

**PATENTS ACT 1977**

BETWEEN

James Campbell

Pursuer

and

The University of Aberdeen &  
Dr Mohammed Imbabi

1<sup>st</sup> Defender  
2<sup>nd</sup> Defender

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PROCEEDINGS

Reference under section 12 of the Patents Act 1977 in  
respect of patent application number WO 03/057470 A1  
and equivalents (EP(UK) 1467858)

HEARING OFFICER     Stephen Probert

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**DECISION**

- 1 This is a dispute over who is entitled to be granted a patent in respect of the invention in patent application WO 03/057470 A1 — entitled “Air permeable cladding panel”. The patent application was filed by Aberdeen University, but James Campbell, a Chartered Architect also based in Aberdeen, claims that the invention belongs to him because it was made by one or more industrial placement students who were employed by him and working under his supervision.
- 2 The invention concerns a cladding material for use in the construction of buildings. The cladding material comprises two air permeable covers sandwiching an intermediate layer that has a graduated filtering profile. The purpose of the graduated filtering profile is to provide filtration through depth and delay clogging of the filter material.
- 3 Mr Campbell and Dr Imbabi (of Aberdeen University) met in August 2000 and agreed to work together on the development of an environmental building system involving the use of filters in a cladding panel. Mr Campbell says that at the outset of this joint venture, there was no invention, and that the invention was made sometime between March and August in 2001 by Sebastien Lafougere, a student from the French institute ENSIAME. Sebastien Lafougere was engaged in a short project at Aberdeen University as part of an exchange agreement, and was simultaneously doing an industrial placement at Mr Campbell’s firm of architects. Mr Campbell claims that

Sebastien Lafougere was working under his direct supervision at the time the invention was made; this is the basis of Mr Campbell's claim to entitlement of the patent application.

- 4 Aberdeen University says that Dr Imbabi had been involved in the theory and technology surrounding the concept of “dynamic insulation” (where air is drawn through a building to provide air circulation for heating and/or cooling) since at least 1995. They maintain that Dr Imbabi realised in 1996 or 1997, during the course of his employment at the University, that dynamic insulation could be used to filter air passing through the building. In 1997 and 2000, Dr Imbabi wrote two research proposals to the Engineering and Physical Sciences Research Council (EPSRC) regarding dynamic filtration. Both of these documents were written by Dr Imbabi prior to his involvement with Sebastien Lafougere, and the first of them was written before he met Mr Campbell. They are among the most relevant documents that have been filed in these proceedings, not least because Aberdeen University relies almost entirely upon them to establish its right to sole ownership of the invention. Nevertheless, as I will explain later, the disclosure of the invention in these research proposals is very brief.

### **Proceedings in Scotland**

- 5 The case came before me at a hearing on 20<sup>th</sup> August 2008. In accordance with rule 88(2), and because both parties are based in Aberdeen, the hearing was held in Aberdeen. As a result, some of the terminology used in this decision may look slightly unusual to those familiar with decisions of the Comptroller. For example, I shall refer to Mr Campbell as the pursuer rather than the claimant, and Aberdeen University and Dr Imbabi as defenders, rather than defendants.
- 6 At the hearing, Mr Campbell represented himself, assisted by Dr Howard Fisher and Mr Ken Bowie. Mr Steven Suer and Mr Thomas Gaunt of Ablett & Stebbing represented the defenders. Most of the hearing was taken up with cross-examination of the witnesses.

### **The Patent(s)**

- 7 The patent applications in issue are WO 03/057470 A1 and EP 1467858, and any other applications or patents that derive from them. Processing of the EP application has been suspended as a result of this dispute, but the latest version of the application contains only one independent claim as follows:
1. A cladding material comprising:- an outer air permeable cover (3); an inner air permeable cover (4); and an intermediate layer (2) **having a graduated filtering profile**, the cladding material further comprising filter materials for particulate emissions and one or more of:- gas pollutants, chemical agents and biological agents. (Emphasis provided)
- 8 It was common ground at the hearing that the inventive concept in the patent application(s) is the element that I have emphasised in the above claim — ie. the use of an intermediate layer having a graduated filtering profile. At the hearing, there was no discussion of any other features of the invention

described in the application(s), and I do not need to distinguish between the different applications. I need only be concerned with the question of who came up with the inventive concept.

