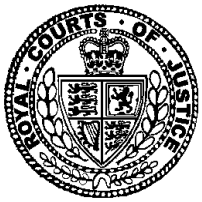

Neutral Citation Number: [2016] EWHC 3105 (Ch)

Case No: CH-2016-000247

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 02/12/2016

Before :

MR JUSTICE MANN

- -

Between :

NGPOD Global Limited	**Claimant/ Respondent**
- and -	
Aspirate N Go Limited	**Defendant/ Appellant**

- -
- -

Bruce Jones (instructed by **Hill Dickinson LLP**) for the **Claimant/Respondent**
James Abrahams QC (instructed by **Bird & Bird LLP**) for the **Defendant/Appellant**

Hearing date: Friday 11th November 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an appeal from a hearing officer in the IPO (Mr Stephen Probert). The proceedings in which he gave his decision were proceedings in which the claimant ("NGPOD") seeks to establish its entitlement to one UK patent and two pending international patent applications (numbered GB 2523591B, PCT/GB 2015/050538 and PCT/GB 2015/050539 respectively). It is unnecessary to distinguish between them for the purposes of this judgment – the claim to entitlement is the same in all cases. For the sake of clear exposition I, like the hearing officer, shall refer to all three as "the patents", even though two of them are applications. That distinction does not matter for present purposes. Nor is the detail of the patent important. It suffices to say that the patents are in the field of naso-gastric aspirators.

2. The decision under appeal is a decision in which the hearing officer refused an application by the defendant ("Aspirate") under section 37 of the Patents Act 1977 that the IPO should decline to deal with the claim on the footing that it would more properly be determined by the High Court. He gave a clear and concise judgment rejecting the application, in terms to which I shall come.

3. The appellant was represented by Mr James Abrahams QC; the respondent was represented by Mr Bruce Jones. They both argued their respective cases well and concisely.

The alleged sources of the competing entitlement claims

4. Each entitlement starts with the inventive activities of Mr George Gallagher. At the time of the inventions (or two of them) Mr Gallagher was a director of, and employed by, Westco Medical Limited. That company went into administration in April 2014 and its IP portfolio was acquired from the administrators by NGPOD (then known by another name), though there is a dispute as to whether the assignment was capable of catching these patents. NGPOD's case is that Mr Gallagher was employed by Westco and the inventions were made as part of his duties, so Westco was entitled to the patents. There is an alternative case for joint ownership of one of the inventions.

5. At the same time Mr Gallager had his own company, Gallagher Medical Devices Ltd ("GMD"). A specific provision in his service agreement with Westco allowed him to

carry on his activities in GMD. He claims that he made his inventions under his engagement by that company, not by Westco, and in any event one of the inventions was made after he had left Westco. The patents were therefore applied for in the name of that company (and, in respect of the patent, granted to that company). In due course, and pursuant to an investment agreement which brought in substantial outside investors, the patents were assigned to a new company, namely the appellant ("Aspirate").

6. The issues between the parties are various. I shall deal with them when dealing with corresponding parts of the hearing officer's decision.

The law – section 37

7. So far as the granted patent is concerned, the application to the hearing officer was made under section 37(8) of the 1977 Act. That subsection provides:

> "If it appears to the comptroller on a reference under this section that the question referred to him would more properly be determined by the court, he may decline to deal with it and, without prejudice to the court's jurisdiction to determine any such question and make a declaration, or any declaratory jurisdiction of the court in Scotland, the court shall have jurisdiction to do so."

It is common ground that the main application before the hearing officer was a reference under the section, so that subsection applies.

8. So far as the applications are concerned the application to the hearing officer was made under section 12(2) of the Act, which is (for practical purposes) in the same terms, and to the same effect, as section 37(8). It was not suggested that they fall to be treated differently, so I can apply the same test throughout.

