

13<sup>th</sup> June 2008

## PATENTS ACT 1977

Nu Tec Medical Limited

Claimant

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### PROCEEDINGS

Application under section 72 of the Patents Act 1977 for  
revocation of patent no. GB 2 400 326 B

HEARING OFFICER

J Elbro

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### DECISION

- 1 This decision concerns an application by Nu Tec Medical Limited (“Nu Tec”) to revoke its own patent, GB2400326 B on the grounds that the invention defined in the claims lacks novelty and/or does not involve an inventive step. The patent was filed on 24 March 2004 with an earliest declared priority date of 24 March 2003, and was granted on 7 June 2006.
- 2 The Office indicated in a letter of 17 November 2007 its preliminary opinion that the case for revocation had not been made out. In response, Nu Tec submitted further observations and evidence, and a hearing was fixed for 17 April 2008. The day before the hearing, Nu Tec indicated that it was instead content for a decision on the papers.

#### **The Law**

- 3 The Comptroller’s powers to revoke a patent on the application of another person are set out in section 72(1). With respect to the validity of the claims, the relevant parts read as follows:

#### **Power to revoke patents on application**

72.-(1) Subject to the following provisions of this Act, the court or the comptroller may by

order revoke a patent for an invention on the application of any person (including the proprietor of the patent) on (but only on) any of the following grounds, that is to say –

(a) the invention is not a patentable invention;

(b) ...

- 4 In relation to section 72(a) above, I must also consider section 1(1) which defines the requirements for a patentable invention. It reads:

#### **Patentable Inventions**

1.-(1) A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say –

(a) the invention is new;

(b) it involves an inventive step;

(c) ....

and references in this Act to a patentable invention shall be construed accordingly.

- 5 The following parts of sections 2 and 3 are also relevant, since they define what is meant above by ‘new’ and ‘inventive step’.

#### **Novelty**

2.-(1) An invention shall be taken to be new if it does not form part of the state of the art.

(2) The state of the art in the case of an invention shall be taken to comprise all matter (whether a product, a process, information about either, or anything else) which has at any time before the priority date of that invention been made available to the public (whether in the United Kingdom or elsewhere) by written or oral description, by use or in any other way.

(3) ...

#### **Inventive Step**

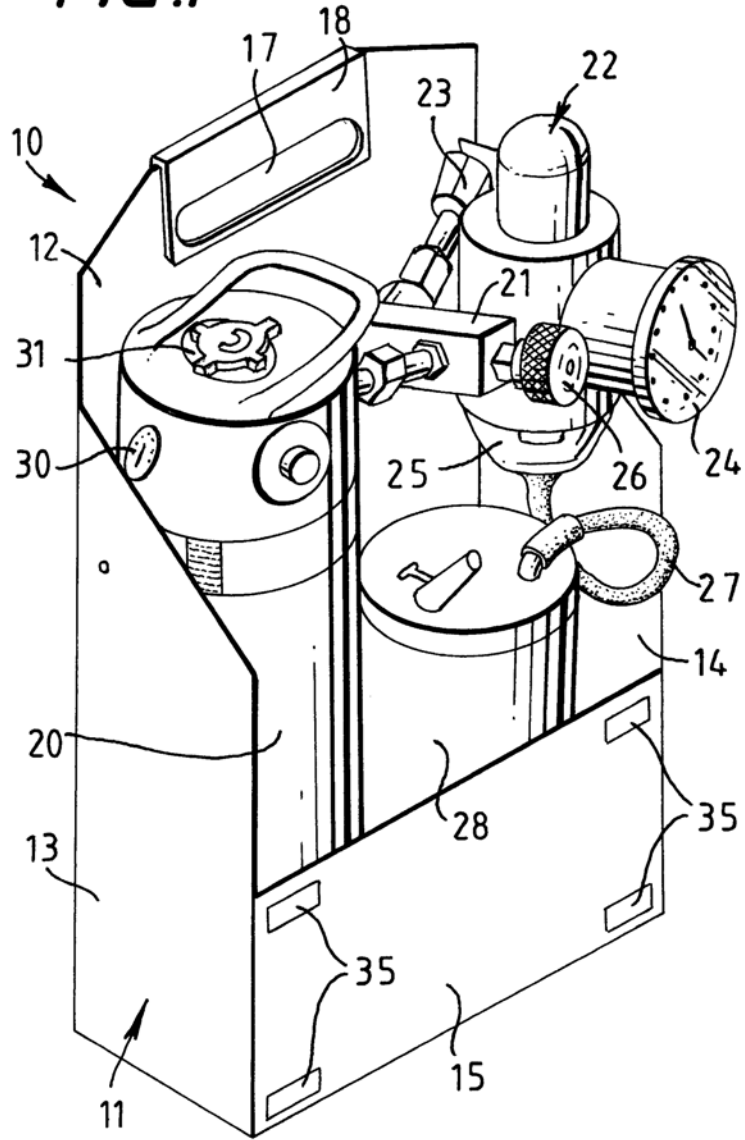
3. An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of the art by virtue only of section 2(2) above (and disregarding section 2(3) above).