## **The Law**

- 9 The present proceedings have been brought under section 12 of the Act, which gives me the jurisdiction to determine entitlement to the patent applications in this dispute. The basis on which entitlement should be decided is to be found in section 7 which says:

### **Right to apply for and obtain a patent**

7. (1) Any person may make an application for a patent either alone or jointly with another.

(2) A patent for an invention may be granted –

(a) primarily to the inventor or joint inventors;

(b) in preference to the foregoing, to any person or persons who, by virtue of any enactment or rule of law, or any foreign law or treaty or international convention, or by virtue of an enforceable term of any agreement entered into with the inventor before the making of the invention, was or were at the time of the making of the invention entitled to the whole of the property in it (other than equitable interests) in the United Kingdom;

(c) in any event, to the successor or successors in title of any person or persons mentioned in paragraph (a) or (b) above or any person so mentioned and the successor or successors in title of another person so mentioned; and to no other person.

(3) In this Act ‘inventor’ in relation to an invention means the actual deviser of the invention and ‘joint inventor’ shall be construed accordingly.

(4) Except so far as the contrary is established, a person who makes an application for a patent shall be taken to be the person who is entitled under subsection (2) above to be granted a patent and two or more persons who make such an application jointly shall be taken to be the persons so entitled.

- 10 The relevant parts of section 12 read as follows:

### **Determination of questions about entitlement to foreign and convention patents, etc.**

12.-(1) At any time before a patent is granted for an invention in pursuance of an application made under the law of any country other than the United Kingdom or under any treaty or international convention (whether or not that application has been made) -

(a) any person may refer to the comptroller the question whether he is entitled to be granted (alone or with any other persons) any such patent for that invention or has or would have any right in or under any such patent or an application for such a patent; or

(b) any of two or more co-proprietors of an application for such a patent for that invention may so refer the question whether any right in or under the application should be transferred or granted to any other person;

and the comptroller shall determine the question so far as he is able to and may make such order as he thinks fit to give effect to the determination.

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(3) Subsection (1) above, in its application to a European patent and an

application for any such patent, shall have effect subject to section 82 below.

- 11 Since the operation of section 12(1) is subject to section 82 (to the extent that one of the applications in dispute is an application for a European patent), I need to refer to part of section 82. It reads:

**Jurisdiction to determine questions as to right to a patent**

82.-(1) .....

(2) Section 12 above shall not confer jurisdiction on the comptroller to determine a question to which this section applies except in accordance with the following provisions of this section.

(3) This section applies to a question arising before the grant of a European patent whether a person has a right to be granted a European patent, or a share in any such patent, and in this section “employer-employee question” means any such question between an employer and an employee, or their successors in title, arising out of an application for a European patent for an invention made by the employee.

(4) The court and the comptroller shall have jurisdiction to determine any question to which this section applies, other than an employer-employee question, if either of the following conditions is satisfied, that is to say -

(a) the applicant has his residence or principal place of business in the United Kingdom; or

(b) the other party claims that the patent should be granted to him and he has his residence or principal place of business in the United Kingdom and the applicant does not have his residence or principal place of business in any of the relevant contracting states;

and also if in either of those cases there is no written evidence that the parties have agreed to submit to the jurisdiction of the competent authority of a relevant contracting state other than the United Kingdom.

- 12 In this case, the applicant is based in the United Kingdom, and there is no suggestion that the parties have agreed to take this dispute elsewhere. Consequently I am satisfied that the controller has jurisdiction to decide the issue. There is also no dispute that if the invention was made by Dr Imbabi, then it would belong to Aberdeen University by virtue of his employment at the University.

- 13 The onus in these proceedings is on Mr Campbell to prove his case on the balance of probabilities. This is confirmed by section 7(4), which states that the person who applies for a patent is entitled to that patent except so far as the contrary is established.

**Relevant case law**

- 14 The recent *Yeda* case<sup>1</sup> from the House of Lords was the only precedent case that was discussed in any detail at the hearing. There was no dispute between the parties as to the relevance of *Yeda* to this case. As far as this case is concerned, it means that I only need to determine who is the actual deviser of

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<sup>1</sup> *Yeda Research and Development Co Ltd v Rhone-Poulenc Rorer International Holdings Inc* [2008] RPC 1.

the invention, and that will determine who should be the applicant. In other words, if Mr Campbell is the actual deviser of the invention, then he is entitled to the applications; if Dr Imbabi is the actual deviser of the invention, then Aberdeen University is entitled to the applications (by virtue of his employment).