9. Guidance on the application of that provision is given in *Luxim Corporation v Ceravision Ltd* [2007] RPC 33 (Warren J). The nature of the central question for the court on an application under the subsection was identified by Warren J as follows:

> "19. Quite apart from that, Mr Thorley submits that the hearing officer applied the wrong test to s37. The hearing officer did

> not need to be able to say *with certainty* that the question would more properly be heard by the court: it only needed to appear to him that that was so. Further, it is not necessary to show that the Comptroller is incapable of resolving the issues; the question is whether the question would more properly be determined by the court. I agree with those submissions. It seems to me that, to adopt the language of the standard of proof, certainty requires something like "beyond all reasonable doubt" whereas appearance requires only something more akin to "a balance of probabilities". Further, it is clear that the test is *not* that the Comptroller is unable to determine the issue; it is whether the court can more properly do so."

10. Warren J went on to consider how the test applied to the facts of his case and various factors which were capable of going to the assessment of whether the matter would be "more properly" determined by the court than by the hearing officer. They included:

> (a) The fact that a different costs regime applied before the hearing officer – in the court full adverse costs orders could be made against a losing party, but far lower adverse costs are payable in the IPO (paragraph 49).
>
> (b) Technical issues – ordinarily a hearing officer would be equipped to deal with those (paragraph 55(a), implicitly adopting the submissions of counsel).
>
> (c) Factual issues unrelated to technical issues. "Factual issues unrelated to technical issues: these are bread-and-butter matters for a judge. Of themselves, they may not merit a referral to the court. But the issues may be seen to be sufficiently complex to merit a transfer, especially, I would observe, if findings of fraud or breach of fiduciary duty are to be found against a party or a witness, a factor which, whilst not by itself conclusive, one might normally expect to be more appropriate for a judge" (paragraph 55(b)).
>
> (d) Patent law issues – normally the hearing officer would be expected to deal with those (paragraph 55(c)).
>
> (e) Non-patent law issues – these would normally be regarded as the province of the judge, but that did not mean that any case which involved such an issue would be more properly dealt with by a judge. This struck Warren J as an important factor. (Paragraph 55(d)).
>
> (f) The test was not whether a matter could be described as "highly complex"; nor was the jurisdiction one which should be exercised cautiously, or with great caution or sparingly. (paragraph 65).

> (g) All relevant factors must be weighed in the balance (paragraph 66).

11. The question of complexity attracted particular attention. Warren J said:

> "68. So, provided that one recognises that what is complex is not an absolute standard, I do not think that the Comptroller can go far wrong if he were to consider exercising his discretion whenever a case is complex; he is to be the judge of what is and what is not complex in this context. What he should not do is start with a predisposition to exercise his discretion sparingly, cautiously or with great caution. Complexity can be manifested in various aspects of a question or the matters involved in a question…"

12. Those principles and factors were not in dispute in the appeal before me. What was in dispute was whether or not the hearing officer actually applied them and whether he carried out an appropriate weighing and evaluation exercise. The hearing officer set out part of paragraph 19 of *Luxim* in that part of his decision dealing with the law, and summarised the position thus:

> " … I was looking to see whether the issues in these consolidated cases would more properly be determined by the High Court. I understood that this might be the case, even if the Comptroller could perfectly well deal with them."

No particular issue was taken with this formulation. It was not suggested that the hearing officer did not acknowledge the correct test.

13. One further question of law was raised by Mr Jones in this appeal. He drew attention to the fact that, once a hearing officer has determined whether a dispute is properly heard in the High Court, the section does not seem to require, in absolute terms, that jurisdiction be declined in favour of the High Court, because the word "may" is then used. Mr Jones submitted that that introduced a further level of consideration, to which the overriding objective is applicable.

14. It was not clear to me that the appeal in any way turned on that two-stage consideration of the matter, but in case it is relevant I should say that I reject this submission if it is intended to introduce a further substantial stage in the reasoning. For my part I find it hard to imagine how a hearing officer could decide that a case is

more properly tried in the High Court but still refuse to decline to deal with it. Such a refusal would seem to me to be perverse. The overriding objective will have been taken into account at the first stage of the reasoning. In line with other courts in other cases, I suppose I should never say never, but it does strike me that the "may" encompasses a purely theoretical discretion. In any event, as I have observed, nothing in this appeal seems to turn on it.

