



BL O/261/06

15th September 2006

PATENTS ACT 1977

BETWEEN

Vibriant Technology Services Ltd

Claimant

and

Protex Healthcare UK Ltd

Respondent

PROCEEDINGS

Application under section 72 of the Patents Act 1977 for
revocation of patent GB2356145 B

HEARING OFFICER Stephen Probert

PRELIMINARY DECISION

- 1 This decision relates to a number of procedural matters that need to be decided following a case management conference that took place on Tuesday 12th September 2006.
- 2 There are several grounds pleaded in the claimant's statement of case, but the case management conference and this decision only relate to one aspect of the claimant's case — the allegation that the invention the subject of the patent was disclosed to the public through prior use before the patent application was originally filed. The invention concerns a dressing for a wound.
- 3 At the case management conference, the claimant (Vibriant) was represented by Richard Waddington of Appleyard Lees, and the respondent (Protex) was represented by Iona Berkeley (Counsel) instructed by Julia Mills of D Young & Co.. At the end of the conference, despite agreement not having been reached on several issues, both parties were keen to see this case progress, and accordingly they agreed that I should make a decision on each of these several issues.

Background

- 4 The claimant filed its evidence-in-chief in February 2006; a single witness statement by Mr William Ancell. It is quite a brief witness statement, but it

does refer to samples of dressings that were sent to various named individuals approximately six months before the patent application was filed. Mr Ancell's evidence in these revocation proceedings is perhaps unusual inasmuch as Mr Ancell is the sole inventor of the patent in suit. (When the patent application was filed in November 1999, Mr Ancell used to work for Protex, but he left the company before the patent was granted.)

- 5 Shortly after Mr Ancell's witness statement was filed as evidence, the respondent (Protex) suggested that the claimant's statement of case should be amended since it appeared to them that Mr Ancell's witness statement¹ referred to two separate and distinct instances of prior use — one relating to a product called "Drawtex" (in paragraph 3) and the other relating to a product called "Vacutex" (in paragraph 2), whereas the statement of case only mentioned one instance. Accordingly, the claimant (Vibriant) requested (on 4 May 2006) that the statement of case be amended by inserting an additional paragraph (13a). The paragraph reads:

"In addition to disclosure of the "Drawtex" product referred to in paragraph 13, Mr Ancell also had produced his own version of the Drawtex product disclosed in D16 and also in D15. These products are the subject of the patent for which revocation is requested. Although there are differences in the way in which the products are described in D15/D16 and the contested patent, these differences only arise because of the different agents involved in drafting the cases and the attempt for Mr Ancell to describe features of the two products which had not been described in the South African priority filing from which D15 originates. Mr Ancell then, unaware of the implications of disclosing the products he had produced, sent samples of the Vacutex products to a number of medical specialists for their comments. These disclosures to third parties amount to a novelty destroying disclosure of the product exactly as described in the patent the subject of this application under Section 72(1)."

- 6 No doubt, this amendment to the statement of case was not quite what Protex had in mind when suggesting that Vibriant should amend. In particular, they considered that it raised more uncertainty regarding the precise specification of Mr Ancell's "own version" of the Drawtex product. Initially, Protex was prepared to agree to Vibriant's request to amend the statement of case (ie. the new paragraph 13a) provided that Vibriant filed further evidence to support what it regarded as a further instance of prior use. On 30 May 2006, Protex wrote to Vibriant requesting further information and documents in relation to the evidence already filed. Vibriant responded by sending Protex a second witness statement prepared by Mr Ancell. Mr Ancell's second witness statement is longer and more detailed than his first witness statement.
- 7 Two of the issues that I need to decide are whether Vibriant should be allowed to amend its statement of case by adding the new paragraph 13a, and whether Mr Ancell's second witness statement should be formally admitted as evidence in these proceedings.

¹ Paragraphs 2 and 3 of Mr Ancell's witness statement are reproduced in an annex to this decision.

8 The third issue that I have to decide concerns a request from Protex that the second paragraph of Mr Ancell's first witness statement should be struck out — this is the paragraph that refers to samples of the product subsequently known as Vacutex. There are a few other ancillary issues that I will deal with as they arise in the remainder of this decision.

Mr Ancell's Second Witness Statement

9 Protex were concerned that it had taken a long time to get further information from Mr Ancell. They also argued that his second witness statement (received only days before the case management conference) should not be admitted as evidence because it did not remedy the defects in his first witness statement, and because Vibrant had not explained why it was of such relevance that it should be admitted.

10 It is true that there have been significant delays in bringing forward this evidence, but I am satisfied with the reasons that have been given. Mr Ancell is not in good health. He has been undergoing Radium and Chemotherapy treatment for a lung and brainstem cancer. I accept that for long periods of time, he has not been well enough to respond to requests for further evidence.

