



23<sup>rd</sup> December 2008

**PATENTS ACT 1977**

BETWEEN

Melea Limited

Claimant

and

Cinpres Gas Injection Limited

Defendant

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PROCEEDINGS

Proceedings under section 37 of the Patents Act 1977 in  
respect of European Patent (UK) No. 0424435

HEARING OFFICER

R J Walker

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**DECISION**

**Introduction**

- 1 The present proceedings are a continuation of a long standing dispute between Melea Ltd (“Melea”) and Cinpres Gas Injection Ltd (“Cinpres”) over the ownership of European Patent (UK) No. 0424435 (“the patent”).
- 2 The background to the dispute is set out in some detail in earlier judgments of the courts, most recently by the Court of Appeal in *Cinpres Gas Injection Ltd v Melea Ltd* [2008] RPC 17. However, it is helpful to summarise the events which have led to the matter being remitted to the Comptroller.
- 3 The patent and its corresponding patent application have been the subject of two sets of entitlement proceedings in the United Kingdom. The first set was launched before the Comptroller in 1991 under section 12 of the Patents Act 1977 (“the Act”) by Cinpres against the then proprietor (“Ladney”). In those proceedings Ladney relied on perjured evidence given by the named inventor (“Hendry”), which was to the effect that he had made the invention whilst working for Ladney and not Cinpres. The Comptroller’s hearing officer accepted Hendry’s story. Laddie J reversed the hearing officer’s decision on appeal but the Court of

Appeal restored the decision of the hearing officer on further appeal and so Cinpres lost.

- 4 Years later Hendry confessed his perjury and fresh entitlement proceedings were brought before the Comptroller, this time under section 37 of the Act since by then the patent had been granted. Proceedings were commenced on 30 June 2003 and transferred to the High Court under section 37(8). At first instance, Mann J found that the invention was made at Cinpres and that Hendry had indeed given perjured evidence in the earlier section 12 proceedings before the Comptroller. However, because Mann J also found that Ladney did not know of the perjury, as a matter of law Cinpres' claim failed. In due course the Court of Appeal overturned this decision and entered judgment for Cinpres - *Cinpres Gas Injection Ltd v Melea Ltd* [2008] RPC 17.
- 5 However, that is not the end of the story because at trial Melea indicated that it wished to pursue a claim for an interest in the patent, and the Court of Appeal remitted the matter to the Intellectual Property Office for the Office to adjudicate in accordance with its judgment. Pending the decision of the Office, the Court of Appeal ordered that the patent shall be registered in the name of Cinpres and the Register of Patents shall be amended accordingly.
- 6 Following the Order of the Court of Appeal, Boulton Wade Tennant wrote to the Office on behalf of Cinpres to request that the patent be transferred from Melea to Cinpres and that the Office adjudicate the matter as ordered by the Court of Appeal. More particularly, in a letter dated 16 June 2008 Boulton Wade Tennant not only sought a decision that Cinpres is entitled to sole ownership of the patent, but they also sought an order requiring –
  - An account of all sums received by Melea by way of exploitation of the patent and the corresponding patent application;
  - Payment to Cinpres of all sums found due as received by Melea by way of exploitation of the patent application / patent; and
  - Full disclosure by Melea of names, addresses and details of each and every licence agreement entered into in respect of the patent.
- 7 The Office amended the Register of Patents in accordance with the Order of the Court of Appeal and informed both parties by letter on 24 July 2008. In the letter to Melea's legal advisors, Brookes Batchellor, the Office also invited comments on the matters raised by Boulton Wade Tennant in their previous correspondence. In a telephone conversation on 4 August 2008 Mr Schindler of Brookes Batchellor explained that he had not been aware of Cinpres' requests until he had received the Office's letter dated 24 July 2008. He stated that he was in the process of dealing with the matters raised but was unable to file comments or observations to meet the deadline that had been set. The deadline was therefore extended by a further two weeks. That extended deadline passed without any comments from Brookes Batchellor on behalf of Melea. This prompted the Office to telephone Brookes Batchellor and as a result the Office learnt that Mr Schindler, who was still dealing with the matter, was away. The period for comments / observations was then extended for a second time but once again the deadline expired without

any response by or on behalf of Melea.