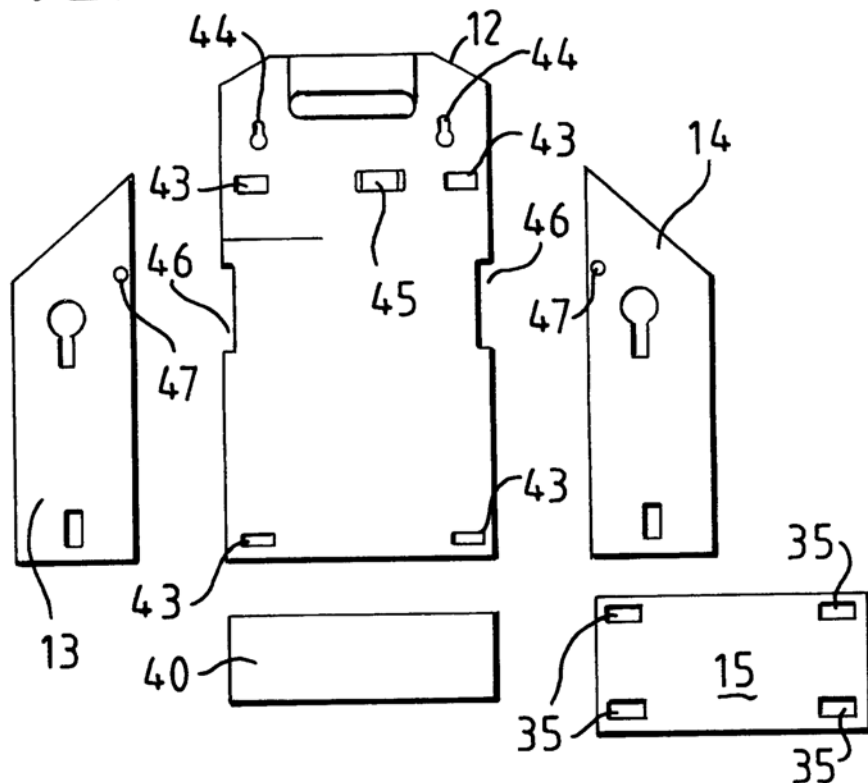
#### **The Invention**

- 6 The invention is a portable resuscitation system designed to be easily carried and held. The aim is to provide a system which is lightweight and protects its delicate components from damage. It does this essentially by enclosing the various components (oxygen cylinders etc) inside a box, with further attachments inside the box to allow more components to be added. Figures 1 and 2 of the patent, illustrating the main embodiment in assembled and disassembled form, are reproduced below.

