



BL O/170/04

10 June 2004

## PATENTS ACT 1977

BETWEEN

Swansea Imports Limited

Applicant

and

Carver Technology Limited

Opponent

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PROCEEDINGS

Applications for compulsory licences under section 48(1) of the Patents Act 1977 in respect of UK patents GB 2154314 and GB 2153989

HEARING OFFICER      P Back

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## DECISION

### Introduction

- 1 This is an application by Swansea Imports Limited (hereafter “Swansea” or “the applicant”) for compulsory licenses on two patents in the name of Carver Technology Limited (hereafter “Carver” or “the opponent”). The parties appeared before me on 7 April 2004, when only preliminary matters were discussed, and on 10 May 2004, when the hearing of the substantive matter took place. On both occasions, the applicant was represented by Mr D Lucking of Messrs Forrester Ketley, and the opponent was represented by Mr Geoffrey Pritchard, instructed by Messrs Wilson Gunn.
- 2 The two patents in suit concern different aspects of heater units. They typically find their application in gas-fired water heaters of a type suitable for installation in an external wall of a caravan. Both patents are now in their final year and will expire on 29 January 2005.
- 3 It is asserted in evidence that the “beneficial owner” of both patents is Truma (UK) Limited (hereafter “Truma”), on the basis of its acquisition in 2000 of Carver and its assets. Truma is a subsidiary of the German firm Truma GmbH and is responsible for the distribution in this country of products emanating from the latter.
- 4 Prior to its acquisition by Truma, Carver appears to have been a successful company

which had produced and sold water heaters according to the patents over a number of years. It is not disputed that many new caravans were at one time supplied with Carver heaters fitted as standard equipment and that Carver came to dominate the UK market for this type of appliance. However, following the takeover of Carver by Truma, Truma ceased the manufacture of heaters according to the patents and adopted a policy of promoting in their place the products emanating from its German parent which do not fall within the scope of the patents. It is not at issue that Carver heaters are no longer installed in new caravans.

- 5 Central to this case is the fate of all the existing Carver heaters which had been sold before the withdrawal of the product. When these break down or wear out, they need to be repaired or replaced. Although Truma do not make this model any more, the opponents say that if customers want to replace old Carver heaters with new ones to the same design, there are enough in stock to satisfy any demand which might arise. However Truma's own design of heater can also be supplied as a replacement. This is not the same as the Carver heater but can be fitted in its place with the aid of a special adaptor plate.
- 6 Swansea base their claims for compulsory licenses on their submission that there remains a considerable demand among users of old Carvers for new heaters of similar design, and that Truma are not willing to meet this demand. Swansea would therefore like a license to exploit the Carver patents themselves through the manufacture and supply of complete heaters and spare parts. It is not in dispute that Swansea has previously approached Carver for a licence to do this but was refused.
- 7 The only real point of contention concerns the size of the actual demand for the patented technology and the extent to which that demand is already being met by the opponent.
- 8 There are two parallel actions, one relating to each of the patents in suit. These have not been formally consolidated, although the issues in each are in practice identical and it has been found convenient by all concerned to treat the proceedings as though they were one and the same. This decision is therefore applicable to both applications.

### **The law**

- 9 The principal provision under which these application are made is Section 48 of the Patents Act 1977, paragraph 1 of which reads as follows:
  - (1) At any time after the expiration of three years, or of such other period as may be prescribed, from the date of the grant of a patent, any person may apply to the comptroller on one or more of the relevant grounds-
    - (a) for a licence under the patent;
    - (b) .....
- 10 It is not at issue that in this case such licenses are subject to Section 48A, which sets the conditions for grant of compulsory licences in a WTO country. The relevant

provisions are as follows:

(1) In the case of an application made under section 48 above in respect of a patent whose proprietor is a WTO proprietor, the relevant grounds are-

(a) where the patented invention is a product, that a demand in the United Kingdom for that product is not being met on reasonable terms;

(b) .....

(2) No order or entry shall be made under section 48 above in respect of a patent whose proprietor is a WTO proprietor unless-

(a) the applicant has made efforts to obtain a licence from the proprietor on reasonable commercial terms and conditions; and

(b) his efforts have not been successful within a reasonable period.