The test and other considerations on this appeal

15. This is a true appeal by way of review and not a full re-hearing. The nature of the decision is that it is a question of discretion or judgment, and an appeal court can only interfere if there is an error in principle, if there are factors wrongly taken into or left out of account, or if the decision is perverse in the sense of being one which no reasonable tribunal could reach. Amongst the factors which can be taken into account is whether the court can be satisfied that the balancing matters have not been taken into account fairly in the scale – see *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at p14.

16. Mr Jones drew attention to another factor which he said applied to appeals from hearing officers. In *Ladney and Hendry's International Application* [1998] RPC 319 Peter Gibson LJ observed (at page 330):

> "As I said at the commencement of this judgment, this appeal raises a familiar question. The court hears numerous appeals originating from decisions of tribunals of fact, not infrequently where the tribunal of fact is not a person with legal qualifications. Even when the tribunal has a legally qualified chairman, such as is the case with an industrial tribunal, this court has repeatedly said that when giving their decisions such tribunals are not required to create elaborate products of refined legal draughtsmanship, and those decisions should not be subjected to detailed legalistic analysis or gone through with a fine-tooth comb. The decisions must be read in a common-sense manner and looked at in the round. Of course the parties are entitled to know from the decision the tribunal's basic factual conclusions and the reasons which have led the tribunal to its conclusions on those basic facts. But this court and other appellate courts read such decisions with a degree of benevolence which may not be accorded to the decisions of qualified judges. I see no reason why a different approach should be adopted in relation to appeals from hearing officers."

17. That indication seems to be confined to findings of fact, but I shall assume that it applies to a finding of the nature of the decision in this case.

The decision appealed from

18. When it came to considering the questions before him, the hearing officer considered the matters by reference to four headings – the importance of the patents, the nature of the issues in dispute, procedural complexity and different costs regimes. He came to the conclusion that none of those factors individually made the case one which was more properly heard in the High Court, and at the end he expressed a conclusion to the same effect when taking them in the round. On this appeal Mr Abrahams sought to criticise the findings under the four heads, and the final determination. In doing so he broke down some of the four heads into sub-components. I shall follow the same route through the judgment as that taken by Mr Abrahams, considering his criticisms.

The importance of the patents

19. The hearing officer seems to have conflated two issues under this head. He considered the importance of the patents to the current owner, taking on board the fact that Aspirate has secured an investment of £3.2m to develop the patents. It was said it would be the end of Aspirate's business if it lost the patents. He went on to consider allegations of what were said to be fraud as against Mr Gallagher and an allegation of breach of fiduciary duty against him as well on the footing that he had, at the time of the invention, a special obligation to further the interests of Westco. Aspirate's answer to the latter point is that Mr Gallagher's duties to Westco were limited by the purpose of his engagement, which did not involve the making of inventions. The allegations of fraud (not recorded in the decision) are essentially allegations that Mr Gallagher asserted title to the patents knowing that they were not his (or his company's).

20. In relation to these issues the hearing officer found as follows:

> "18. Reviewing the arguments under this heading, I did not consider that there was enough here to persuade me that the issues in these proceedings would more properly be determined by the High Court. Most people who file patent applications consider that they are of significant importance – if it were otherwise, they wouldn't spend time and money filing them in the first place.

> 19. In relation to the issues of fraud and breach of fiduciary duty, the basis of these supposed allegations is, in my experience, common fare in entitlement proceedings before the comptroller. They certainly do not convince me that the issues in this case would more properly be determined by the High Court."

21. Mr Abrahams submitted that that determination on the importance of the patents amounts to a "refusal" to take into account that this is a high-value claim, which was a factor which put it into a category of cases which are more properly to be resolved by the court than the Comptroller. The financial consequences to a party is a factor capable of taking the importance of a case above the normal importance which it is likely to have for one or both parties anyway – see *Luxim* at paragraph 106.

