



BL O/129/04

11 May 2004

PATENTS ACT 1977

BETWEEN

NIC Instruments Limited

Claimant

and

P W Allen and Company Limited

Defendant

PROCEEDINGS

Application under section 247 to settle the terms of a licence of right available under section 237 in respect of certain design rights.

HEARING OFFICER

P Hayward

DECISION

- 1 On 29th January 2004 I issued a decision settling the terms of a licence of right between NIC Instruments Limited (“NIC”) and P W Allen and Company Limited (“Allen”) in respect of design right in some pieces of equipment used by bomb disposal engineers. The present decision deals with a disagreement between the two sides as to whether certain information should be redacted from the version of the January decision that is to be made available to the public.
- 2 The letters to the parties accompanying my original decision provided the opportunity for them to comment if they felt the decision contained anything which they did not want to be made available to the public. In their letter of 13 February 2004 Allen requested that certain financial details be redacted as being commercially sensitive. This was copied by the Office to NIC on 18th February and they were given until 27th February to file any observations regarding Allen’s request. NIC did not respond within that time limit.
- 3 At the time this was going on, the parties were negotiating the issue of costs which I had deferred until they had had the opportunity to consider my original decision. It was no accident that the date for NIC to file observations regarding Allen’s redaction request coincided with the end of the period I set for submissions on costs in my original decision. I did that with a view to drawing a line under these proceedings in one go. I am pleased to say that the parties have now reached agreement on costs (and some other matters). However it

took two mutually agreed extensions of time for them to reach that agreement and in the process some confusion has crept in over the status of the redaction request. In short, Allen felt that by not filing any observations by 27 February NIC were not opposing their redaction request. Conversely, NIC felt that the agreement reached with Allen covered all outstanding issues and as it was silent on redaction, it was their understanding that the decision would be issued in its original, unredacted form.

- 4 From their correspondence on this issue it became clear that NIC's understanding of the situation was not wholly correct, because whether material should be redacted from the published decision is for the comptroller to decide, not the parties. Moreover, this remains a live issue as my original decision had still not been made public. Given their misunderstanding of the situation, I allowed NIC a belated opportunity to file observations regarding Allen's request. This they have now done, and subsequently Allen filed further observations in response. Both parties have now agreed that my decision on redaction should be based on their written submissions, without an oral hearing, and I am grateful to them for this.

Argument

- 5 The justification given by Allen for their request to redact information from my original decision is that it contains price and cost information which would be commercially damaging to them if it were to remain in the public version. Their request affects 6 paragraphs of my original decision and involves the redaction of 26 figures in total.

- 6 NIC have opposed Allen's request on a number of grounds, which I can summarise as follows:

(1) The decision is of interest to third parties generally, but particularly to those in this sector, and it would be difficult for third parties to draw any sensible conclusions from the decision with this information redacted.

(2) The justification for redaction needs to be highly persuasive before the comptroller should act against the public interest in agreeing to it, and Allen have not in fact provided any justification for why publication of this information would be commercially damaging to them.

(3) Allen ignored the comptroller's steer at an early stage in the proceedings that excessively detailed financial information was unlikely to be useful, so having chosen to introduce such information to the proceedings, they can hardly object to its presence in the published decision.

(4) The request has been made in bad faith since the material in question was only introduced to elicit extraneous financial information about NIC's operations.

- 7 I have looked at the information Allen would like redacted and agree that it is the sort of commercially-sensitive data that a company might reasonably want to keep confidential. I have also considered NIC's arguments, and I have to say I am not persuaded by any of them. On their first point, to draw conclusions from the decision the parties need to know the legal principles I applied, but I cannot see why they need to know the precise costs and

profits in Allen's business dealings. The principles would still be perfectly clear if that information were redacted. Of course, the information may well be of great interest to companies in this particular market sector, but that is irrelevant. On their second point, I think it would be perfectly obvious to any business person that the sort of information Allen wish to redact is likely to be commercially sensitive, and against that background it would be disproportionate to require Allen to provide a more details of the particular harm that might be done by publishing these particular figures. NIC also seem to be implying that a decision to redact should have to pass a very high threshold. I cannot see why. As in any exercise of the comptroller's discretion, I have to balance all the factors, and whilst the public interest is clearly an important factor, protecting the reasonable business interests of the parties is also an important factor.

- 8 On their third point, I fail to see what bearing the level of detail Allen chose to include in their evidence has on their redaction request. Whether my decision contains commercially sensitive information is a totally separate issue from that of the extent of the evidence filed to enable me to reach that decision. Finally, their fourth point is no more than a wild, unsupported allegation, to which I am not prepared to attach any weight.

Conclusion

- 9 As I have said, in exercising my discretion I have to consider all the relevant factors and decide where the balance lies. In the present instance, NIC have not suggested redaction would harm their own interests in any way, so it is largely a question of balancing Allen's concerns about commercial confidentiality against the public interest. In my view Allen's concerns are reasonable and the harm to the public interest is negligible. Accordingly I agree to Allen's request and direct that my original decision be published in the redacted form Allen have requested.

Appeal

- 10 Under section 249 of the Act, any appeal against the present decision lies to the Registered Designs Appeal Tribunal. As the decision is on a matter of procedure, any appeal must be lodged within 14 days.

P HAYWARD

Divisional Director acting for the Comptroller