11 It is not in dispute that the conditions set in Section 48A(2) for prior attempts to negotiate a licence have been fulfilled. Accordingly, the only question which I have to determine is whether the conditions set in Section 48A(1) are met. The burden is on the applicant to prove his case, and the standard required is the normal civil one of balance of probabilities. However once the case is proved, there is no discretion over whether or not to issue a licence; in such a situation, one must be granted.

12 I should mention here a submission made to me by Mr Lucking to the effect that because the opponent's case (that current demand for the patented product is being met) is supported by evidence which tends to show that the level of demand is quite low, I should give the benefit of any doubt in the matter to the applicant. His logic in arguing this is that if the figures given by the opponent are correct, then no harm would be done by the small amount of business that would arise from the grant of a licence. On the other hand, if actual demand is higher than the figures provided by the opponent, then that demand is clearly not being met, and grant of a licence would be justified. This might seem a seductive argument, but it is not how I understand I should apply the law on this subject. Accordingly, what I shall do is determine if the case is made out to the required standard of proof, and if I find that it is, I shall grant the licences requested.

13 I have been referred to two precedent cases which assist me in considering how to apply the conditions laid down in Section 48A(1)(a). The first is the decision of the Comptroller in *Cathro's Application* (1934) 51 RPC 75, which sets out the principle that the demand to be established must be an actual one and not merely one which an applicant hopes and expects to create. It is a decision made under earlier Patents legislation, but is still considered to be applicable today. The Comptroller stated (at page 82):

“... it seems to me that any such demand must be an actual one by a trader or traders in business here [*i.e.* in this country] and not merely one which an applicant for a licence hopes and expects to be in a position to make if and when

he has obtained the licence and has commenced business ...”

14 What constitutes "reasonable terms" is a question of fact to be determined on the basis of the evidence, and will depend on all the surrounding circumstances. In order to be “reasonable”, the price charged by the patentee should be a *bona fide* one and not one adopted to suppress or depress demand, although this is not to deny that demand and price are almost always related. This is explicitly recognised in the judgment of Hoffman J, as he was then, in *Research Corporations’s (Carboplatin) Patent* [1990] RPC 663, where he says at page 695-696:

“When section 48(3)(b)(i) speaks of demand not being met on reasonable terms, it recognises that demand, unless wholly inelastic, must mean demand at a given price. If the price being charged by the patentee or its licensee is reasonable and the demand at that price is being fully met, it seems to me irrelevant to say (as one almost invariably could) that the demand would be greater at a lower price.”

15 I note here that there is no dispute that the patented product has been taken out of production, or that Truma, as a matter of business policy, does not wish to see the patent being exploited by anybody else. It has been alleged, and not denied, that Truma’s business objective in taking over Carver was to eliminate the hitherto dominant Carver product from the UK market and use its control of the Carver patent to keep the field free for its own design.

16 Acquisition is frequently used as a means to gain entry into a national market. This may or may not raise issues of competition or other law, but such are of no concern to me in these proceedings. Moreover, a manufacturer is fully entitled to withdraw products, including patented products, from the market in favour of new ones that it may wish to bring forward. However, in this kind of situation a patentee is not entitled to use its patent as a tool for preventing competition against its new product if there is a continuing unsatisfied demand for the patented technology. This is precisely the kind of abuse that the compulsory license provisions of the Act are intended to combat.

### **Preliminary matters**

17 Following the initiation of proceedings, the evidence rounds went ahead in the usual way with the applicants and the opponents filing their evidence in chief. The applicant did not exercise its right to file evidence in reply.

18 A hearing was appointed for 6 April. However very shortly before the hearing the opponent’s agent notified the Office that there had been an error involving the omission of certain material from their evidence. Consequently they filed at very short notice further evidence comprising a new witness statement, the pages which had been allegedly omitted from the original evidence, and additional material in the form of an “update” to the original evidence. Regrettably, a further error was made even at this point involving the omission of one page from the advance copy which was faxed to the Office and the applicant’s agents. This error was rectified later in the day by a fax sent direct from the chambers of Mr Pritchard.

19 It is not necessary to go into detail, except to say that the proceedings on 6 April were

taken up entirely with the question of whether I should admit the opponent's late-filed evidence. In the event, I decided to do so, and allowed Swansea the opportunity to file evidence in reply. I then adjourned the proceedings to a new date for hearing the substantive arguments.

