



03 April 2013

PATENTS ACT 1977

BETWEEN

Anthony Richard Timson and Cellxion
Limited

Claimant

and

M.M.I Research Limited

Defendant

PROCEEDINGS

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

HEARING OFFICER

P R Slater

COSTS DECISION

Background

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

the police force and security services.

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

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

- 12 Having failed to obtain the aforementioned documents from the defendants, the claimants filed a formal request for disclosure on 6 June 2012. A Case Management Conference (CMC) was held on 13 July 2012 to discuss issues raised in the disclosure request.
- 13 In my previous decision dated 13 September 2012¹, I dismissed the claimants' request for disclosure as it appeared to me, at least on face value, that the specific questions forming the basis of the claimants' statement of grounds had been answered in the defendants' counterstatement, and that there was nothing to suggest in the various submissions I had received since then, that any additional documents were necessary to dispose of these proceedings fairly.
- 14 The claimants in a subsequent letter dated 11 October 2012 withdrew their claim, and offered to pay the defendants a figure of £800 in respect of their costs. The defendants, on the other hand, have requested an off-the-scale payment of up to a maximum of £22,000. Both sides have made submissions on the issue of costs and have indicated that they are content for me decide the matter on the basis papers currently on file.

Costs before the comptroller

- 15 It is long-established practice for costs awarded in proceedings before the Intellectual Property Office (IPO) 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. This policy reflects the fact that the IPO ought to be a low cost tribunal for litigants, and builds in a degree of predictability as to how much proceedings before the IPO may cost them.
- 16 The standard scale for proceedings commenced prior to December 2007 is set out in Tribunal Practice Notice (TPN) 2/2000². The Tribunal Practice Notice also states that a Hearing Officer may depart from the published scale of costs and even award costs approaching full compensation to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour.
- 17 The defendants argue that the circumstances of this case are such as to warrant an off-the-scale award in their favour. Their submissions on costs are clearly laid out in their letter of 25 October 2012 which includes therein a schedule of expenses incurred during these proceedings. They have requested a payment of up to a maximum of £22,000 on the basis that not only was the claim unlikely to succeed but that it should have been withdrawn following filing of the counterstatement. Furthermore, they argue that the request for disclosure was misconceived, and an attempt on behalf of the claimant to "fish" for material that had no bearing upon the claims made in their statement of grounds.
- 18 Whilst the claimants appear to accept that they are liable for costs, they argue that a figure of £800 would be more in line with the standard scale. The claimants'

¹ BL 0/346/12

² <http://www.ipo.gov.uk/tpn22000annexa.pdf>

arguments are clearly laid out in their letter of 14 November 2012, and I do not therefore intend to repeat them here.

Conclusion and Order

- 19 It is clear to me, that if I am to award costs which are off the scale, I must be certain that the claimants' behavior has been unreasonable. There is no doubt in my mind that these proceedings have taken longer than would have normally been expected, and that there have been delays along the way which perhaps could have been avoided. However, I do not think that these delays can be attributed solely to the behavior of the claimant.
- 20 I think it is fair to say that the claimants could have withdrawn their claim at an earlier stage in the proceedings, perhaps after having seen the defendants' counterstatement, and that their subsequent request for disclosure was somewhat speculative and has thus resulted in a delay in the proceedings which could otherwise have been avoided. Whilst I do not think this warrants an award beyond the standard scale, I have taken this into consideration in calculating the level of the award.
- 21 I therefore order the claimants (Anthony Richard Timson and Cellxion Limited) to pay the defendants (M.M.I Research Limited) the sum of one thousand five hundred pounds (£1500) as a contribution to their costs. This sum should be paid within seven days of expiry of the appeal period below. Payment may be suspended in the event of an appeal.

Appeal

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

P R SLATER

Deputy Director acting for the Comptroller