the hearing Mr Cardwell described the company as a "research and development company".

11. By no later than February 1998, Mr Abdulhayoglu ceased to be associated with the company. I cannot be sure of the exact date on which this happened, but on 10 February 1998 Mr Brogan submitted a form to Companies House declaring that Mr Abdulhayoglu had resigned as a director, whilst in a letter dated 2 April 1998 he said Mr Abdulhayoglu had not been working for the claimant "for several months".

12. The four patent applications that form the subject of the present proceedings were filed on 28 January 1998, and were withdrawn on 11 August 1998 at the request of the applicant, Mr Abdulhayoglu. The inventions were allegedly made shortly before the applications were filed, in December 1998.

### **The law relating to entitlement**

13. These proceedings have been brought under section 8(1)(a), the relevant part of which says:

"At any time before a patent has been granted for an invention (whether or not an application has been made for it) -

- (a) any person may refer to the comptroller the question whether he is entitled to be granted (alone or with any other persons) a patent for that invention or has or would have any right in or under any patent so granted or any application for such a patent; . . .

and the comptroller shall determine the question and may make such order as he thinks fit to give effect to the determination.”

14. The claimant has argued that its entitlement to be granted a patent or have rights in the applications is by reason of section 39(1), which says:

“Notwithstanding anything in any rule of law, an invention made by an employee shall, as between him and his employer, be taken to belong to his employer for the purposes of this Act and all other purposes if -

- (a) it was made in the course of the normal duties of the employee or in the course of duties falling outside his normal duties, but specifically assigned to him, and the circumstances in either case were such that an invention might reasonably be expected to result from the carrying out of his duties; or
- (b) the invention was made in the course of the duties of the employee and, at the time of making the invention, because of the nature of his duties and the particular responsibilities arising from the nature of his duties he had a special obligation to further the interests of the employer's undertaking.”

15. Thus the claimant needs to establish that Mr Abdulhayoglu was an employee of the claimant at the appropriate time and that the circumstances in which the inventions were made fit (a) and/or (b).

16. The question of what is meant by “an employee” is a complex one, and arises in many areas of legislation. The Patents Act 1977 itself includes a definition, in section 130:

““employee" means a person who works or (where the employment has ceased) worked under a contract of employment . . . ”

However, my attention was also drawn to interpretations of the expression “employee” in other legal contexts, which I shall turn to in a moment.

17. Other parts of section 8 set out the relief that can be granted should a reference under the section be successful. I will not go into them at this stage, save to observe that the relief that can be granted when the patent applications in question have been withdrawn before publication appears to be somewhat limited.

**The key issue: was he an employee?**

18. The arguments put to me concentrated almost entirely on the first requirement that must be satisfied for section 39(1) to apply, ie was Mr Abdulhayoglu an employee? By implication, I assume the defendant concedes that if he was an employee, the remaining requirements of section 39(1)(a) and/or (b) would indeed also be satisfied.

19. In that connection, one unusual feature of this case is the fact that the claimant is claiming entitlement to patent applications it has not actually seen. However, I do not think that is fatal to the case, and indeed Mr Purvis conceded as much. It does mean that if the claimant satisfies me that Mr Abdulhayoglu was an employee, it will then also have to satisfy me that anything he invented in certain technical fields must belong to it. It will then be for me to look at the patent applications and decide whether they do in fact fall in one of those fields.

20. The key issue, then, is whether Mr Abdulhayoglu was an employee of the claimant. Of course it is not sufficient for him to have been an employee at some time - he needs to have

been an employee at the time the inventions were made. As I have said, that was allegedly in December 1997. The parties have not, in fact, made an issue of timing, apparently working on the basis that whatever Mr Abdulhayoglu's relation with the company, that relationship did not change during the time spanned by most of the evidence. By and large, I am content to go along with that, though there are some items of evidence where I feel timing must be taken into account.

21. Both Mr Purvis and Mr Cardwell agreed that there is no single, simple test that can be applied to determine whether someone was an employee. Mr Purvis quoted a helpful passage from Volume 16, Employment Section, paragraph 3 of Halsbury's Laws of England, and since Mr Cardwell did not dissent from it, it is worth quoting more or less in full. The explanation in italics is my own.

“There is no single test for determining whether a person is an employee; the test that used to be considered sufficient, that is to say the control test [*ie whether the employer could control not just what he did but the way he did it*], can no longer be considered sufficient . . . and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but it is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status.

The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit.”