**FIG. 1**

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**FIG. 2****The claims**

- 7 There are five claims in the patent; claim 1 is the broadest claim and claims 2 to 4 are appendent to it. Claim 5 is an "omnibus" claim. Claim 1 reads as follows:

A portable resuscitation system which comprises a generally flat rigid base panel provided with means to permit attachment of a manifold, and a manifold for connection thereto, which manifold is provided with conduits for pressurised gas flow therethrough and further with means to operatively interconnect an oxygen cylinder and a suction device driven by pressurised gas from the oxygen cylinder in such a way that, in use, the manifold, the oxygen cylinder and the suction device all lie and/or adjacent the same surface of the base unit.

**Construing Claim 1**

- 8 Claim 1 presents some difficulties in construction. In particular, I need to consider what is meant by the words "a generally flat rigid base panel". As the claimant states in its argument, this is unclear on the face of it.
- 9 The claimant points out that the only use of "base panel" in the description is to refer to the base panel of an enclosure [box] for the operative parts of the system that is formed by the base panel and four upright panels arising from its periphery (in fig. 2 above, this is item 40 – it is not visible in figure 1 being underneath the bottles and concealed by the box walls). The claimant argues this is in line with the "normal unstrained meaning" of the phrase as a flat integer at the base of the system on which the system stands at rest.

- 10 As far as it goes, this argument is compelling. But claim 1 requires that the generally flat rigid base panel is “provided with means to permit attachment of a manifold”. As can be clearly seen from the figures, the manifold is attached to the backing plate, item 12, not the base of the box.
- 11 Is it possible to construe claim 1 so that it is the “portable resuscitation system which is “provided with means to permit attachment of a manifold” rather than the “base panel”? This interpretation would require the manifold to not be part of the portable resuscitation system, which would directly contradict claim 2 (which is appendent to claim 1 and explicitly requires the manifold to be part of the portable resuscitation system), so I reject it.
- 12 Can the fact that the “base” panel 40 is connected to panel 12, which has an attachment for the manifold, mean that panel 40 is “provided with means to permit attachment of a manifold?” This is just about possible as an interpretation, but would reduce the connection between the manifold attachment and the base panel to being simply one of being in the same system, which seems to go against what the claim is trying to do, i.e. link the attachment and the panel directly together.
- 13 Furthermore, embodiments are described on page 5 lines 23-25 in which the “box” is reduced to just the backing plate (item 12). For this to fall within the scope of the claim, it would be necessary for this plate to be the “generally flat rigid base panel”. In addition, on page 7 lines 9 to 16, the value of a rigid flat back panel for sliding through confined spaces is explained – there is no equivalent passage extolling the virtues of a rigid flat bottom panel.
- 14 As a matter of English, it is possible to consider the “base panel” to be the panel which everything else is built off, a role formed by item 12, which links the box containing the bottles and the manifold together. I hold that the claim should be construed in this way.

### **The Prior Art**

- 15 The main prior art relied on by the claimant is
- a) UK Registered Design Number 2 095 148 (“the registered design”) in the name of Essex Rivers Healthcare NHS Trust (“Essex Rivers”)
  - b) A prior sale of a “modified unit” in accordance with the registered design and a specification provided as a schedule to a sole licence agreement between Nu Tec and Essex Rivers.
- 16 The registered design is for a carrier of oxygen bottles and other equipment in a similar manner to the claimed invention. One of the pictures from the specification is reproduced below.