- 8 The Office wrote to Cinpres on 18 November 2008 to request that a draft Order covering the matters, identified in the correspondence from Boulton Wade Tennant, be filed with the Office and sent to Melea's legal advisors, or failing that to Melea itself. The letter stated that I expected both sides to agree a final form of Order by 5 December 2008 and if that were not possible a case management conference would be held. The letter also made clear that I would use the general powers available to me under rule 82 of the Patents Rules 2007 to require that both parties or their legal representatives attend the conference. This letter was copied under cover of a letter, dated 18 November 2008, to Brookes Batchellor, stressing my intention to require attendance of both parties or their legal advisors if a case management conference proved necessary.
- 9 It was then Boulton Wade Tennant's turn to ask for extensions but after two short extensions they filed a draft Order under cover of a letter dated 1 December 2008. In their letter Boulton Wade Tennant confirmed that a copy of the draft Order had been sent direct to the agents for Melea and that they would be in touch with these agents to see whether an Order could be agreed. It seems that this letter crossed with a letter to the Office from Brookes Batchellor, dated 4 December 2008, stating that they had received no instructions from their clients in this matter.
- 10 The draft Order sought the following relief –
  - “1. The Register of Patents be rectified so as to show European Patent (UK) No. 0424435 (“the Patent”) solely in the name Cinpres Gas Injection Limited.
  2. That Melea Limited give an account of all sums received by them by way of exploitation of the Patent.
  3. That Melea Limited pay to Cinpres all sums found due as received by Melea by way of exploitation of the Patent together with interest thereon at the interest rate of 8% or at such other rate as the court thinks fit.
  4. That Melea Limited do by [DATE] disclose the full names and addresses of every party who has entered into a licence with Melea Limited in respect of the Patent and details of each such licence.
  5. That Melea Limited reimburse the costs awarded to them [??] against Cinpres arising from the decision of Dr. Ferdinando acting for the Comptroller General of patents dated 22 May 1996, the subsequent decision of Mr Justice Laddie in the Patents Court and the decision of the Court of Appeal dated 23 July 1997 together with interest thereon at the interest rate of 8% or such other rate as the court thinks fit.
  6. Melea Limited do pay Cinpres Gas Injection Limited their costs of the proceedings referred to in paragraph 5 above together with interest thereon at the interest rate of 8% or at such other rate as the court

thinks fit.

7. Melea Limited do pay Cinpres Gas Injection Limited the costs of these proceedings.”

- 11 The deadline for the parties to agree an Order expired without agreement being reached. The Office then wrote to confirm the arrangements for a case management conference on 19 December 2008. These letters once again indicated that I required both parties or their legal advisors to attend. The letters also indicated that at the conference I would seek clarification from Melea or its legal advisors whether Melea still intended to pursue a claim to an interest in the patent. In addition the letters flagged up that I would want to be addressed on the Comptroller’s jurisdiction to order the relief set out in paragraphs 2 – 6 of the draft Order.
- 12 On 17 December 2008 Boulton Wade Tennant filed a witness statement by Mr Geoffrey Bayliss who is a patent attorney with that firm and has acted for Cinpres and a predecessor company since 1988. This witness statement sets out the background to the continuing dispute between Cinpres and Melea over the patent and also explains the various steps taken by Cinpres as the result of Melea’s refusal to comply with court Orders against it. More or less at the same time I received Cinpres’ skeleton argument for the case management conference. Attached to this skeleton was an amended draft Order seeking relief as follows –
  - “1. Cinpres Gas Injection Limited be awarded sole ownership of European Patent (UK) No. 0424435 and the Register of Patents be rectified so as to show European Patent (UK) No. 0424435 solely in the name Cinpres Gas Injection Limited.
  2. Cinpres Gas Injection Limited’s claims for further relief as set out in the letter of 16<sup>th</sup> June 2008 referred to above be stayed.
  3. Melea Limited do pay to Cinpres Gas Injection Limited the costs incurred by Cinpres Gas Injection Limited as the result of this matter being remitted to the Intellectual Property Office, to be assessed if not agreed.”