22. The main factors to which the parties have drawn my attention in the present case to demonstrate that the defendant either was or was not an employee include whether he was a director, what remuneration he received, the existence or otherwise of a contract and the existence of a work permit. I think it will be helpful to go through these factors one at a time.

### **Directorship**

23. The claimant has filed evidence which, it says, shows that Mr Abdulhayoglu was a director of Cerise Innovation Technology Limited. Mr Abdulhayoglu, on the other hand, denies that he was a director.

24. Having looked at the evidence before me, I am quite satisfied that, at very least, Mr Abdulhayoglu behaved as though he were a director and described himself as a director in dealings with others. Several documents indicate this. For example, there is a consultancy agreement dated 10 January 1995 with a Dr Shepherd and a Property Share Agreement dated 20 September 1995 which Mr Abdulhayoglu signed as a director. Similarly, there are two forms, dated September 1995 and September 1996 and signed by Mr Abdulhayoglu, submitted to Companies House to notify the appointment of Mr Abdulhayoglu as director of other companies, which declare that he was also director of Cerise Innovation Technology Limited. There are also statutory declarations from third parties saying that Mr Abdulhayoglu described himself as a director of the claimant in meetings they had with him.

25. True, certain primary evidence that might have helped establish this point unequivocally is missing. In particular, we do not have in evidence copies of forms actually lodged at Companies House appointing Mr Abdulhayoglu as a director. Nevertheless, the weight of evidence appears to point to his having been a director.

26. However, I have come to the conclusion that I do not need to decide whether or not he was a director because I do not believe it helps answer the question of whether or not he was an employee. A director does not have to be an employee, and indeed often is not. Mr Purvis drew attention to two decisions, one under the Companies Act 1967 and the Trade Union and

Labour Relations Act 1974, *Parsons v Albert J Parsons & Sons Ltd*, [1979] FSR 254, and the other under the Employment Protection (Consolidation) Act 1978, *Eaton v Robert Eaton Ltd*, [1988] ICR 302 which support this proposition. As further confirmation of this, Mr Purvis referred me again to Halsbury's Laws of England, in which it is said that:

"A company director is an office-holder who is not, without more, an employee of the company. A director who actually works for the company, especially under a service agreement, may, however, also be an employee of the company..."

27. Thus whether or not Mr Abdulhayoglu was a director has no bearing on whether he was an employee, and indeed Mr Cardwell eventually conceded as much at the hearing. Accordingly I do not need to consider the case law on the obligations of directors to which Mr Cardwell referred me until I have first established whether Mr Abdulhayoglu was an employee.

### **Remuneration**

28. I think it must go without saying that an employee expects to be remunerated. This is taken for granted in the extract from Halsbury quoted above, and Mr Cardwell implicitly accepted it by spending significant time on the issue at the hearing. However, to underline the point Mr Purvis did draw my attention to *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497, where MacKenna J says (with my explanation in italics):

"A contract of service [*which in this context means whether the person is an employee*] exists if these three conditions are fulfilled:

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees expressly or impliedly, that in the performance of that service he



will be subject to the other's control in a sufficient degree to make that other the master . . . .”

Conversely, of course, the absence of remuneration would strongly suggest that the person was not an employee.

29. In the present case, there is no suggestion whatsoever that Mr Abdulhayoglu received any regular weekly or monthly salary. Proof of this, if proof is needed, can be seen in the accounts and cashbook entries for the company during the period 1993 to 1997, which were provided in evidence and which the defendant asked a Chartered Accountant to review. There are no entries whatsoever for salary, or for anything that might constitute salary, for anybody until October 1997. The cash book then records that, in that month, 15 people received a salary payment from the claimant. Mr Purvis submitted that these were all employees of Gamester Multi-Media Limited which was then in financial difficulties, and that was not denied by the other side. However, for present purposes the only relevant fact is that Mr Abdulhayoglu was not one of the 15 named in the cash book.

30. Another pointer to the fact that Mr Abdulhayoglu received remuneration as an employee would be evidence of income tax and National Insurance contributions made on his behalf. There is indeed *prima facie* evidence for such payments, but only for one year. The claimant has provided copies of an Annual Tax Return for the period 6 April 1997 to 5 April 1998, in which it is declared that the sums of £690.69 tax and £762.09 National Insurance are due in respect of one employee, *viz* Mr Abdulhayoglu. This is accompanied by a receipt from the Inland Revenue for these amounts, and a photocopy of a hand-written letter and cheque from Mr Brogan.