- 20 Unfortunately that was not the end of the procedural issues. On the afternoon of the Friday before the Monday on which the reconvened hearing was due to take place, a supplementary skeleton argument was received from Mr Pritchard in which notice was given that he would be objecting to certain elements of Swansea's evidence as not being strictly in reply.
- 21 When Mr Lucking and Mr Pritchard finally came before me again on Monday 10 May, Mr Pritchard clarified that the evidence to which he was objecting was the statement of a certain Mr Ewart whose name had not previously figured in any of the papers. Mr Pritchard confirmed that he had no problem with the other items of evidence.
- 22 Mr Lucking however was not able to accept the exclusion of Mr Ewart's statement. This raised the prospect of yet another delay in the proceedings.
- 23 In the event, in order not to delay the proceedings still further, both parties agreed that I should admit the contentious evidence *de bene esse* and that I should be addressed on this basis. Further, it was agreed that should I come to the view, having heard both parties and taking into consideration all the evidence, that without the evidence of Mr Ewart I would find in Carver's favour, but with that evidence I would find in Swansea's favour, I would at that stage allow a further period for evidence to come in from Carver. This is then the basis on which the rest of this decision proceeds.

### **The evidence**

- 24 Much of the evidence is duplicated because there is a separate action in respect of each patent. However because the issues raised are identical, it is convenient and less confusing if I refer throughout this decision to the evidence in the singular. I have also referred to Truma's evidence in its consolidated form incorporating both the evidence initially filed as Truma's evidence-in-chief and the later filed evidence that I admitted at the preliminary hearing.

#### *Evidence-in-chief*

##### *Applicant's evidence*

- 25 Swansea's main witness is Ray Summers, a director of the applicant company. In his statement of 29 May 2003, he sets out how Carver introduced a water heater (the "Cascade One") in the early 1980's suitable for installation in touring caravans. This was subsequently developed and further models were brought out. By the time of Carver's acquisition by Truma in 1999, Carver "dominated" the UK market with their heaters fitted to new caravans by many UK manufacturers. He estimates that up to 90% of the 24,000 caravans sold every year for the 15 years prior to 1999, as well as many horse boxes catering trailers and motorhomes, were fitted with Carver heaters.

26 He says that following the takeover of Carver and the cessation of the manufacture of the Carver range, spare parts had become difficult or in some cases impossible to obtain, which had led to difficulties for servicing of existing heaters. In response to this situation, he approached Truma with a request for a licence to manufacture Carver water heaters and spares, but was told that “under no circumstances did [Truma] want the Carver water heater or spares back on the market”.

27 He says that the Truma heater which does not fall within the scope of the patent and which is being offered as a replacement for Carvers is inferior in many respects, and as a result of this situation the need for Carver owners to maintain or replace their old heaters is not being met.

28 Exhibited to the statement of Mr Summers are the following:

**Exhibit RS1/3:** a letter from Truma (UK) Limited to Ray Summers dated 14 September 2000, which deals primarily with how warranties for Carver products were to be dealt with following the closure of Carver Technology Limited. The letter states that spare parts would remain available for current Carver products for 5 years or such time as sufficient stocks remain.

**Exhibit RS2/4:** a draft licence

*Opponents' evidence*

29 Truma's evidence comprises a witness statement of 24 December 2003 by Len Latham, the managing director of Truma (UK) Limited, in which he says that upon the acquisition of Carver by Truma, his company purchased more than £1 million of “finished heaters ready for sale and spare parts which were believed to be sufficient to support the need for spare parts for the “Cascade heater” for a minimum of 5 years from the date of the purchase”. He also states that his company has continued to supply complete Carver heaters and spare parts, although demand has tailed off. He says that his company retains residual stocks to meet any continuing demand that is encountered. The statement of Latham includes annexes as follows:

**Annex LL1:** an undated document on Truma headed paper relating to Truma's intention to continue to supply Carver products and spare parts. According to the statement of Len Latham, this document was issued following discussions between Truma and the UK body for the caravan business (National Caravan Council).