11 Protex suggested that Vibrant could have obtained the relevant evidence from someone else, and need not have waited for Mr Ancell. In particular, a Mr Ken McMaster was identified as having been involved with Mr Ancell during the critical period. According to a brief witness statement by Stephen Belben (presented at the case management conference by Protex), Mr McMaster is now associated with Vibrant. Although Protex maintain that Mr McMaster should have been able to supply further information, I note from Mr Ancell's second witness statement that Mr Ancell himself was responsible for all the technical aspects. Mr McMaster's role involved negotiating with manufacturers.

12 As for the substance of Mr Ancell's second witness statement, I thought that in several areas it was extremely relevant. Firstly, Mr Ancell makes it absolutely clear that in his recollection, there was only ever one product. In other words, Drawtex and Vacutex were one and the same product. They may have been manufactured at different times, and in different places, but they were (for all practical purposes) the same product. In very crude terms, Mr Ancell says that he began by distributing samples of the Drawtex dressings in Europe and the USA on behalf of a South African company, and that when it looked as though the supply was going to dry up, he arranged for copies of the Drawtex dressings to be manufactured in the Far East and Europe. He says the product was then re-branded as Vacutex.

13 The second reason why I think that Mr Ancell's second witness statement is extremely relevant is that he provides another list of eighteen names of people to whom he says samples of the product were sent before the application for the patent in suit was filed.

14 Furthermore, I do not think that Protex will be unduly prejudiced by the admittance of this late evidence. Indeed I think it would have been difficult for

Protex to sustain an argument along these lines given that they had specifically requested that Vibrant supply further evidence on many of the matters covered in this second witness statement by Mr Ancell.

- 15 For all these reasons, I consider that Mr Ancell's evidence should be admitted into the proceedings.

Amendment of the Statement of Case (Para 13a)

- 16 Vibrant request that the statement of case be amended to include a new paragraph relating to prior use, and in particular, relating to the products that Mr Ancell had manufactured in line with the original Drawtex specification. Although the need to amend the statement of case was first raised by Protex, they do not agree that the proposed amendment overcomes the deficiency in the original statement. More specifically, they say that the statement (even as proposed to be amended) still does not reflect the evidence that has been brought forward by Vibrant. In particular they say that it is still not clear whether the claimant is alleging prior use of several different versions of the Drawtex product, not least because it refers to products that are the subject of the patent for which revocation is requested, and the Drawtex product, and there is no clear specification of the products that Mr Ancell says are the subject of the patent.
- 17 At the heart of this issue is an inevitable conflict between the two parties. Protex resist any amendment that indicates or implies that the Drawtex dressing is the same as the invention the subject of the patent. On the other hand, it is clear that that is a fundamental plank of Vibrant's case. Whether they will succeed with this case can only be determined when all the evidence has been filed, and all the arguments have been heard. In the meantime, I can see no good reason why Vibrant should be prevented from clarifying the case that is being brought, and lots of good reasons why they should be permitted, and even required, to clarify their case.
- 18 Consequently I agree that the statement of case should be amended to include paragraph 13a, but only on condition that one minor amendment is made to the paragraph to deal with a specific ambiguity that was discussed during the case management conference. The draft version of paragraph 13a supplied by Vibrant in May 2006² refers to Mr Ancell producing "his own version" of the Drawtex product. This is potentially misleading. Mr Waddington confirmed to me that it is Vibrant's case that the products produced by Mr Ancell were exact copies of Drawtex. The new paragraph needs to be amended to make this clear; for example, by replacing the words "his own version" with the words "exact copies", or by adding a sentence immediately after to that effect: Eg. "This version was exactly the same as the Drawtex product". Vibrant should file an amended statement of case including a suitably amended paragraph 13a within two weeks of the date of this decision.

² See paragraph 5 above.

Striking out

- 19 Protex have requested that the second paragraph of Mr Ancell's first witness statement be struck out. However, the request is based on the premise that the proposed amendment to the statement of case was not allowed, and also (it seems to me) in the belief that Mr Ancell was referring to a separate instance of prior use involving a different product. But even without the subsequent clarification provided in Mr Ancell's second witness statement (ie. that there was ever only one product), it was in my view always possible to read Mr Ancell's evidence as referring to a single product — ie. that Mr Ancell is saying that Drawtex was subsequently known as Vacutex.
- 20 On this basis, I cannot see any reason to strike out the second paragraph of Mr Ancell's first witness statement. The paragraph could be clearer, and it could have been more detailed, but that is not a good reason for striking it out. Rather these are matters that must be considered when Mr Ancell's evidence is weighed against whatever other evidence is brought in these proceedings, and the proper time to do that is when all the evidence has been filed, and full arguments have been heard. Consequently I refuse the request to strike out.