### **The Evidence**

- 15 Witness statements were provided by Mr Campbell for the pursuer, and by Dr Imbabi on behalf of the two defenders. One of the more remarkable features of this case from the outset has been the staggering amount of paperwork filed by Mr Campbell, initially as appendices to his statement, and subsequently exhibited to his evidence in chief. This is an issue that I will have to return to later in relation to the issue of expenses, since only a tiny fraction of these documents turned out to be relevant to the issue in this case.
- 16 The two EPSRC research proposals written by Dr Imbabi (CS1D & CS1E) were provided by the defenders as attachments to their counterstatement. In a decision<sup>2</sup> dated 26<sup>th</sup> June 2008 I directed under rule 53 of the Patents Rules 2007 that the original versions of these documents should be treated as confidential documents. However, the defenders provided redacted versions of both of these documents, and these are not confidential.
- 17 At least four of the documents supplied by Mr Campbell were mentioned at the hearing:
- i) A draft programme of the project work to be carried out by Sebastien Lafougere. [JC1.1]
  - ii) The report prepared by Sebastien Lafougere at the conclusion of his project work. Dated July 2001 [JC1.16]
  - iii) "SMART 1" - An application for funding of a project for an environmental building system. Dated 15<sup>th</sup> December 2001. [JC22.3]
  - iv) "SMART 2" - A revised version of the first SMART application. Dated 10<sup>th</sup> January 2002. [JC22.7]  
**NB.** This document is also to be treated as confidential as directed in my previous decision<sup>2</sup>.
- 18 The two SMART applications ("SMART 1" and "SMART 2") were prepared jointly by the pursuer and the second defender, and bear the names of both men.
- 19 Mr Campbell and Dr Imbabi were cross-examined on their witness statements during the hearing. Dr Imbabi was cautious while being cross examined by Mr Campbell, and he initially appeared wary of the direction in which the cross-examination was going. I should perhaps explain that the relationship between the parties has clearly deteriorated as a result of this dispute and other disputes in which the parties are currently engaged, and I had to keep

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<sup>2</sup> BL O/178/08

intervening to calm the proceedings down. Nevertheless, Dr Imbabi came across as an accurate and reliable witness. When he wasn't sure of an answer, he said as much and/or asked if he could refresh his memory from the relevant documents.

- 20 When cross-examined by Mr Suer, Mr Campbell was clear and emphatic in almost all his replies. The only time he wavered in his responses was when he was asked who had posted off the second SMART application (which included a copy of the patent application at the heart of this dispute). Mr Campbell's inability to remember this one incident stood out in stark contrast to his capacity to recall instantly and accurately even the most insignificant dates and other facts of the case. (As it happens, the question of who posted the document(s) is irrelevant to the issue that I have to decide; it was simply another one of the side-issues between the parties that threatened to obscure the real issue.)

### **The Issue**

- 21 The issue I need to decide is who is the actual deviser of the invention. Or, to put it another way, who came up with the idea of constructing a cladding material with an intermediate layer having a graduated filtering profile?
- 22 The defenders' case is clear enough — they maintain that Dr Imbabi had been working on the theory and technology surrounding the concept of “dynamic insulation”<sup>3</sup> since at least 1995, and in any event long before he ever met Mr Campbell or Sebastien Lafougere, and that in 1996 or 1997 he had the idea of forming the filtration layer of a building cladding material with a graduated, depth filtering profile. It seems to me that the defenders' case largely stands or falls on two documents — ie. the two research proposals that Dr Imbabi wrote in 1997 and 2000 (CS1D & CS1E). Mr Campbell admits that he had no part in the drafting of either of these documents, so if they establish that Dr Imbabi had already devised the invention before he had any contact with Mr Campbell or Sebastien Lafougere, then it seems to me that Dr Imbabi must be the actual deviser, and the invention belongs to Aberdeen University.
- 23 The pursuer's case is that the two research proposals written by Dr Imbabi establish nothing more than “proof of concept”; and that it was Sebastien Lafougere, while working under Mr Campbell's supervision, who turned Dr Imbabi's “proof of concept” into a workable invention. The pursuer's case rests more on the two SMART applications, and specifically that the significant difference between the two SMART applications is a contribution taken from Sebastien Lafougere's final report.