**Annex LL2 :** a table listing what appear to be names of caravan businesses and quantities of stock supplied in the years 2001-2003. The table is headed “Truma (UK) Limited Cascade - 102039K”

**Annex LL3** (filed with the statement of Latham dated 6 April 2004): three tables listing part numbers, description and stock situations of parts for Carver heaters. One of the tables is headed “Exhibit 2” and “Parts where a new supplier has been sourced. Ongoing supply chain established”. It lists 27 parts by number and description with an indication of “quantity in hand” which varies between zero

and 20,386. The second table is headed "Exhibit 3" and bears the description "Stock held where no demand exists". It lists 17 items in respect of which there appears to have been no sales at all in the period August 2002-September 2003 and where between 34 and 4,890 are held in stock. The third table is headed "Exhibit 4" and bears the description "Stock held to cover existing demand, new supplier not yet sourced". It lists 21 parts having quantities of stock in hand varying between 14 and 5,305, and representing between 0.5 and 31,830 months' worth of stock based on average monthly sales.

Attached to Mr Latham's statement of 6 April is **annex LL4** (also referred to as "LL2 update") which comprises summaries of conversations with eleven dealers who were contacted to enquire about Carver Cascade sales and stocks. Only one considered that there was any continuing demand for this product while the others were reported to have said that they had no further requirements for the complete unit. All but three said that they still had stocks of unsold Cascades.

*Swansea's evidence in reply filed 21 April 2004*

30 This comprises the following:

Witness statement of Robert Ewart  
Witness statement of David Thomas and three exhibits  
Second witness statement of Ray Summers and two exhibits

**Witness statement of Robert Ewart**

31 Robert Ewart is a director of a company which supplies spare parts and accessories for caravans. Before setting up the company in 2001 he worked for Swift Group, a manufacturer of caravans and motor homes.

32 He says that when he heard that Carver had been taken over by Truma and were no longer going to manufacture the Cascade heater, he contacted Truma on behalf of Swift Group dealers and attempted to negotiate guarantees for future supplies of spare parts. According to Mr Ewart, these negotiations were "unsuccessful" in that the best he could secure was an indication (but not a guarantee) that they would be supplied for a period of five years.

33 He subsequently tried to locate sources of Carver spares and was largely unsuccessful, although Swansea Imports was able to supply some parts. His contacts indicated that a small number of dealers did have limited numbers of stocks but none were willing to supply complete heater units.

34 He considers that demand for complete Carver units and spares remains high, both because of the quality of the product and because the Truma alternative is not very suitable as a direct replacement for the Carver design.

**Witness statement of David Thomas**

35 David Thomas is a director of Swansea Imports, the applicant company. His statement

is an explicit response to the additional evidence filed by the Carver and reports telephone conversations conducted by Thomas with the dealers mentioned in annex LL4 to the statement of Len Latham. He also reports a conversation he had with a Martin Spencer, a “technical expert” at the Caravan Club who said that Carver spares were difficult to obtain and complete units were unobtainable.

*Documents exhibited to the statement of David Thomas*

- 36 **Exhibit DT1** contains transcripts of conversations between Thomas and six of the eleven caravan dealers referred to in the statement of Latham. The approach to each appears to have been a purported enquiry seeking to establish the availability of Carver heaters and/or spares. This is a summary of the responses:

*Availability of spares:* three dealers said spares were unobtainable or difficult to obtain, one had spares in stock but said that they were generally scarce, one said it would be necessary to make enquires and one was not asked about the spares position.

*Availability of complete Carver heaters:* Three said they were unavailable or difficult to obtain, two offered to supply them, and one required a special order.

*Demand for Carver products:* four were not asked or volunteered no information, one said there was a demand, and one said that complete units were “like gold dust”.

*Other comments:* One said that Truma could be fitted in place of old Carver units with no special adaptor needed, one said that Truma products were inferior to Carver heaters and that they don’t fit adaptor plates because they give problems, one had no adaptor plates in stock and appeared to have little knowledge of them, and one said it was not always possible to substitute Truma heaters for old Carver units due to space considerations.

- 38 **Exhibit DT2** is an e-mail from Mr Spencer at the Caravan Club following up the conversation referred to in the statement. This indicates that the Club does receive enquiries about the availability of Carver heaters and refers these to Truma or a dealer. He indicates that for older models a breaker or secondhand spares dealer might be a better bet and suggests that in such cases these could be the only possible source.