Error in Witness Statement?

- 21 The third paragraph of Mr Ancell's witness statement includes a reference to a South African patent application (ZA 98/8838). This is an application, lodged in September 1998, apparently relating to Drawtex. The reference caused considerable confusion during the case management conference because this provisional patent specification describes several embodiments of a dressing with either four or five layers. But Vibrant's statement of case says that Drawtex has three layers, an assertion supported by at least one other document provided by Vibrant as an attachment to its statement of case. Protex were understandably confused. On the one hand, Vibrant say that Drawtex is a three layer dressing, but in their evidence (Mr Ancell's first witness statement) it is said that the Drawtex product was exactly as described in the above mentioned South African patent application which appears to describe only four or five layer dressings.
- 22 The source of the confusion only came to light when a passage from the South African patent specification was read out aloud during the case management conference and it became clear that Mr Waddington was reading from a later South African patent application. More significantly, he had a later version that described a three layer dressing. Mr Waddington submitted that the most likely explanation was that the reference given in Mr Ancell's evidence is an error, and that Mr Ancell has accidentally referred to the priority document of the "Drawtex" application. I agree that on the evidence available to me, it appears that Mr Ancell has made a mistake, and has quoted the wrong application number.
- 23 I don't find this altogether surprising given the amount of time that has passed, Mr Ancell's present state of poor health, and the fact that he appears to have had to leave all his records behind under the terms of his Service Agreement when he parted company with Protex. I therefore direct that Vibrant take

whatever steps are required in order to rectify this error. In more usual circumstances, this would involve a further witness statement from Mr Ancell, correcting his earlier evidence. But if Mr Ancell's physical health is such that this is not possible, Vibriant will have to look for other means of correcting the error. In any event, copies of the correct document should be filed at the Patent Office and supplied to Protex within fourteen days of the date of this decision.

Professor Anand's Letter

- 24 This is a letter provided by Mr Waddington with his skeleton argument in advance of the case management conference. It is addressed "To whom it may concern", and is signed by Professor Anand, who is a Professor of Technical Textiles at the Centre for Materials Research and Innovation at the University of Bolton Institute. Although it was accompanied by a request that it be admitted as evidence, Miss Berkeley objected that it was not in the correct format for evidence. The substance of Professor Anand's letter is in two parts. The first part deals with his personal knowledge of a product similar to the one described in the patent, and a test/analysis that he conducted on a dressing known as Drawtex. There is no explanation of why this information was not provided in the form of evidence within the period set for the claimant to file evidence.
- 25 The second part of the letter concerns a heat treatment called "calendering", which Professor Anand says has been well known in the textile trade for at least fifty years. The claimant has asserted in the statement of case that calendering is an inherent part of the production of non-woven products, and as such would be in the general knowledge of a skilled man as a well known technique for preventing adhesion of a dressing to a wound face. The respondent has neither admitted nor denied this in the counterstatement, although Miss Berkeley indicated that the respondent should have specifically denied this claim, and would probably be seeking an amendment to the counterstatement to that effect.
- 26 Nevertheless, as matters stand, I have not been offered any explanation for the lateness of the first part of Professor Anand's 'evidence', and the second part is directed to matters that are not (currently) in issue between the parties. Thus even if Professor Anand's 'evidence' were in the correct form, I would not admit it into these proceedings.

Timetable for Protex Evidence

- 27 The next stage in these proceedings (other than the issues already mentioned above), is for Protex to file its evidence. Miss Berkeley expressed concern on behalf of Protex, complaining that they were still not in a position to understand the case that was being brought against them, at least insofar as it concerns the allegations of prior use. She referred on several occasions to the list of questions put to Vibriant in the letter of 30 May 2006, and maintained that Vibriant had still not responded to many of them. For example, she was looking to Vibriant to provide samples of the Drawtex products that had been supplied prior to the filing date, and also a detailed specification of the

dressings that Mr Ancell had arranged to be manufactured “in line with the Drawtex specifications”. She submitted that it was not enough for Mr Ancell to say that they were “exactly as described in the patent” because the patent specification includes descriptions of several embodiments, and the claims of the granted patent were in any case narrower than the scope of the original application.

28 Lastly, she suggested that it was entirely possible that the product was developed further by Mr Ancell during the months between the alleged prior use and the date when the patent application was filed. Therefore she argued that it was possible that the samples (distributed six months before the patent application was filed) might not have included features that later became part of the patent as granted.