22. I consider there is something in this criticism. Any inventor, or a challenger for entitlement, is likely to think that their case is important to them, but this is a case in which outsiders have, on the evidence, invested a large amount of money. Mr Jones's observation that there is no outward manifestation of development (no advertisement, no website portrayal of a product, no apparent commercial exploitation yet) rather misses the point. The exploitation of the patents has not yet got that far. Nevertheless these are apparently not just an invention which two parties think is worth fighting over. It is one in which third parties think it is worthwhile investing a large sum of money. The sums invested are an indicator of the commercial significance of the patents. The decision does not suggest that that was fully taken into account by the hearing officer.

23. The other points dealt with under this head do not at first blush seem to me to belong there. They are not points going to the importance of the patents; they are points going to the significance of the issues to be tried, which is an issue dealt with elsewhere. However, that point was not taken against the hearing officer. Mr Abraham's criticism was that it was wrong to characterise issues of fraud and breach of fiduciary duty as "common fare" in entitlement proceedings, and the hearing officer did not engage with the real question which was whether the allegations were more appropriately dealt with in the High Court. They were serious issues and he did not conduct an evaluation.

24. In this instance Mr Abraham's criticism does not reflect what the hearing officer actually found. This finding was that, in relation to the issues of fraud and breach of fiduciary duty, "<u>the basis of these supposed allegations</u> is, in my experience, common fare in entitlement proceedings before the Comptroller." He was not saying that deciding heavy questions of fraud and breaches of fiduciary duty are themselves "common fare". He is apparently considering the underlying allegations. With that in mind I consider that he was reaching a justifiable decision – decisions as to the status

of the individual inventor at the time of the invention are commonly dealt with by a hearing officer, and although in this case they have attracted a penumbra of allegations of breach of fiduciary duty that, of itself, does not make them particularly complex on the facts of this case. Similarly the allegations of fraud are at root allegations that Mr Gallagher denies an entitlement which someone else is claiming. That, too, is "common fare". Although Mr Abrahams criticised the hearing officer here, as elsewhere, for not "weighing" the two cases, I think that behind his statement that he was not convinced that the High Court a more appropriate venue is an unarticulated weighing exercise, in this particular instance. His failure to elaborate should not be taken against him.

25. Having said that about that particular finding of the hearing officer, it will be necessary to re-consider the fiduciary duty allegations in the wider context of the scope and nature of the issues in dispute, which I do below.

Nature of the issues in dispute

26. The hearing officer recorded that these were divided into factual issues and non-patent law issues. He recorded the factual issues as being:

(i) Mr Gallagher's normal working duties at Westco.

(ii) The circumstances of Mr Gallagher's creation of a device (called "the ANG device" in accordance with the patent) and a second ANG device.

(iii) The disclosure of the ANG device to Westco and a proposal to licence the ANG device to Westco.

(iv) The treatment of intellectual property rights when Westco entered administration.

(v) The disclosure of the ANG device to the administrators and the duties of the administrators during the Westco administration process.

(vi) The assignment of intellectual property rights from GMD to ANG.

(vii) The development of the second ANG device (over which rights are claimed).

27. At paragraph 22 the hearing officer thought it possible that Aspirate was overstating the complexity of the issues but even if it were an accurate summary:

> "I don't think it would be unusual in inter partes proceedings before the Comptroller. More importantly, there is nothing here that makes me think that the case would more properly be determined by the High Court."

28. He then went on to record the non-patent law issues, said to be estoppel, employment law, contract law, company law and insolvency law. It was Mr Abrahams' submission below that these were issues which made the case more properly tried in the High Court. Mr Jones is recorded as having submitted that Aspirate was unnecessarily complicating what was, at its heart, a straightforward matter of company law. The hearing officer's conclusion was in paragraph 24:

> "24. I thought this was Mr Abrahams' strongest argument, but ultimately it also failed to persuade me. Non-patent law issues, including those indicated by Mr Abrahams, arise from time to time in patent and trademark proceedings, but they do not of themselves cause the Comptroller to decline to deal (or, as the Registrar of trademarks, to refer an application to the court). In this particular case, I consider that any non-patent law issues that are likely to arise should involve no more than brief excursions into well trodden byways. Consequently I do not accept that the non-patent law issues are such as to make this case one that would more properly be determined by the High Court."

