



13 September 2012

**PATENTS ACT 1977**

BETWEEN

Anthony Richard Timson and Cellxion  
Limited

Claimant

and

M.M.I Research Limited

Defendant

---

PROCEEDINGS

Reference under sections 12 and 37 of the Patents Act 1977 in  
respect of patent number EP1908319

HEARING OFFICER

P R Slater

---

**PRELIMINARY DECISION**

**Background**

- 1 On 4 March 2011, Anthony Richard Timson and Cellxion Limited (“the Claimants”) initiated proceedings under sections 12 and 37 of the Patents Act 1977 (“the Act”) claiming that they were entitled to the invention protected by European patent EP1908319 and its foreign equivalents.
- 2 EP1908319 entitled “Acquiring identity parameters by emulating base stations” was filed in the name of M.M.I Research Limited (“the Defendants”) on 17 July 2006. The application is derived from an earlier international application PCT/GB2006/002639 which claims priority from two UK applications GB0515125.3 filed on 22 July 2005 and GB0601956.5 filed on 31 January 2006. The international application was published on 25 January 2007 as WO2007/010223. The claimants allege that they are entitled to all equivalent patents which claim priority from either of the original UK filings.
- 3 Both M.M.I Research Limited and Cellxion Limited manufacture devices for electronic surveillance primarily for use by governmental organizations such as

the police force and security services.

- 4 Mr Timson is a former employee of M.M.I who helped develop their so-called “XP” device, a device which is both capable of capturing the IMSI of a mobile phone and of intercepting and recording voice calls and text messages made by that phone.
- 5 After leaving M.M.I, Mr Timson was employed by Cellxion in the development of their “Nemesis” product, a device capable of emulating base stations, identifying, capturing and manipulating “target” mobile phones. Competition between the two companies has led to a number of legal challenges including the case of *MMI Research Limited & Anor v Anthony Richard Timson & Ors* (Claim No. HC05C02015) (“the confidentiality proceedings”) before the High Court which is referred to in paragraph 5 of the claimant’s statement of grounds.
- 6 The claimants in their statement of grounds of 4 March 2011 allege that they are entitled to the patents in suit as the subject matter of which is derived from proprietary technology used in their Nemesis product. They argue that information obtained in preparation for and/or during the course of the aforementioned confidentiality proceedings shows that M.M.I acquired this technology from them prior to filing their patent application.
- 7 The claimant’s case appears to turn on whether the defendants, having been in possession of a data sheet (“slick sheet”) describing their Nemesis product and various photographs of the Nemesis’ Graphical User Interface (GUI), used that information as a basis for their patent application which was filed on 25 July 2005.
- 8 The defendants in their counterstatement of 10 August 2011 deny these allegations, and provide evidence to show that whilst they were in possession of the slick sheet on the 5 July 2005, they were already in discussions with their patent attorney regarding the filing of their patent application in January 2005 several months before having received the slick sheet. Furthermore, the defendants argue that they did not receive the photographs of the GUI until 12 October 2005 many weeks after having filed their application.
- 9 The counterstatement also includes a redacted copy of a Requirement Specification dated 17 September 2004 prepared by Dr Paul Martin, an M.M.I employee tasked with redesigning and further developing their XP product. This document is intended to show that the technology required to emulate base stations had been incorporated into the XP platform well in advance of the filing of their patent application.
- 10 In a subsequent letter dated 28 October 2011, the claimants requested disclosure of all correspondence between M.M.I and the private investigators, instructed by them in April 2004 to investigate the activities of their employees including Mr Timson which came to light in the confidentiality proceedings. This they believe would show that the defendants had acquired the technology at an earlier date than was originally envisaged in the statement of grounds.
- 11 The claimants also requested disclosure of an un-redacted copy of the

Requirement Specification which they consider to contain anomalies calling into question its attributed date.

- 12 Having failed to obtain the aforementioned documents from the defendants, the claimants filed a formal request for disclosure on 6 June 2012 followed by supporting submissions on 26 June 2012. The defendants in their letter of 3 July 2012 filed submissions opposing the request for disclosure.
- 13 The defendants up until now have declined the claimants' request for disclosure on the grounds that the request is vague and excessively broad, and that there is no evidence to suggest that this is in any way related to the case currently being pleaded. They argue that this would amount to no more than a "fishing expedition", and as such should be refused. They have also declined to provide an un-redacted version of the Requirement Specification as they allege that it contains highly confidential material belonging to them as proprietors.
- 14 During the case management conference held on 13 July 2012, both parties agreed for this matter to be decided on the basis of the papers currently on file.