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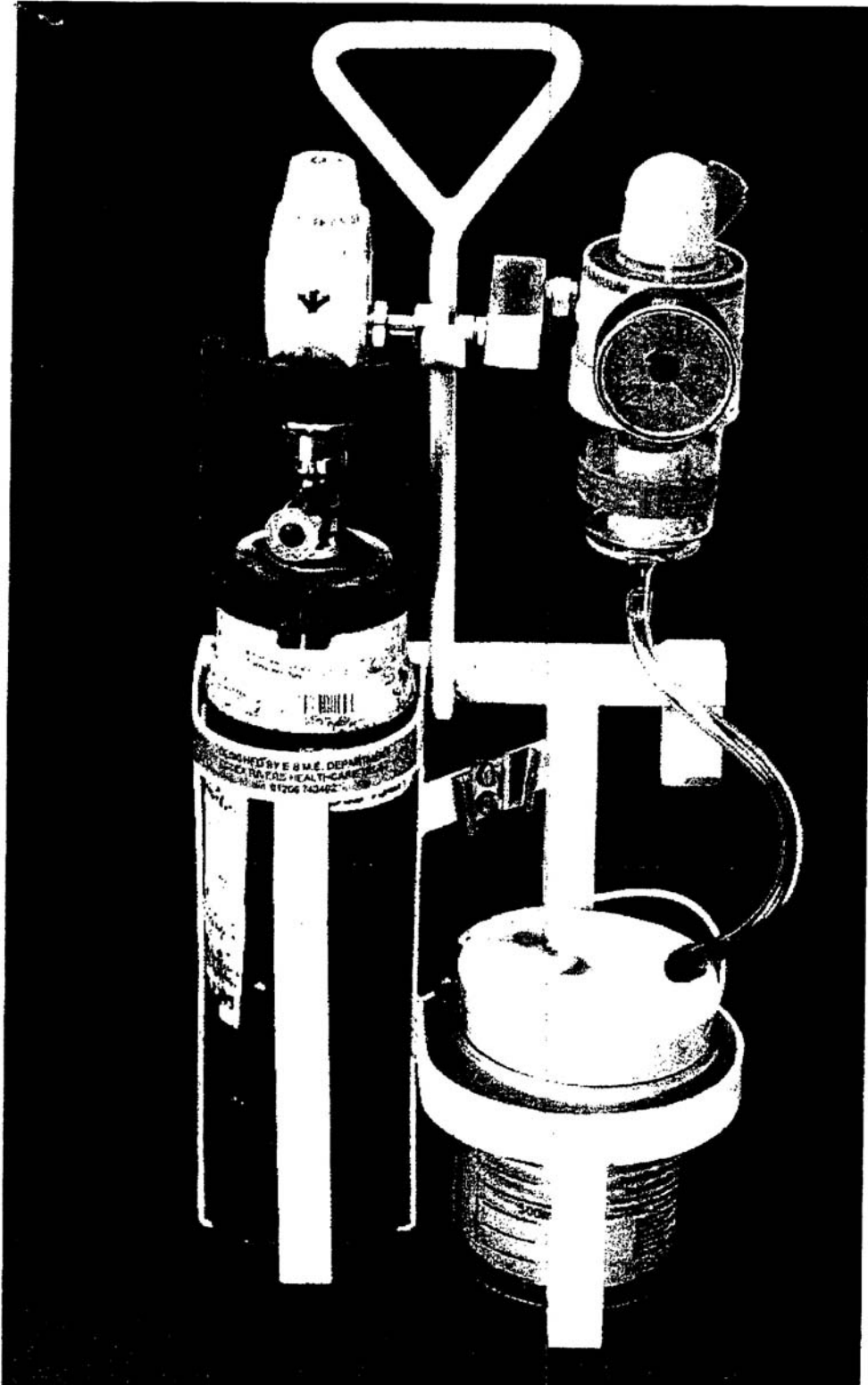
ESSEX RIVERS HEALTHCARE NHS TRUST

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FRONT PERSPECTIVE,  
VIEW FROM ONE-SIDE AND SLIGHTLY ABOVE

- 17 In use, a gas cylinder would fit in the larger “basket”, an aspirator would go in the smaller basket, and a manifold would be attached to a clip on the handle. A witness statement from Robin More, managing director of Nu Tec, was provided, including the following photograph which Mr More described as a photograph of the registered design. It appears to show the system in use.



18 The registered design has a date of grant of certificate of 4 September 2001 and I accept it was available at the priority date of the patent.