31. The absence of any similar evidence for previous years is, to say the least, surprising, and Mr Purvis invited me to treat the evidence for the 1997/98 tax year with caution. He drew particular attention to the dates on the relevant documents. As the printed information on the Tax Return indicates, it should have been received by the Inland Revenue by 26 May 1998. However, the completed return is dated 22 July 1998, ie two months later, and the cheque is

dated 28 July 1998. Mr Purvis pointed out that on 13 July 1998 the claimant wrote its first letter to the defendant alleging entitlement to the applications. The defendant responded on 17 July 1998 with a request for evidence that Mr Abdulhayoglu was an employee of Cerise Innovation Technology Limited, including details of PAYE and NI contributions. The Tax Return was only submitted shortly after that request had been made. That, said Mr Purvis, should make me very suspicious of it. I agree. Had there been returns in previous years, this one might have carried some weight, but in the absence of returns for previous years, the timing of this Return is too much of a coincidence for comfort. I consider it has no probative value so far as establishing whether Mr Abdulhayoglu was employed is concerned..

32. I am quite satisfied, therefore, that Mr Abdulhayoglu was not paid a regular salary. However, the claimant argues that he was given a number of payments by the company and that these count as remuneration and thus indicate that he was an employee.

33. The first, and arguably the most significant, of these payments is a sum of £8932.60 to pay off a debt which Mr Abdulhayoglu owed to Bradford University in respect of tuition fees. Whilst it is not disputed that this payment was made from the claimant's bank account, there is dispute about the source of the money. The defendant asserts that it was part of a loan made by a Mr McManus to another company, Cerise UK plc, and the payment was only made through the claimant's bank account because Cerise UK did not have an operating bank account of its own. The claimant asserts that it cannot have been a loan because there is no loan documentation whereas there is documentation for other loans.

34. Certainly it is clear from the company's cash book that the payment was made immediately after Mr McManus had made a loan of £30,000 to the claimant, but as the company was in the red before that loan was received, it could not have paid Mr Abdulhayoglu earlier even if it had wanted to. Thus I do not think the timing of the payment can be conclusive one way or the other. The fact is, though, that Mr Abdulhayoglu was facing bankruptcy proceedings and the future of the claimant depended on him. It was thus in the claimant's interests (and, indeed, in the interests of the other companies such as Gamester Multi-Media) to bail him out, but it would have been in its interests to do so whether he was

an employee, a non-employee director or merely a technical consultant. In my view, therefore, whilst it is conceivable that this payment may have been made by way of employee remuneration, it is equally, if not more, likely to have been made simply because it was in the interests of the company to make it. Indeed, some of the claimant's evidence supports this view. The three shareholders other than Mr Abdulhayoglu, ie Mr Brogan, Mr Scragg and Mr Cooper, all say the decision to pay off this loan was agreed between them. However, only Mr Cooper suggests they agreed it was to be paid as wages. Mr Brogan says they agreed to pay it in order to keep the SMEC project working towards completion, whilst Mr Scragg says they agreed to pay it in order to keep Mr Abdulhayoglu out of bankruptcy and thus preserve his good name and allow him to progress his goal as director and shareholder of the company. Further, Mr McManus, the source of the company's funds at this stage, says Mr Brogan told him that unless the debt was paid "Melih would be bankrupted and the commercial future of Gamester severely jeopardised, if not terminated". This does not add up to a clear understanding that the payment was to count as wages.

35. A second payment, in kind rather than cash, was the provision of a company car, also in 1997. However, the claimant has not denied that cars were supplied not merely to Mr Abdulhayoglu but also to all the other shareholders - Mr Brogan, Mr Cooper and Mr Scragg - and Mrs Brogan. There is not the slightest suggestion that any of these others were employees, so by the same token there is not the slightest basis for inferring that the provision of the car to Mr Abdulhayoglu was remuneration to him as an employee.

36. Thirdly, Mr Brogan asserts in his evidence that Mr Abdulhayoglu received £14,400 from a Regional Enterprise Grant of £25,000, paid in 1994 by the Department of Trade and Industry to Cerise Innovation Technology Limited. There is evidence that the grant application in 1993 was based in part on estimated wages costs for Mr Abdulhayoglu of £14,400 for 20 hours a week over the 36 weeks of the project, and that the grant was actually paid in 1994. Mr Abdulhayoglu, however, denies that he received anything, and indeed asserts that Mr Brogan told him the grant application had been refused.