I have been informed that both the witness statement of Mr Bayliss and Cinpres’ skeleton argument with the attached amended draft Order were copied to the other side.

- 13 At the case management conference on 19 December 2008 Miss Jessie Bowhill, instructed by Geoffrey Bayliss, appeared for Cinpres. Neither Melea nor its legal advisor appeared. I should add here that the Office telephoned Brookes Batchellor on 11 December 2008 and was informed that so far as they were concerned they were no longer prepared to act for Melea and so would not attend the case management conference. To date the Office has not received written confirmation of this from Brookes Batchellor.

## The Order

- 14 Before I consider the amended draft Order, submitted with Miss Bowhill's skeleton, I should explain why I have taken the view that Melea is the claimant in the matter remitted to the Intellectual Property Office for adjudication. Whilst Cinpres was properly the claimant and Melea was properly the defendant when the matter of entitlement was before the Court of Appeal, I believe the Court's judgment changed that and that Miss Bowhill was right when at the case management conference she said the ball was now in Melea's court. In my view the burden of proof was reversed when the Court of Appeal remitted the question whether Melea had any interest in the patent to the Intellectual Property Office and ordered the patent to be registered in Cinpres' name pending the Office's decision.

## Ownership

- 15 At the case management conference Miss Bowhill pressed me to order there and then that Cinpres should be awarded sole ownership of the patent. She submitted that it is clear that Melea no longer intends to pursue any claim for an interest in the patent. In her view Melea has had ample opportunity to do so since the time the matter was remitted to the Office but it has chosen not to do so. I note that Mr Bayliss is less certain in his witness statement in that at paragraph 37 he states that "..... Melea appear to have abandoned their claim for an interest in the subsidiary claims".
- 16 I am conscious that prior to the case management conference the Office wrote to Melea to warn that I intended to invite clarification of Melea's position at the conference. In the light of this letter, Melea might have expected with some justification that the purpose of the conference was merely to determine how events should proceed. In the event Melea did not attend the conference and I could perhaps have drawn the conclusions urged on me by Miss Bowhill but I informed her that I was not inclined to do so.
- 17 In response to my concern Miss Bowhill proposed that the Order should give Melea the liberty within a set period to set aside the award of sole ownership to Cinpres and to pursue any claim for joint ownership that it may have. I accepted this approach in principle and invited Miss Bowhill to let me have a revised draft incorporating it. I have now received Miss Bowhill's revised draft Order, which has been copied to Melea, and the relevant provisions are –
- “1. Cinpres Gas Injection Limited be awarded sole ownership of European Patent (UK) No. 0424435.
  2. Melea Limited be given liberty to apply to set aside paragraph 1 of this Order and pursue any claim for joint entitlement of claims 2 - 9 of European Patent (UK) No. 0424435 that it may have. Such an application is to be made by 4pm on [INSERT DATE 21 DAYS FROM DECISION] and supported by a Statement of Grounds signed by a duly authorised officer of Melea.”
- 18 Mr Bayliss refers to the question of ownership of the subject matter of claims 2 –

9 of the patent in his witness statement. At paragraph 28 of his statement Mr Bayliss states that –

“Shortly before trial (in its skeleton argument), Melea took the point that the subsidiary claims (which are all dependent on claim 1) contained more inventive concepts than just the spillover process that was claim 1. I refer to paragraph 46 of Melea’s skeleton argument at Exhibit GB8.”