- 39 **Exhibit DT3** comprises copies of faxes from two suppliers stating that the Carver Cascade heater is no longer made. One indicates that three units are in stock and the other offers a Truma unit as an alternative.

**Second witness statement of Ray Summers**

- 40 This statement refers to the additional evidence filed by the Carver. Summers asserts that not all the parts listed there are in fact Carver Cascade parts (although some are). He lists the parts which he says are either generic engineering components (such as bolts and screws) or parts supplied for the Truma heater which is marketed as the



replacement for the Carver heater. By reference to Exhibit RS3 (see below), he seeks to show that many of the parts listed in Latham's evidence are not Carver parts. He also asserts that RS3 shows that not all Carver parts are available.

41 He also says that he made sample enquiries using an online service and got responses (Exhibit RS4) showing that Carver parts cannot be sourced.

42 Summers goes on to say that he is a director of a business which services and repairs caravans. He asserts that this business services around 300 caravans annually which have Carver heaters installed, and of these typically 4 or 5 would benefit from having the units replaced. He admits that it would be possible to supply spare parts without infringing the patents, but says that in many cases it is the preferred option to replace the entire heater.

43 By scaling these figures up to the size of the total caravan repair market in the UK he estimates an overall annual demand for replacement Carver units at around 500 units. He also corrects the estimate given in his first witness statement that there may be up to one million Carver heaters in use; he says this figure is likely to be closer to 450,000.

#### *Documents exhibited to the statement of Ray Summers*

44 **Exhibit RS3** - extract from "Burden" catalogue showing exploded view of a Cascade heater and indicating part numbers. This is a single page of what appears to be a larger document (judging from the observation that not all the parts identified in the diagram appear to be listed with their descriptions and numbers). Moreover, the reproduction is imperfect and not all the information which is present on the page can be read clearly.

45 **Exhibit RS4** - screen prints showing results of enquiries made on the "Burden" website. On the face of it, these prints purport to show that a variety of Carver spare parts are unavailable. However only the five parts listed on the second of the three screen prints actually appear in the single sheet of RS3.

#### **Summary of submissions made at the hearing**

46 Following an introduction in which he gave the background to the case (many of the facts of which are not in dispute, as set out above), Mr Lucking referred me to the evidence of Mr Summers in which he estimates the size of the current demand for replacement heaters. His estimate of the number of caravans and similar vehicles which are in circulation and in which Carver heaters are installed is in the region of 450,000 (this figure having been given in Mr Summer's second statement by way of correction to the estimate of one million given in his original statement). He referred me to the letter (exhibit RS1) from Truma to the Caravan Repair Centre in which the closure of Carver Technology Limited in July 2000 was announced, and in which it is stated that Carver spare parts will remain available for five years *or such time as sufficient stocks remain* [emphasis added], but in which no mention is made of complete heater units (although it must be noted that the main purpose of the letter appears to be to deal with warranty agreements). Mr Lucking said that Mr Summers had "seen the writing on the wall" and concluded that in future spare parts would be

likely to be in short supply. For this reason Swansea had been set up with the specific objective of ensuring a continued supply of Carver parts.