29. Mr Abrahams criticised the decision on the factual issues as containing a determination (in the last sentence) that was conclusory without any actual evaluation as to whether this factor made it more appropriate for the court or the Comptroller to determine the case. He also submitted that the sentence revealed that the hearing officer was not following the right approach – he was not considering which was the more appropriate forum but had (and Mr Abrahams said not for the first time) started from a presumption that the proceedings should proceed in front of the Comptroller, and then considered whether the proceedings were complex enough to warrant moving them to the High Court. On analysis, all the hearing officer was doing was deciding whether the Comptroller was capable of determining the proceedings. He did not give any explanation because he was not thinking in proper terms.

30. On this occasion I think that the way in which the hearing officer has expressed himself is unsatisfactory because it is too brief. The parties are entitled to see his reasoning. One cannot see whether he was considering that there was nothing in the factual points (and Mr Jones from time to time made much of what he said was the poverty of the case of Aspirate) or whether he was considering that individually and collectively they were all more properly determined in the IPO because of the lack of complexity in the assessment involved. It is therefore not possible to assess the

quality of his reasoning and whether he understated or overstated the importance of a particular factor. In the end it is not necessary for me to reach a conclusion as to whether or not that of itself would lead to a successful appeal, because other material has come to light which affects the impact of this particular factor, and which makes the forum determination clearer, as will appear below.

31. Before turning to that I mention Mr Abrahams' further criticism of the decision on the non-patent law issues. His criticism here is that the conclusion of the hearing officer that all that would be required was "brief excursions into well trodden byways" is simply unsupportable because the issues involved are all very significant legal issues which are not "well trodden byways" for the IPO, and the conclusion of the hearing officer demonstrated a misunderstanding either of the test or of the significance of the issues.

32. I think that there is much in what Mr Abrahams says in relation to his conclusion on the non-patent law issues, but what in my view is appropriate is to consider the issues of fact together with the non-patent legal issues to assess the complexity of the dispute with which the determining tribunal will be faced in the future. As a result of the conduct of the proceedings in the IPO since the appeal further light has been shed on the complexity of these issues.

33. Pursuant to directions given by the IPO, NGPOD has served a Reply statement of case. Aspirate had served a "Counter-statement" to the initial claim document of NGPOD which raised a number of points, most of which are reflected in the summary of the hearing officer, though their extent is not. It pleads Mr Gallagher's service contract with Westco, and the alleged limited duties under it which did not involve inventive activities; then it pleads a carve-out which entitled him to continue to work in his own company, where it is said he did have inventor functions. It was there that he invented the invention in the English patent. It then pleads that a prototype embodiment of the invention was disclosed to Westco personnel and offered to them to market. It is from these events that the estoppel claim is said to flow, on the footing that Mr Gallagher's ownership of the invention was not challenged, there were dealings which assumed his ownership and on an occasion or occasions that ownership was explicitly acknowledged. In reliance on that Mr Gallagher (and others) developed and invested money in the invention. That is an outline of the employment-based and estoppel points taken by Aspirate.

34. The Reply statement takes issue with this analysis. It contains a detailed pleading of Mr Gallagher's obligations to Westco (including a pleading of his "statutory, fiduciary and common law duties (which included the duty of good faith and loyalty)") and it raises a significant question of construction of the contract. That was probably in issue before, but this pleading demonstrates the full scope of the case in a manner which might not have been apparent to the hearing officer. There is an

allegation that Mr Gallagher was not allowed to be involved in the manufacture and supply of goods that competed with the business of Westco. So far as concerns the disclosure to Westco, on which the estoppel claim is based, it is pleaded that the disclosure, or at least some of it, was to a person who had a 40% shareholding in GMD, and a detailed factual and legal case is mounted against the disclosure in both legal and factual terms. There is a straight conflict of evidence about the acts of one Westco director (did he accept Mr Gallagher's position or did he walk out so as not to cause a row?), and a point is taken that the disclosure was to Westco's parent's board, not Westco. The ability of the board to accept Mr Gallagher's ownership is said to be affected by the conflict of interest of Mr Gallagher and the other 40% GMD shareholder.