Mr Bayliss continues in paragraph 29 of his statement –

“Melea was given permission to amend its Defence, a copy of which is exhibited at exhibit GB9. In paragraph 24 of the Re-Re-Amended Defence Melea pleads that the spillover process did not include any of the features embodied in claims 2 to 9 of the Patent, as set out in that paragraph. Cinpres’ response to this amendment is at paragraph 2A of the Re-Amended Reply, a copy of which is exhibited at Exhibit GB10. It can be seen that because this point was raised so late in the day Cinpres did not formally plead to the allegation, but reserved its right to do so.”

- 19 I have considered the exhibits referred to in Mr Bayliss’ witness statement and it is clear that Melea claimed an interest in the patent on the basis that the process alleged to be developed by Hendry did not include any of the features embodied in claims 2 to 9 of the patent. Therefore, it seems conceivable that if Melea decides to pursue a claim to joint entitlement to the patent, it will be on the basis that it and not Cinpres came up with the features of the subsidiary claims. I have therefore amended Mr Bowhill’s draft to clarify that Melea’s interest may arise from claims 2 to 9.
- 20 At the case management conference I had sympathy with Miss Bowhill’s proposal that Melea should be given no more than 21 days in which to apply to set aside paragraph 1 of the Order. However, this period does not sit comfortably with the 28 days in which an appeal against this decision may be lodged. I have therefore allowed Melea 28 days in which to make the application referred to in paragraph 2 of the Order.
- 21 I have also further amended paragraphs 1 and 2 of Miss Bowhill’s draft to tidy them up a little and to make clear that any application to set aside paragraph 1 of the Order should be made to the Comptroller.

#### Further relief

- 22 Miss Bowhill submitted in very general terms that section 37 of the Act gave me broad powers to order the further relief sought by Cinpres as outlined in the abovementioned letter dated 16 June 2008 from Boulton Wade Tennant. However, she went on to explain that Cinpres accepts the reality of the situation, which is that there is currently very little prospect of recovering anything from Melea, and therefore any further time spent on this matter will only serve to increase Cinpres’ costs.
- 23 At the case management conference I indicated that I remained to be persuaded that the Comptroller has the jurisdiction to order the further relief sought by

Cinpres. Moreover, I was not inclined to stay relief which ultimately I do not have the power to order. Equally, I did not want to put Cinpres to the additional and possibly unnecessary cost of arguing the point to a conclusion. The solution to emerge from discussion was that I should order that **consideration** of Cinpres' claims for the specified further relief should be stayed.

24 I also indicated that I wanted to avoid ordering a stay which would lead to the related proceedings languishing forever in a state of suspended animation. I required a date or an event which would trigger the end of the stay and ideally in the present circumstances would lead to the automatic dismissal of the stayed proceedings. Miss Bowhill accepted these points and dealt with them in the revised draft Order, submitted following the case management conference, as follows –

- “3. Consideration of Cinpres Gas Injection Limited’s claims for further relief as set out in the letter of 16<sup>th</sup> June 2008 referred to above be stayed until 26<sup>th</sup> June 2009, whereupon they shall be dismissed.
4. Cinpres Gas Injection Limited shall have liberty to apply to restore the claims referred to above in paragraph 3 before 26 June 2009 upon Melea making any application in respect of European Patent (UK) No. 0424435.”

The email that accompanied the revised draft Order explains that 26 June 2009 is the date when the patent will expire. Cinpres do not want to lose the opportunity to pursue the further relief it seeks before that date in case Melea makes other applications in relation to the patent, for example, an application for a licence. The email continues by stating that if Melea were to make such an application, Cinpres would wish to have its claims for further relief considered, because Cinpres could be protected on costs as Melea would be participating in the litigation again.

25 In view of this explanation I accept paragraphs 3 and 4 of the revised Order as proposed with some tidying up and one small clarification. That is an amendment to paragraph 4 to clarify that any application should be made to the Comptroller.

### Costs

26 It is a long-established practice that costs in proceedings before the Comptroller are awarded after consideration of guidance given by a standard published scale and are not intended to compensate parties for the expense to which they may have been put. However, the Comptroller has on occasions awarded costs off the scale, approaching full compensation, to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behavior. It seems to me that if there is a departure from the scale, the extent of that departure should reflect the extra costs one party has incurred as a result of the unreasonable behavior by the other party.