- 47 Mr Lucking referred me to the estimate in Mr Summers's second statement of the likely size of the demand. Scaling up from his personal experience, Mr Summers considers that there is an immediate demand of new Cascade heaters to replace damaged or uneconomically repairable units of between 208 and perhaps 500 annually. Based on Mr Summers's estimates of the current population of working Carver heaters, this represents a fraction of one percent annually, which Mr Lucking suggested is a very conservative figure.
- 48 Mr Lucking sought to explain the evidence of Mr Latham that Carver heaters were in stock and were available to anyone who wanted them by suggesting to me that Truma's dealer network had an interest in promoting the Truma product line and were "educating the market" that Carvers were no longer available. He pointed to the evidence of Mr Ewart, who says that he had experienced difficulties in obtaining Carver spares, and had received a very poor response to a mail-shot he had sent to caravan dealers asking about their stock levels.
- 49 Mr Lucking criticised Mr Latham's evidence which he said was self-inconsistent in that it referred to Truma having acquired one million pounds worth of stock (which, he submitted, might represent approximately 2,500 or more complete heaters), yet the figures quoted for the current stock position and units already disposed of suggested a much lower figure than this. He also questioned what inferences might be drawn from statement of Carver's stock position issued by the National Caravan Council (Annex LL1), which, he said, referred only to intentions as regards the supply of spare parts and made no actual commitment even to continue supplying the full range of these.
- 50 Concerning LL4 (the reported telephone conversations with Truma dealers), Mr Lucking invited me to treat this evidence with caution because of the way in which the "survey" was conducted and the manner in which the results are reported. He contrasted it with the evidence of Mr Thomas who contacted some of the same dealers and was told that the few Carver heaters that remained available were being reduced to spare parts.
- 51 Finally, Mr Lucking criticised the evidence of the supply and stock position of Carver products (LL2-3) which he said were unclear, incomplete, and did not address the question of sales to end users and therefore could not be used to prove that any existing demand was, in fact, being met.
- 52 In reply, Mr Pritchard started by posing the question of what needs to be taken into consideration in respect of the concept of "demand" and how to assess whether any demand is being satisfied. With reference to a hypothetical example involving the sale of a particular model of car which has been superseded, he put it to me that Swansea had been "looking in the wrong place for the right evidence". By this he meant that it was irrelevant whether or not *dealers* were prepared to supply Carver heaters; what Swansea needed to show was that it was *Truma* who was not meeting the demand, and they had failed to produce evidence to this effect.

- 53 In Mr Pritchard's submission, the nearest Swansea get to proving this is in the letter dated 14 September 2000 from Truma to the Caravan Repair Centre (RS1), which is the only direct correspondence to be presented in these proceedings between "the people who want to buy and the people who can supply". However he went on to say that this letter has nothing to do with the product. It is rather about Truma's warranty and returns procedure, and does not amount to a refusal to supply anything.
- 54 Mr Pritchard pointed out to me that there was on its face clear evidence from Truma that Carver heaters had been sold up to the year 2003. The numbers varied, but this could simply be due to a dropping off in demand. The evidence from reported conversations with dealers was consistent with the view that the Carver heater was obsolete and there was no longer any significant demand for it.
- 55 Mr Pritchard was critical about the evidence of Swansea in a number of respects, in particular that Mr Summers was not a "careful" witness and that I should treat his evidence with caution. In support of this contention he pointed to certain errors and inconsistencies in the statements and documents produced. He also reminded me about the lack of any cross-examination and invited me to weigh evidence differently depending upon whether it concerned opinions or matters within the direct knowledge of a witness. In respect of the latter situation he used the illustration that a man can be "the most careless person in the world, but when asked he knows whether he has [a pound] in his pocket or not". Such evidence, if unchallenged or tested, can only be rejected by branding the witness a liar. On the other hand, "one can be careless about one's opinions. One does not check quite too carefully as one should. One does not carry out all the investigations that one should. One is slipshod over one's mathematics". In such situations, evidence can be accorded low weight without the implication that the witness has lied, and should be if there are grounds for doing so.

### **Discussion**

- 56 I should deal first with Mr Pritchard's submissions about how I should approach the evidence in particular taking into account the fact that there has been no cross-examination.
- 57 What was of most direct concern to Mr Pritchard in making these remarks was the evidence of Mr Latham, and in particular the parts of this evidence where he says that his company has been in control of stocks of Carver heaters and has continued to supply them since Carver was taken over by Truma. In this Mr Pritchard drew a contrast with the estimates of the demand situation submitted in the applicant's evidence which are in effect opinion and not matters within the direct knowledge of the witnesses.
- 58 The proper approach in cases where conflicts of evidence have to be resolved is for me to consider all the circumstances, including the nature and persuasiveness of the contradictory evidence, the credibility of witnesses and the extent to which the matters testified are within their direct knowledge, and apportion weight appropriately. However in this case, it is striking to me that hardly any of the evidence is strictly contradictory in the sense that I do not have to make a straight choice between which of the parties I "believe". I have no difficulty in accepting the truthfulness of any of the

witnesses. I have however in certain instances not found particularly straightforward the task of interpreting the evidence and gleaning its relevance to the core issue in dispute, and where this is the case I have brought it out in the discussion below.