- 19 The evidence relating to the prior sale comprised a licence agreement dated 13 September 2001, including a specification with design “blueprints”. The specified design seems for material purposes much the same as the registered design, and indeed the claimant describes the first sale as being “according to the registered design”.
- 20 A witness statement from Mr More was provided in which he states that he further modified the design to allow for larger bottles to fit in, and a first sale of that modified design was made on 5 December 2002. I have no reason to doubt this evidence, and although the precise specification at the time of sale is slightly unclear, I accept that it was in broad accordance with the registered design. In particular, for the material features I consider below, they appear identical.
- 21 In addition, the claimant submitted a further witness statement from Robin More in which he describes what he would have seen in the registered design photographs, viewed prior to 24 March 2003. I do not think it adds anything to the photographs themselves and I will say no more about it.
- 22 The claimants also referred to Australian patent application AU 2001100283, published 20 September 2001, which relates to a carrier for pressurised gas cylinders (primarily scuba tanks, but others are mentioned). The aim is to protect the cylinders from damage, using a (generally rigid) base portion for receiving and supporting the base of a gas cylinder.

### **Novelty**

- 23 The registered design and the prior public sale specification show broadly similar portable resuscitation systems. From the diagrams reproduced above, it is apparent that they both have a vertical rod ending in a handle, to which is welded perpendicularly a second rod (the “cross piece”). Baskets are formed from U-shaped bars running down from the cross-piece. The handle-rod, cross-piece, and baskets can thus be said to form a “base unit”. In use, a manifold (held on by a bracket attached to the handle rod), the gas cylinder, and an aspirator all lie adjacent to the back of this base unit. Therefore the two disclosures anticipate all the features of claim 1 except for the “generally flat rigid base panel”.
- 24 The claimant puts forward the argument that the bases of the baskets (as seen in the above diagrams) form a “rigid base panel”. I am unconvinced by this argument as it is difficult to see the bottom parts of the U-shaped metal bars forming the baskets as “panels” as a matter of normal reading. But in any event, in line with my findings on construction above, I do not consider that part of the carrier to be “provided with means to permit attachment of the manifold.” It is the handle rod which is provided with such means.
- 25 It is evident from the diagrams that the handle rod is cylindrical rather than “generally flat”, and it protrudes forward from the cross-piece before going upwards (the rod being an L-shape at the bottom). There is thus no “generally flat rigid base panel provided with means to attach a manifold”. The objection to lack of novelty therefore fails.



## **Inventive Step**

- 26 The difference between the prior art design and specification and the claimed invention is, as I have found above, the lack of a generally flat rigid base panel. The claimant asserts without detailed argument and as an alternative to its novelty argument that such a feature is obvious and that the patent makes no case for such a feature being inventive. In addition, it argues that it would have been obvious to combine the protective base of AU 2001100283 with the carrier shown in the registered design.
- 27 To some extent the claimant is basing its view on a construction (that the “base panel” is the bottom of the carrier) I have found wrong above, and I am not convinced that the patent makes no case for the inventiveness of the panel – the patent suggests, on page 7 lines 9 to 16, that it confers the advantage of enabling sliding the carrier without danger of damaging the components.
- 28 That said, it seems to me that protecting the components of the system would have been an obviously desirable goal to a person skilled in the art at the priority date of the patent. Equally, I believe that using a rigid sheet to protectively back the device disclosed in the registered design and the specification would have been an obvious way to achieve this goal. I therefore find that claim 1 lacks an inventive step in light of each of the registered design and the prior use demonstrated by the sale contract and product specification.
- 29 AU 2001100283 adds little to this argument, but it does illustrate that at least some people considered protecting air bottles from damage when being carried around as important (and that putting a rigid enclosure around them was a known way to do it at the priority date). It reinforces my view that protecting the contents of the system was an obviously desirable goal.

## **Conclusion**

- 30 I have concluded that claim 1 of Nu Tec’s patent lacks an inventive step over the prior art. It follows that Nu Tec’s patent is invalid for want of inventive step as it stands. As there appears to be no prospect of any amendment of the patent under section 75, I can see no reason for me to go on and consider whether any of the other claims are obvious or not. I therefore order that patent GB 2400326 B be revoked in accordance with Section 72(1) of the Patents Act 1977.

**J Elbro**

Deputy Director acting for the Comptroller