### **CS1D - EPSRC Research Proposal**

- 24 This document was written by Dr Imbabi as “Principal Applicant”, and is dated 1<sup>st</sup> December 1997. Excluding the covering letter and title pages, the document consists of ten pages (including annexes). The document is entitled “The building envelope as a filter of urban air pollution” and describes the use

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<sup>3</sup> “Dynamic insulation”: Where air is drawn through a building to provide air circulation for heating and/or cooling.

of air permeable materials in the construction of walls for buildings. On the sixth page (4/6 part 2), under the heading “(iii) Staging and methodology”, the proposal sets out the second of three stages to the project. This second stage is described in three paragraphs, the last of which reads:

“(f) Develop layered construction for filtration through depth.”

25 The exact same words appear in Annex 1 of the proposal document, which is an outline critical path diagram for the proposed project. Proportionately these two references constitute a very small part of the document, but in the context of the document as a whole, they do disclose the very pith of the invention. The defenders say that Sebastien Lafougere’s contribution was to produce a mathematical model of Dr Imbabi’s invention; specifically a model that would support the concept that filtration through depth provides enhanced results in the context of dynamic filtration.

26 The defenders therefore insist that Sebastien Lafougere did not come up with the idea of using a graduated filtering profile. Mr Suer drew my attention to the draft programme of work that was prepared for Sebastien Lafougere [JC1.1] to show that the fundamental concept of a graduated filtering profile was presented to Sebastien Lafougere before he began work on the project. The draft programme sets out a range of activities over a 17 week period. Weeks 6 and 8 include the following activities:

“Week 6 : 23.4.01 Develop single dimension multi layer model to look at 1, 2 and 3 layers”

“Week 8 : 7.5.01 Consider single dimensional model of particles captured through depth”

27 As explained to me at the hearing, one of the reasons for providing a graduated filtering profile is to achieve filtration through depth — ie. smaller particles penetrating further into the body of the filter material, to reduce or (ideally) prevent clogging at the surface of the filter.

28 (Mr Campbell tried to persuade me that the expression “multi-layer filter” does not necessarily mean the same as “graduated filtering profile”. I can see the distinction he was making, but when considered in context, in this case, I do not think the distinction is of any significance.)

29 As I have noted above, it is not disputed that Dr Imbabi alone is responsible for the content of research proposal CS1D. Since I have found that this document describes the inventive concept of the patent application, I conclude that Dr Imbabi is the actual deviser of the invention and that Aberdeen University is entitled to any rights in the invention. For what it’s worth, it seems likely to me that Sebastien Lafougere’s contribution was to prove that Dr Imbabi’s invention was theoretically possible through his work on a computer model. But that does not make Sebastien Lafougere an inventor according to the definition in section 7(3) of the Patents Act.

30 That essentially disposes of this reference, but in view of the brevity of the description of the inventive concept in CS1D, I shall say a bit more about the other evidence.

## CS1E - EPSRC Research Proposal

31 This document was also written by Dr Imbabi as one of two proposers and is dated 4<sup>th</sup> October 2000. The pursuer's company, James Campbell Architects, is named as one of three "associates". Mr Campbell confirmed under cross-examination that he did not contribute to this document. Excluding the covering letter and title pages, this document consists of five pages (including an annex). The document is entitled "Breathing walls for natural ventilation and filtration or urban air pollution". On the second page under the heading "Proposed programme of research", there is a list of tasks to be carried out, including the sentence:

“• develop layered construction for particulate and gas filtration through depth;”

32 As with the earlier research proposal, this is a very brief reference, but again it does describe the inventive concept. Although by the time Dr Imbabi wrote this document, he had met Mr Campbell, it is still several months before Sebastien Lafougere's earliest involvement in the project. I therefore consider that this document also supports the defenders' case that Dr Imbabi (and not Sebastien Lafougere) was the actual deviser of the inventive concept.

### The SMART applications and Sebastien Lafougere's Report

33 Mr Campbell submitted that Sebastien Lafougere's scope of work occurred between the two SMART applications. He said that SMART 1 (dated December 2001) failed, perhaps because it lacked sufficient innovation, and that SMART 2 (dated January 2002) was successful. In Mr Campbell's opinion, the success of the SMART 2 application was due to material added to the application from Sebastien Lafougere's programme of work and the findings in his final report<sup>4</sup>; the particular material being a description of a graduated filter. Mr Campbell went on to say that this material was also incorporated into the claims of the patent as filed.