- 59 Turning now to the substantive questions at issue, the essence of Swansea's case is that there are a large number of Carver heaters installed in existing caravans and the like, all of which require periodic maintenance. There is some uncertainty over the precise number, which was initially estimated at around one million, but revised downwards in the later evidence to around 450,000. Mr Pritchard cast doubt on the reliability of this figure but the applicant's evidence that most major UK suppliers fitted Carver up to 1999 is not challenged and there is no doubt that whatever the precise figure, it is very substantial and likely to run into the hundreds of thousands.
- 60 Servicing of heaters may involve either replacement of parts, or, where this is not convenient, the replacement of the entire unit. Concerning first the situation regarding spare parts, I am satisfied that at least some are finding their way to end users. However, many of these seem to be what might be described as generic engineering components (such as bolts), and I have no evidence about which parts might fall within the scope of one or other patent. Nor do I have any evidence about the actual demand for parts. I therefore have no basis on which to come to any conclusions about the implications of the spare parts market for the exploitation of the patents.
- 61 Fortunately, I do have a little more to go on regarding complete heater units. It is agreed between the parties that a complete heater falls within the scope of both the patents. In Swansea's evidence it is estimated that the demand for replacement units is something in the region of 200-500 (or more) annually. However there must be considerable uncertainty in this figure, which is obtained by extrapolation from the experience of a single small business operating in the field.
- 62 Truma do not seek to deny that some demand exists. Their response is to provide figures showing that 281 Carver Cascades were supplied in the period 2001-2003 and evidence in the form of reports of telephone conversations with selected suppliers who are reported as saying that they retain stocks that they cannot sell. Truma say that the conclusion to be drawn from the totality of this evidence is that only a small demand exists and that it is being met.
- 63 Now Truma's evidence on this point is one of the key pieces of evidence that Mr Pritchard insisted that I either had to accept or brand Mr Latham a liar. In this regard, I am happy to confirm that I have no difficulty in accepting what Mr Latham says. However this is not the same as accepting that it is quite as strongly supportive of his case as Mr Pritchard would have me do. Insofar as this relates to supply of complete units to dealers, it is not evidence of sales to end users. As far as I can see Mr Latham is not holding himself out as having direct knowledge of any heater according to the patent finding its way to an actual customer who installed it in his caravan. The best I can find is some indication that some actually have done from the reports of conversations with dealers, some of whom reported that they have disposed of the majority of their stock. Comparison of the current stock position with the data in LL2 showing numbers of units originally supplied suggests that most of the heaters initially supplied have been disposed of. This in turn suggests an overall figure for sales to end

users which may fall somewhat short of, but is nevertheless of a similar order of magnitude to, the demand which Swansea says exists.

- 64 This brings me neatly to Mr Pritchard's submission to me that what I should be looking for is evidence that Truma (rather than Truma's dealers) is refusing to supply demand. I disagree. The Act says simply that the relevant condition for issue of a compulsory licence is that "a demand in the United Kingdom for that product is not being met on reasonable terms". I see nothing here that obliges me to limit my consideration to whether or not the patentee is refusing to supply the product in question. The question is in effect a two part one: is there a demand? Is the demand being met? If I conclude that there is demand and it is not being met, that is enough. There is no third step along the lines of "if the demand is not being met, is it because of the direct actions of the patentee?". This is the basis on which I shall approach the question.
- 65 Returning to the evidence of Mr Summers, I might have been quite happy to conclude that, within the considerable margin of error inherent in his estimate of the size of the likely demand, this is being met according to the figures supplied by Mr Latham. However, I have a problem because there is something in Mr Latham's evidence which disturbs me. This is where it is reported from conversations with dealers, that they have stocks of Carver heaters which they are unable to sell. Mr Pritchard would have me believe that this is because there is simply no demand. However this is not plausible. I have found that there are large numbers of existing Carver heaters in service, some of which will require replacement at any time. This situation is likely to change only gradually with the passage of time as the period since the withdrawal of the Carver range from the market increases. How can it be then, that demand has suddenly dried up to the extent that dealers no longer think that they will be able to dispose of the few Carver heaters they have remaining in stock? A possible explanation which has been raised is that customers prefer to fit Truma heaters as replacements. However this does not ring true either. Exhibit 3 to the evidence of Mr Latham states in terms that there is no demand whatsoever for the adaptor plate which is apparently needed to fit a Truma in place of a Carver. In fact I have seen no direct evidence that a single Truma heater has ever been sold to an existing customer for the purposes of replacing an old Carver.
- 66 Another explanation, which finds some support in the evidence, and which I consider to be the more likely, is that dealers are holding on to their remaining stocks because they prefer to "cannibalise" them as a source of spare parts. They are prepared to supply complete units to customers who really want them, but in practice not very many customers are prepared to pay the prices that are being asked. In this scenario, caravan owners presumably conclude that it is more economical to repair their old heaters than to buy new ones and the dwindling stocks are accounted for not by sales to customers, but to the process of cannibalisation.
- 67 Viewed against this conclusion, I need to decide whether the demand which exists is being met on reasonable terms. As I have commented above, there is a price elasticity present in any normal demand curve, and I must take this into consideration in my assessment of what is "reasonable". It is not good enough simply to make the trite finding that demand would be higher if the price were lower.