35. That is a bare outline of the sort of points that are taken by NGPOD on the estoppel and employment points. They are probably not inconsistent with the nature of the case as it will have appeared to the hearing officer, but the new pleading amplifies the issues in a way which, in my view, demonstrates their complexity. In addition to those points the Reply takes other points which will need to be decided, but they are not so complex.

36. It was accepted by both representatives at the hearing before me that the pleading in the Reply was a development that I could take into account notwithstanding that it was not before the hearing officer. Mr Abrahams said it demonstrated the complexity of the non-patent law issues and how it was that the hearing officer mis-assessed that complexity. The issues were clearly more properly the subject of High Court proceedings than proceedings in the IPO before a hearing officer.

37. Mr Jones's principal response was that it did not make a difference because when one looked at the material now pleaded it was apparent now that the issues were not all that serious because there was a pretty clear answer to the estoppel claim and the Reply did little more than articulate it. He urged an appeal to reality and sought to demonstrate how, on the facts, there was little or no substance in the estoppel claim and allied disputes.

38. I am able to look at this aspect of the matter with the benefit of a clearer articulation of the areas of dispute than the hearing officer. Even if it was not apparent before, it is now apparent to me that this aspect of the dispute makes the case a complex one, and sufficient to make it more properly tried in the High Court than in the IPO. I doubt if the hearing officer's description of its involving "brief excursions into well trodden byways" was an adequate description even on the material available to him, but it is in my view clearly not the case now. The issues that arise on this part of the case are not "byways" – the appropriate metaphor would be "main thoroughfares". And the excursions would not be brief – they would be extended journeys. I consider that his original description meant that the hearing officer had simply not appreciated

the scope of the case at the time, and probably then, but certainly now, these non-patent law issues plainly make this case one more properly tried in the High Court. They are significantly beyond the likely experience of a hearing officer, while being rather more standard fare for a judge. There are likely to be significant legal disputes (though not of the highest order) and equally significant questions of fact. They all point to the court, not to hearing officer. Any other decision would, in my view, be one which could not reasonably be reached. This appeal therefore succeeds.

39. In coming to that conclusion I rely not merely on the nature of the issues themselves but also on the evidence likely to be necessary to deal with them. The case has become a substantial witness action. Mr Abrahams listed a very significant number of witnesses who would be giving evidence. Mr Jones did not consider they would all be required, or that all their evidence would necessarily be tested by cross-examination, and there was something in what he said, but doing the best I can to evaluate things at this stage it seems to me that this factor contributes to the complex quality of the case propelling it towards the High Court. *Luxim* points up that complexity is a pointer to a court determination, and this case clearly qualifies.

40. That conclusion makes it unnecessary for me to consider the other factors considered by the hearing officer and on which he reached a conclusion, but I will nonetheless consider them briefly because in my view they reinforce the conclusion that I have reached on the factors that I have considered.

Procedural complexity

41. Under this head the hearing officer dealt with the number of witnesses whose evidence would be necessary. He recorded what I have summarised above on this point, and recorded:

> "30. I was left with the impression that this case will be as long and as complex as the Hearing Officer allows it to be. Moreover it seems to me that in the end, the successful party is usually the one that succeeds in making the issues look simplest and most straightforward.
>
> 31. In any event, I did not find that the procedural complexity of the issues in this case were such that they would more properly be determined by the High Court."

42. His paragraph 30 is a little puzzling. It does not amount to a clear finding that Mr Abrahams was making the case sound far more complicated than it in fact was. He seems to be suggesting that the case as advanced could be cut down by the hearing officer so as to make its scope more manageable for the hearing officer thereby making the IPO a more appropriate venue. That is not a correct approach to the problem. The question is whether the case, as currently constituted, would be more properly tried in the High Court, not whether it could be cut down to a size which would make it appropriate for a trial in the IPO. That does not mean to say that an assessment as to venue should not take a realistic view of the size of the case, shorn of the extra trimmings which do not contribute much to complexity or which are added to give a false impression of complexity, but that is a different point. I consider that on this point the hearing officer demonstrated an error of approach.