29 On the face of it, these are reasonable complaints. I entirely agree with Miss Berkeley’s submission, referring to paragraph 72.06 of the Manual of Patent Practice, that:

“... where prior disclosure or prior use of the invention are alleged, or an argument of obviousness is based thereon, the disclosure or use must be sufficiently identified to allow the proprietor to appreciate the scope of the allegation he is required to meet.”

30 However, this case is unusual not only because the evidence of prior use has been supplied by the inventor of the patent in suit, but also because the inventor says that he had to leave all the material that the respondent is now seeking with them when he left their employment. Thus the claimant says that if there is any documentary evidence (eg. detailed specifications) relating to the samples that were distributed seven years ago, it is already in the respondent’s possession. I considered this to be a very persuasive reply; a view that is further reinforced by a witness statement from Mr Andrew Morpeth. This witness statement was provided by Protex at the case management conference. Mr Morpeth was the general manager of Protex until 31 July 2006, and is currently acting in a consulting role for the company. Mr Morpeth has conducted a search through the company records and confirms that he has found documents dating from 1999 relating to the testing of the Drawtex product. As I read his witness statement, Mr Morpeth also found documents demonstrating that Mr Ancell (or someone from the company) sent Drawtex dressings to the people named in Mr Ancell’s first witness statement. This supports Mr Ancell’s evidence that any documents relating to the alleged prior use are already available to the respondent.

31 Bearing in mind also the period of time that has elapsed, and Mr Ancell’s current state of health, I consider that the claimant has done everything possible to particularise the allegation of prior use.

32 Consequently I can see no reason why the period for filing evidence by the respondent should not begin immediately. I will therefore instruct the case officer in the Patent Office to write to both parties confirming the relevant deadline.

33 I understand that Protex is likely to request an amendment of its counterstatement in the near future. I suspect that if Vibrant opposes this request, it may be necessary to suspend the evidence rounds until the matter can be resolved. We will have to cross that bridge if and when we come to it.

Costs

34 Miss Berkeley raised the issue of costs in relation to the case management conference. While Mr Waddington resisted her request for costs, I don't think he specifically requested costs on behalf of the claimant. It is now customary for costs to be awarded at any appropriate stage in proceedings before the Comptroller, but on this occasion I have decided to make no award for costs. On the whole, I think the claimant has undoubtedly won more than it has lost. However, the respondent has served the cause of justice well by highlighting the need for the claimant's statement of case to be amended, and by requesting further evidence from the claimant to clarify the allegation of prior use. I also bear in mind that it was an error and/or other ambiguity in the claimant's evidence that contributed significantly to the confusion that necessitated the case management conference.

Summary

35 In this decision, I have reached the following conclusions:

- a. Mr Ancell's second witness statement is formally admitted into these proceedings.
- b. The claimant's statement of case shall be amended by including an additional paragraph (13a), corresponding to the draft paragraph supplied in their letter of 4 May 2006, but amended as indicated in this decision.
- c. The second paragraph of Mr Ancell's first witness statement shall not be struck out.
- d. The claimant shall take whatever steps are necessary to formally correct the error in the third paragraph of Mr Ancell's first witness statement, and shall supply copies of the correct South African patent application to the Office and the respondent within fourteen days.
- e. The letter from Professor Anand is not admitted as evidence.
- f. The period allowed for filing the respondent's evidence begins immediately.
- g. Finally, I decided to make no order for costs in relation to the case management conference.

Appeal

36 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days of the receipt of this decision.

S J Probert

Deputy Director acting for the Comptroller

Annex

(Paragraphs 2 and 3 of Mr Ancell's first witness statement)

2. I can confirm that samples of the product (subsequently known as Vacutex) exactly as described in the patent application were sent to various medical specialists (in the UK and USA) in April, May and June 1999; these included Linda Russell - Burton on Trent hospital, Professor Tim Reynolds - Burton on Trent hospital, Professor Richard Salcido - University of Pennsylvania USA, Dr Robert Goldman - University of Pennsylvania USA, Dr Harry Rowe - Chiropractor UK, Julia Herzog - consultant Indianapolis USA. I did not realise at the time, in the absence of any confidentiality agreements, that this constituted placing the product into the public domain.

3. The article by L Russell and A Evans in the British Journal of Nursing (Russell L., Evans A., British Journal of Nursing, 12 August 1999, vol.8, no.15, pages 1022-1026) flows from one of the numerous samples of the product known as Drawtex that I sent to Linda Russell, a tissue viability nurse at Burton on Trent Hospital. The Drawtex product was exactly as described in the patent application filed by J Mouton in South Africa (ZA 98/8838). The trial referred to in the article was conducted publicly with products exactly as described in the Mouton patent application between April and June 1999.