27 The draft Order submitted by Cinpres seeks off scale costs and so I need to consider if the behavior of Melea has been such as to warrant such an award. Since the matter was remitted to the Office by Order of the Court of Appeal,

Melea's only contribution to the proceedings has been to delay them. Melea has failed to make its position clear one way or another in relation to its earlier claim before the courts that it has an interest in the patent. Overall, Melea has demonstrated an almost total lack of respect for the Comptroller's tribunal. For these reasons I consider it appropriate to depart from the scale.

- 28 As I have already indicated, when awarding costs off the scale I should do so proportionately. Thus, I need to consider the extra costs incurred by Cinpres as the result of Melea's unreasonable behaviour. Even though the ball was in Melea's court, Cinpres had to initiate and pursue these proceedings before the Comptroller. If Melea had no interest in pursuing its claim, it could have said so at the outset and the matter could then have been resolved quickly and simply. However, even now Melea has not stated its position. Therefore, I am prepared to accept that the costs incurred by Cinpres, as the result of the matter being remitted to the Intellectual Property Office, are all extra costs which could have been avoided in Melea had acted reasonably. For this reason, I accept the relief on costs sought by Cinpres in the draft Order.

### **Conclusion**

- 29 I make the Order accompanying this decision.

### **Costs**

- 30 These are dealt with in the Order.

### **Appeal**

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

**R J Walker**

Divisional Director acting for the Comptroller



**IN THE INTELLECTUAL PROPERTY OFFICE**

**IN THE MATTER OF ENTITLEMENT PROCEEDINGS**  
**UNDER SECTION 37 PATENTS ACT 1977 IN RESPECT OF**  
**EUROPEAN PATENT (UK) NO. 0424435**  
**BETWEEN CINPRES GAS INJECTION LIMITED AND**  
**MELEA LIMITED**

**Before :** R J WALKER ACTING FOR THE COMPROLLER

**Dated:** 23rd DAY OF DECEMBER 2008

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ORDER

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UPON THIS MATTER being remitted to the Intellectual Property Office by Order of the Court of Appeal dated 6 February 2008 for the Intellectual Property Office to adjudicate in accordance with the judgment of the Court of Appeal

AND UPON READING the witness statement of Geoffrey Bayliss dated 17 December 2008 and the exhibits thereto including the letter from Boulton Wade Tennant of 16<sup>th</sup> June 2008 on behalf of Cinpres Gas Injection Limited

AND UPON HEARING Counsel for Cinpres Gas Injection Limited

AND UPON Melea Limited failing to respond to correspondence from the Intellectual Property Office and failing to attend the case management conference

IT IS ORDERED THAT

1. Cinpres Gas Injection Limited be awarded sole ownership of European Patent (UK) No. 0424435.

2. Melea Limited be given liberty to apply to set aside paragraph 1 of this Order and pursue any claim for joint entitlement arising from claims 2-9 of European Patent (UK) No. 0424435 that it may have. Such an application is to be made to the Comptroller by 4.00 pm on 20<sup>th</sup> January 2009 and supported by a Statement of Grounds signed by a duly authorised officer of Melea Limited.
3. Consideration of Cinpres Gas Injection Limited's claims for further relief as set out in the letter of 16<sup>th</sup> June 2008 referred to above be stayed until 26<sup>th</sup> June 2009, whereupon they shall be dismissed.
4. Cinpres Gas Injection Limited shall have liberty to apply to the Comptroller to restore the claims referred to above in paragraph 3 before 26<sup>th</sup> June 2009 upon Melea Limited making any application in respect of European Patent (UK) No. 0424435.
5. Melea Limited do pay to Cinpres Gas Injection Limited the costs incurred by Cinpres Gas Injection Limited as a result of this matter being remitted to the Intellectual Property Office, to be assessed if not agreed.