43. So far as the significance of the point itself is concerned, and so far as it turns on the number of witnesses to be dealt with, I have already dealt with it as part of the preceding point. By itself the number of witnesses would not point away from the IPO, but in the context of this case it contributes to the complexity of the non-patent law issues.

44. There was also a disclosure point taken. Mr Abrahams took the point that, while disclosure is available in the IPO, it is seldom if ever ordered, whereas it is standard in High Court proceedings. In my view, if it were necessary the IPO could order disclosure, and would doubtless do so. However, the inevitability of significant disclosure in the case is another strong pointer towards the High Court, if only to make sure that it is properly policed yet properly given. Reading his decision, I do not think that the hearing officer gave this factor proper weight.

Different costs regimes

45. In the IPO the right of a successful party to recover costs is limited. The hearing officer recorded the submission of Mr Abrahams to the effect that the lack of exposure of NGPOD to costs in the IPO meant that it could "take a punt" in the proceedings, spending as much or as little as it liked, and its lack of exposure to Aspirate's costs was unfair and unbalanced. Aspirate had no choice – it had to spend to whatever it took to defend the proceedings because they posed an "existential threat" to the company. NGPOD could, if it wished to do so, easily afford the additional expense of running the claim before the High Court.

46. The hearing officer concluded that all that might be so, but he found that:

> "35. On the basis of the facts that have been pleaded and/or established so far in this case, and also having regard to the overriding objective, it seemed to me that the claimant is fully justified in wanting to keep these proceedings before the Comptroller."

That does not seem to me to be a relevant matter. Whether or not the desires of the claimant were justified is not the point. The question is how the potential imbalance of costs and liabilities impacted on where the proper venue for the dispute was. In my view this is another error on the part of the hearing officer. He should have dealt with the question in the context of what it said about the appropriate venue for the determination of the dispute. There is, in my view, much to be said for Mr Abrahams' analysis.

47. The hearing officer also dealt with the question of how many appeals would flow from each potential venue. I do not think it necessary for me to deal with that point.

The hearing officer's summary

48. The hearing officer ended by expressing an overall assessment in his paragraph 39. He said:

> "39. Taking each of Mr Abraham's points in turn, under the four headings, I found that none of them (individually) caused me to believe that the issues in these proceedings would more properly be determined by the High Court. Considering all of them together clearly makes a stronger case for declining to deal; but even so it is not strong enough to outweigh the arguments for keeping these proceedings before the Comptroller – especially those arguments based on the overriding objective."

49. Mr Abrahams criticised this paragraph as being "formulaic" and plainly wrong. In one sense it might be said to embody a formula, but it does reflect something which the hearing officer had to do, which was to stand back and consider the effect of all the factors taken together. It may well be that in any given case factors, broken down into various areas, do not individually point to a High Court trial as being more appropriate, but their aggregate effect might be such as to make a High Court trial more appropriate. I think that the hearing officer had that effect in mind because he observed that taking them altogether made a stronger case for declining to deal. If

there is a criticism it would be that he did not give some reasoning, but it has to be acknowledged that giving reasons for an impression (which is in part what the hearing officer was required to form) is not always easy.

50. Nonetheless, I consider that his overall assessment was wrong. It is not merely that I would disagree with him. I have already found that the complexity of the non-patent law case is sufficient to drive this case to a High Court trial, but if I had not come to that conclusion I would nonetheless have determined that a combination of that with other factors meant that a decision to the contrary would be one which no reasonable tribunal could reach. Whether or not the patents, and success in the case, are very significant to NGPOD, they are undoubtedly patents of real financial and commercial significance to Aspirate, and that is a strong pointer to the High Court. When one couples that with the nature of the dispute as it now emerges in relation to non-patent matters, and the techniques for trying this case (including the need for properly policed disclosure), and the lack of familiarity of non-legally trained hearing officers to deal with both the complexity of the litigation and the points of law that are likely to arise, those factors would, in my view, make any other conclusion an unreal one.

Conclusion

51. It follows that I shall allow this appeal and determine that the Comptroller should have declined to deal with this case on the footing that it is more properly determined by the court.