68 What evidence I have suggests that dealers are currently charging around £500 for complete Carver heaters, and at that level, demand is indeed being satisfied. This figure compares with around £300 which was the going rate before Carver were taken over in the year 2000. This is undoubtedly a substantial premium over the earlier cost, which will have had some effect on demand levels. However the price is in my opinion not so high as to be self-evidently one which is unreasonable. Although it was suggested to me by Mr Lucking that this price is indeed unreasonably high, I find no real evidence to back up that claim, bearing in mind the principles set out in the *Carboplatin* case cited above.

#### *Overall conclusion*

69 I have no evidence that new complete Carver heaters reach customers by any route other than via intermediaries (dealers). Although it is possible that there is in this supply chain some shortfall with respect to demand, the probability cannot be placed any higher than that in view of the uncertainty over the estimated size of the demand.

70 On the other hand, the undisputed evidence that at least some dealers do retain Carver heaters in stock which are not being sold points to the conclusion that current demand is being met by existing supplies. Although some explanations for this which would be consistent with the applicant's case have been suggested, the evidence falls far short of the standard of proof necessary.

#### **Decision**

71 I have found that although products according to the patents are no longer in production, there does exist a residual demand for the patented technology in the form of complete "Carver" heaters. I have further found that the level of this residual demand is likely to have been affected to some extent by high prices charged by dealers for their remaining stock. However the applicants have not shown that this situation amounts to a failure to meet the demand on reasonable terms. For this reason, I refuse the application.

72 In coming to my decision I have given full consideration to all the applicant's evidence, including the evidence the admission of which was disputed by the opponent. However in view of the fact that I have nevertheless found in favour of the opponent, and in accordance with the manner of proceeding agreed with the parties, it is not necessary to take any further action in this regard.

#### **Costs**

73 It is normal for costs to go with the prevailing party. However there are special circumstances in this case. It is quite clear to me that had the opponent's agent prepared the case correctly and filed all the evidence at the correct time, we could have dispensed with the proceedings at one sitting. I was offered no excuse or explanation other than to say that the papers were prepared by an agent who is no longer with the firm.

- 74 Mt Lucking submitted to me that in view of these circumstances I should be prepared to depart from the normal Patent Office scale even to the point of awarding costs on an indemnity basis for the expenses associated with the first hearing. Mr Lucking argued that the opponent's late-filed evidence was not in the event critical to the determination of the case, and preparing a reply to it had caused him to incur considerable extra and unnecessary expense on behalf of his client.
- 75 I have some sympathy with the position of Mr Lucking and his client. However, I do not agree with him on the subject of the relevance of the evidence. I consider that Carver's additional evidence was indeed highly relevant, and had it been filed in due time and good order at the same time as the rest of their evidence in chief, Swansea would have been bound to reply. This would moreover in all probability have taken the same form as the evidence that they actually did produce. On this basis the only additional costs incurred by Swansea as a result of the opponent's actions are those associated with preparation for and attendance at the first hearing.
- 76 I have therefore proceeded by calculating the costs in favour of the opponent on the standard Patent Office scale, but then applied an abatement on the basis of the same scale to take into account the applicant's costs associated with the wasted first hearing.
- 77 On this basis I order Swansea Imports Limited to pay Carver Technology Limited £1000 as a contribution to their costs. This sum should be paid within five weeks of the date of this decision, payment being suspended if an appeal is lodged.

### **Appeal**

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

**P BACK**

Divisional Director acting for the Comptroller