## **The Law**

### *Disclosure*

- 15 Guidance on the approach to be taken when considering requests for disclosure can be found in *Tribunal Practice Notice (TPN 1/2000)* and is set out in more detail in paragraphs 3.40 to 3.56 of *The Patent Hearings Manual*. However, I think it would be useful, in the paragraphs which follow, to pick out the key considerations which will form the basis of my approach to this decision.
- 16 Disclosure is not as common in proceedings before the Comptroller as it is in the High Court. It can be costly and discretion must be exercised to keep excessive costs down. In exercising their discretion to make an order for disclosure, hearing officers have traditionally followed principles set out in Order 24 of the old Rules of the Supreme Court. This approach was endorsed by Aldous J in *Merrell Dow Pharmaceuticals Inc's (Terfenadine) Patent*<sup>1</sup>. The questions to be considered are:
  - *whether the documents concerned relate to the matters in question in the proceedings; and*
  - *whether their disclosure is necessary to dispose fairly of the proceedings or to reduce costs*
- 17 It should be noted that the relevance of documents is not an issue when deciding whether to make an order, but as I have just said it is important to consider the particular matters which are to be decided at the main hearing, as indicated by Aldous J in *Merrell Dow*, where he said:

*"The test is whether the documents relate to the matters in question. If they do, then they should be disclosed and their relevance will be decided at trial. To decide whether a document relates to a matter in question, it is first necessary to analyse what are the*

---

<sup>1</sup> Merrell Dow Pharmaceuticals Inc's (Terfenadine) Patent [1991] RPC 221

*questions in issue in the proceedings.”*

- 18 The hearing officer also has the discretion to refuse to make an order, for example, if the value of the material to the Claimant is outweighed by the burden it would impose on the Defendant, as discussed in *Mölnlycke AB v Procter and Gamble Ltd (No 3)*<sup>2</sup>.
- 19 Another reason might be if the categories of documents requested were very general and not adequately particularised. In other words, the request amounts to a “fishing discovery”, as discussed in *British Leyland Motor Corporation v Wyatt Interpart Co Ltd*<sup>3</sup>.
- 20 I am also aware that the provisions of the Rules of the Supreme Court have now been replaced by the Practice Direction to part 31 of the Civil Procedure Rules 1998, which the Office’s practice on specific disclosure should now reflect. It says at 5.4:

*“In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. “*

- 21 However, as the hearing officer concluded in *Cerise Innovation Technology Ltd v Abdulhayoglu*<sup>4</sup>, this new approach does not mean that the old tests are to be discarded, but the hearing officer should now additionally put greater emphasis on the principle of proportionality and on the need to deal with proceedings expeditiously.

## **Discussion**

- 22 The underlying question to be answered during these proceedings is whether or not the defendants acquired the technology which is the subject of the invention from the claimants prior to the filing of their patent application. The only evidence provided by the claimants to substantiate this matter is contained in the various witnesses statements of Mr Simon Kinsella, submitted during the confidentiality proceedings, which suggest that the defendants had been provided with a copy of the slick sheet describing the Nemesis product on 5 July 2005, and that photographs of the associated GUI were obtained by the defendants in May 2005.
- 23 The matter in question in these proceedings is therefore whether or not the defendants acquired the technology from the claimants and at what point in time i.e. were the defendants in possession of the slick sheet and/or the photographs of the GUI prior to 25 July 2005, the filing date of the patent, and was this information used as a basis for their patent application. The evidence supplied by the defendants as part of their counterstatement would seem to suggest, at least prima-facie that this was not the case, and that preparation of the patent application had begun in January 2005, well in advance of them having received the slick sheet and photographs.

---

<sup>2</sup> *Mölnlycke AB v Procter and Gamble Ltd (No 3)* [1990] RPC 498

<sup>3</sup> *British Leyland Motor Corporation v Wyatt Interpart Co Ltd* [1979] FSR 39 at pages 44-45

<sup>4</sup> *Cerise Innovation Technology Ltd v Abdulhayoglu* BL O/177/99

- 24 Furthermore, the Requirement Specification, submitted as Annex A to the defendant's counterstatement, would appear to show that they had incorporated the concept of emulating multiple base stations into their XP platform back in September 2004, again prior to having filed their patent application. This is acknowledged by the claimants in their submissions of 26 June 2012 at paragraph 11.
- 25 Do I think that the documents requested by the claimants would shed any more light on this matter? I do not think so. It appears to me, at least on face value, that the specific questions forming the basis of the claimants' statement of grounds have been answered, and that there is nothing to suggest in the various submissions I have received, that any additional documents are necessary to dispose of these proceedings fairly.
- 26 Indeed, it would appear that the claimants are "fishing" for additional evidence and documents which they can then use to bolster and/or shift their original claim. Even if there was something to suggest that relevant material would be forthcoming, I do not think that an order for disclosure as requested would be proportionate in this case, it would delay proceedings and add unnecessarily to the costs incurred by the defendant.

### **Conclusion**

- 27 I therefore refuse the claimants' request for disclosure.

### **Appeal**

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

**P R SLATER**

Deputy Director acting for the Comptroller