37. Because there was no cross examination, it is not easy for me to resolve this conflict of

evidence. However, I note with some surprise that, according to the undisputed evidence of the accountant commissioned by the defendant to check the claimant's accounts, not only does the £14,400 allegedly paid to Mr Abdulhayoglu not appear in the accounts but neither does the £25,000 grant itself. That leaves the claimant with a lot of explaining to do if it wants me to rely on this evidence. Mr Brogan says in his evidence that the claimant's expenses were being defrayed by another of his companies, GB Salvage Limited, at this time, but that is not really an adequate explanation, because the grant should still have appeared in the accounts of the company to which it was paid. He also says that the £14,400 was drawn on a different one of the claimant's bank accounts, but again, if that is true, why does it not appear in the accounts?

38. At the end of the day, though, I have come to the conclusion I do not need to resolve this conflict of evidence. Even if I believe the claimant, at very best this shows that Mr Abdulhayoglu was employed by the claimant for a period of 36 weeks in 1993/4, some four years before the present patent applications were made. As far as proving Mr Abdulhayoglu was employed when the inventions were made is concerned, it is of negligible value.

39. Fourthly, Mr Brogan asserts that Mr Abdulhayoglu was given £6,200 in 1995 to save him from another petition for bankruptcy. Since Mr Brogan's own evidence shows that this money came from the bank account of a different company, it does not help at all in supporting the assertion that Mr Abdulhayoglu received remuneration from the claimant as an employee. Mr Brogan does say in his evidence that "although some of these monies did not come directly from Cerise Innovation Technology Limited they were still paid on behalf of Cerise by my associated companies", but in my view that is not good enough. If these payments were really being made on behalf of the claimant, why is there nothing about them in the accounts?

40. Fifthly, the claimant tries to make something of another Regional Enterprise Grant, for approximately £18,000, that Mr Abdulhayoglu obtained in 1994. Since that grant was awarded to a company called M & L Investments (UK) Limited - of which Mr Abdulhayoglu was apparently a director - as with the preceding point, this does not help the claimant's case

at all.

41. Finally, the evidence includes a letter written by Mr Scragg authorising a payment of £1139.00 to the credit of Mr Abdulhayoglu in 1996, to discharge mortgage arrears. There is nothing whatsoever to suggest this payment was made by the claimant, let alone that it constituted remuneration for employment.

42. In summary, then, the claimants have failed to satisfy me that Mr Abdulhayoglu received remuneration as an employee. That on its own must cast very serious doubts on its claim that he was an employee, but I will go on to look at the other factors that were put forward.

### **Existence of a contract**

43. Section 130 of the Patents Act 1977 requires a contract of employment. Mr Purvis conceded that this does not necessarily mean a written contract - it could be oral, or even merely implied. There must however, Mr Purvis submitted, be something which amounts to a contract. I agree. I also agree with his submission that there are three basic essentials to the creation of a contract: agreement, contractual intention and consideration. This is trite law, though Mr Purvis did refer me to chapter 2 of "Chitty on Contracts" in support.

44. There is no evidence of a formal written or oral contract in the present instance, as was acknowledged by Mr Cardwell. Thus the very most there can be is an implied contract.

45. I can, though, find nothing in the evidence to suggest that the details one would expect to find in an employment contract - such things as remuneration, working hours, duties, place of work, holiday entitlement or terms for termination - were ever agreed or even discussed. I recognise that an implied contract would not necessarily cover some of the less important details such as holiday entitlement, but I would still expect it to cover major issues such as remuneration, duties and, at least in broad terms, the amount of time to be devoted to the employment.

46. As Mr Purvis submitted, there is another aspect to this as well. If there were a contract, one would expect to find that each party owed some obligations to the other. Specifically, in the light of the comments of MacKenna J in *Ready Mixed Concrete, supra*, in an employment contract one would expect to find the employee obliged to submit to the control of the employer, and the employer obliged to remunerate the employee. However, in the present case there is no evidence that either party was obliged to do anything. For example, during at least some of the time he was associated with Cerise Innovation Technology Limited, Mr Abdulhayoglu was both running his own export business and working for Gamester Multi-Media Ltd. The claimant does not appear to have had any control over the time that Mr Abdulhayoglu devoted to its business, and indeed he does not even seem to have been under any obligation to devote a certain minimum amount of his time to the claimant. Equally, the claimant appears to have had no obligation to the defendant. For example, even if all the payments that the claimant says it made to Mr Abdulhayoglu were actually made, I am satisfied that not one of them was made because the claimant was under a obligation to make them. Indeed, not even the claimant has suggested it was under such obligation. There is an observation in the claimant's evidence that a director is more likely to await the financial benefits of the outcome of his labour than look to reward when cash flow does not allow it. I would be willing to accept that proposition so far as a non-employed director is concerned, but I do not believe this would apply to an employed director.