34 I have looked closely at both of the SMART applications, but I did not reach the same conclusion as Mr Campbell. Moreover I cannot see that this point assists either party. It doesn't assist the pursuer because there are several paragraphs already in SMART 1 (eg. page 4/14 - "Task 2") that refer to "*multi-layer filtration*", "*selective particle filtration by size within the component layers*", "*filtration through depth*", "*multiple layers or a single layer with graded filtration properties*" etc.. In the context of the document as a whole, these paragraphs effectively describe the inventive concept. As far as the issue of inventorship is concerned, there is nothing of substance to be added by SMART 2. But this doesn't assist the defenders either because Sebastien Lafougere's report is dated July 2001 — ie. it predates both of the SMART applications.

### Missing evidence?

35 During the hearing, Mr Suer made the very relevant observation that there was one important piece of evidence missing from the pursuer's case — the

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<sup>4</sup> Specifically at page 51, third paragraph, lines 11 to 13.

testimony of the person claimed by the pursuer to be the inventor, Sebastien Lafougere. Mr Campbell explained that he had tried to contact Sebastien Lafougere, but had failed. Although I did not regard the absence of evidence from Sebastien Lafougere as critical in this case, I cannot deny that, having made my decision on other grounds, this striking omission appears to justify the decision I have made.

### **Summary**

- 36 I have concluded on the basis of a research proposal written by Dr Imbabi in 1997 that he alone is the actual deviser of the inventive concept in the patent application(s) in suit. It follows that Aberdeen University is entitled to that invention by virtue of Dr Imbabi's employment, and consequently I make no order under section 12 in relation to this reference.

### **Expenses**

- 37 The defenders have succeeded in this action, and they are entitled to a contribution to their expenses. It is long-established practice for expenses (or costs) awarded in proceedings before the Comptroller to be guided by a standard published scale. The scale costs are not intended to compensate parties for the expense to which they may have been put, but merely represent a contribution to that expense.
- 38 This policy reflects the fact that the Comptroller ought to be a low cost tribunal for litigants, and builds in a degree of predictability as to how much proceedings before the Comptroller may cost them. The standard scale for proceedings commenced before 3 December 2007 is set out in Annex A of Tribunal Practice Notice (TPN) 2/2000.
- 39 However, as the Tribunal Practice Notice also makes clear, Hearing Officers may be prepared to award amounts in excess of the scale when circumstances warrant it. I heard submissions from both parties at the hearing regarding the appropriate level of expenses in this case.
- 40 Mr Suer urged me to award expenses above the level indicated by the standard scale because of the volume of unnecessary documents with which Mr Campbell has flooded these proceedings. Despite being advised on several occasions that much of it was unnecessary, Mr Campbell has insisted on filing a very substantial number of documents. The overwhelming majority of these documents have played no part in the proceedings, but Mr Suer's point was that the defenders have been put to the trouble and expense of reviewing every document in order to identify the few relevant documents.
- 41 Mr Campbell explained that he wanted to avoid being left at a disadvantage in these proceedings. Knowing that he was up against a large academic institution with greater resources than himself, he felt the safest course of action was to make sure that everything was available to this tribunal, especially as the defenders were represented by a firm of patent attorneys while he has been pursuing this action without the benefit of professional representation.

- 42 I came very close to awarding expenses above the scale level in this case for the reasons advanced by Mr Suer. What ultimately persuaded against doing so, is that Mr Campbell has suggested mediation on several occasions; and I know for a fact that he was willing to try mediation when I urged the parties to consider it during a Case Management Conference early in the proceedings. The defenders have resisted suggestions of mediation throughout because, as I understand it, they took the view that Mr Campbell would try to bring in other disputes in which the parties are currently engaged. They maintained that the issue of inventorship was strictly a matter of fact — ie. not negotiable — and that mediation in this case would therefore be a waste of time. I agree that inventorship is a matter of fact (non-negotiable), but I don't accept that mediation would have been a waste of time, or that bringing in other areas of dispute should be a problem. In my experience that is when mediation can be most effective.
- 43 In the circumstances, I have decided not to depart from the published scale, but to recognise the force of Mr Suer's submission by awarding expenses at the top end of the range indicated under item 4 of the scale (ie. "considering evidence"). **I therefore order Mr Campbell to pay Aberdeen University the sum of £2,000 as a contribution to their expenses.** This sum should be paid within 7 days of the expiry of the appeal period below. Payment may be suspended in the event of an appeal.

### **Appeal**

- 44 Under the Rules of the Court of Session 1994, any appeal must be lodged within six weeks of the date of this decision.

**S PROBERT**

Deputy Director acting for the Comptroller