47. There is one other issue I should mention in connection with the existence or otherwise of an employment contract. Mr Purvis submitted that under the Employee Protection Act 1978, an employer is required to provide employees who work more than 16 hours per week with a written statement setting out the terms and conditions of their employment. The claimant has not denied that this is the case, but there is no evidence that Mr Abdulhayoglu was required to work more than 16 hours a week. The only reference to his hours is in connection with the 1993 grant application, which specifies that he will work on the project for 20 hours a week for a period of 36 weeks. Quite apart from the fact that it is not clear these terms were ever put into practice, they are no help at all in deciding what his hours of work might have been several years later. Thus I do not consider that the absence of a written statement is in itself conclusive evidence that he was not employed.

48. There is therefore in my view no persuasive evidence in favour of the existence of an implied employment contract.

### **Work permits**

49. To work in this country, the defendant needed a work permit from the Overseas Labour Service. The claimant laid considerable emphasis on a permit obtained in 1996 by Mr Brogan as supporting its claim that it employed Mr Abdulhayoglu, because that permit named the claimant as employer (though with an address that starts off “Gamester Multi-Media Limited”) and quotes a salary of £9,200 per annum.

50. On the face of it, this permit is strong evidence that the claimant employed Mr Abdulhayoglu. However, when one digs a little deeper this evidence looks a lot less secure. The permit quotes a regular salary, but as I have already found, Mr Abdulhayoglu was not, in fact, paid a regular salary. If the statement about salary on the permit application does not reflect what actually happened, how can I have any confidence that the statement as to who was going to employ him reflects what actually happened?

51. That is not all, though. The 1996 permit was not the first, because Mr Brogan had also arranged an earlier one in 1993. This earlier permit states that permission has been given for Mr Abdulhayoglu to take employment with a company called G B Salvage Limited - another company owned by Mr Brogan - for 36 months at an annual salary of £8,000. However, it is not in dispute that Mr Abdulhayoglu never worked for this company, and as far as I can make out, there was never even any intention that he should work for it. If Mr Abdulhayoglu never worked for the company named on his first permit, how can I be confident he worked for the company named on his second permit?

52. Whatever Mr Brogan’s intentions may have been when he filled in these applications for permits, I have come to the conclusion that, so far as pointing to what actually happened is concerned, they are hardly worth the paper they are written on. Accordingly, I do not believe the 1996 permit can be construed as evidence that Mr Abdulhayoglu was employed by the

claimant.

## **Conclusion**

53. Having looked at all the evidence, and balancing all the relevant factors, I have come to the conclusion that this is not a case in which deciding whether the person in question was an employee comes down to a fine balance between the various pointers as to his status. The scales are firmly tilted in one direction, because in my view the evidence falls a long way short of establishing that Mr Abdulhayoglu was an employee of the claimant. The relationship between Mr Abdulhayoglu and the claimant was clearly pretty ill-defined, but whatever the precise status of that relationship, I do not believe it was one of employer-employee.

54. This being the case, the first requirement for section 39 to apply has not been met. Thus I do not need to consider the other requirements of section 39, such as whether the inventions were made in the course of his duties, let alone what relief might be appropriate.

55. The reference under section 8 has therefore failed. I decline to make the declaration and orders sought by the claimant.

## **Costs**

56. Both sides have asked for costs to be awarded in their favour, although no specific submissions were made on this point at the hearing. The reference was unsuccessful, and the defendant is therefore entitled to costs.

57. In addition to this substantive decision, I have had to make three preliminary decisions in the course of these proceedings. They were all based on written submissions, without an oral hearing, and the claimant was successful in one, unsuccessful in another, with both sides being partly successful in the third. In those circumstances, I have come to the conclusion that the preliminary issues should not affect the costs one way or the other.



58. Accordingly, the costs should be based on the Comptroller's normal scale which represents a contribution towards costs rather than full compensation. On that basis, I order Cerise Innovation Technology Limited to pay £1300 to Mr Abdulhayoglu as a contribution to his costs.

### **Appeal**

59. As this decision does not relate to a matter of procedure, any appeal should be lodged within six weeks.

Dated this 23<sup>rd</sup> day of February 2000

**P HAYWARD**

Divisional Director, acting for the Comptroller

**THE PATENT OFFICE**