

Media CAT v Adams: the CAT that did not get the cream

Gary Moss*

Illuminating a murky world

In February 2011, His Honour Judge Birss, sitting in the Patents County Court (PCC) for England and Wales, handed down a judgment in *Media CAT Limited v Adams & Others*.¹ The judgment is illuminating since it casts some light into the murky world of how some individuals and companies have sought to enforce copyright claims against members of the public in circumstances which could, at their most charitable, be described as suspect. It also highlighted certain procedural issues which can arise in such cases and which will be of considerable interest to practitioners, not least in relation to the abuses which can potentially arise from unfettered use of the *Norwich Pharmacal*² procedure.

In a further judgment dated 18 April 2011,³ the judge ruled on the defendants' applications against Media CAT's solicitors for a wasted costs order and also for an order under section 51 of the Senior Courts Act 1981 that those solicitors should be liable for the costs of the action as *de facto* funders of the litigation.

This paper discusses the particular procedural implications of this judgment and assesses the PCC's ability to deal with lower value disputes, particularly in circumstances in which it is likely that the defendants will have neither the resources nor the inclination to avail themselves of legal representation.

The background

The case concerned actions commenced against a number of individuals who were allegedly infringing the copyright in various films (which were accepted by the court to be of a pornographic nature) by downloading them via the internet. The alleged infringements were said to have taken place by the use of peer-to-peer (P2P) software. Media CAT, which claimed that it was entitled to bring the proceedings in its own name by virtue of agreements with the owners of the copyright in these films, asserted that its agents had monitored

The author

- Gary Moss is a partner in the London office of McDermott Will & Emery UK LLP, where he leads the IP Litigation Practice Group.

This article

- In February 2011 Judge Birss, sitting in the Patents County Court (PCC), handed down a judgment in *Media CAT Limited v Adams & Others*.
- The judgment is illuminating since it casts some light into the murky world of how some individuals and companies have sought to enforce copyright claims against members of the public in circumstances which could, at their most charitable, be described as suspect. It also highlights certain procedural issues which can arise in such cases and which will be of considerable interest to practitioners, not least in relation to the potential abuses which can arise from unfettered use of the *Norwich Pharmacal* procedure.

the 'unauthorized' exploitation of the various copyright works and had compiled a list of IP addresses linked to P2P file-sharing software. It then applied to the High Court for orders against various internet service providers (ISPs) under the *Norwich Pharmacal* jurisdiction, seeking the names and addresses of the persons who were associated with those IP addresses. The evidence showed that, as a result of this exercise, some 10,000 names and addresses were obtained.

Media CAT, through its lawyers, wrote to these various individuals asserting its claims. The letters demanded a payment of £495 by way of compensation, the sum being said to include damages as well as 'ISP administration costs, a contribution to Media CAT's legal costs incurred to date and all additional costs'.

* Email: gmoss@mwe.com.

1 [2011] EWPC 6.

2 *Norwich Pharmacal Co v Commissioners of Customs & Excise* [1974] AC 133.

3 *Media CAT Limited v Adams & Others* [2011] EWPC 11.

There was no evidence as to how many individuals simply paid out on receipt of these letters. The letters consisted of six pages of legal and technical discussion; in the judge's view, this would be understood by lay recipients as indicating that they had been caught infringing copyright in pornographic films and that a court had already looked into the matter and had acted accordingly (a copy of the order on the *Norwich Pharmacal* application was provided with the letters). Further, as the judge remarked, the fact that the alleged downloading related to pornographic films must have acted as a strong incentive to people to pay up quickly and quietly. However, some recipients of the letters did not give in. Accordingly, during the period from August to November 2010, Media CAT commenced 27 actions in the PCC, ostensibly for copyright infringement in the films in question.

There the matter might have rested, had Media CAT's lawyers⁴ not taken the step of applying for default judgments in some of these cases under Part 12 of the Civil Procedure Rules ('CPR'). Part 12 is effectively an administrative procedure enabling a claimant to enter judgment without the need for judicial intervention if the defendant is in default of certain procedural steps, eg acknowledgement of service. However, Rule 12.4 states that this procedure can only be used where the claim is for a specified amount of money, an amount of money to be decided by the court, the delivery of goods (in certain limited circumstances), or any combination of these. In all other cases, an application for judgment must be made under Part 23 CPR. Unfortunately for Media CAT (but possibly fortunately for the defendants), because of the more limited resources available in the PCC, these applications were placed before the judge. He picked up on the fact that, since the cases under consideration all included applications for injunctions, they did not fall within Part 12 CPR and the request for the procedure was therefore inappropriate. In a judgment, dated 1 December 2010,⁵ the judge also raised some concerns about the nature of the allegations which had been set out in the Particulars of Claim and whether they gave rise to a valid cause of action.

A further judgment followed on 17 December 2010,⁶ arising from a letter written by one of the defendants in his individual capacity, to the court in response to certain letters sent out by the court. This defendant's letter raised concerns about the way in which the case

against him was being pursued. This prompted the judge to take the unusual step of exercising the court's power to make an order of its own initiative under Rule 3.3.1 CPR and convene a hearing in all 27 pending cases.

A further significant development which the court had to consider was that, on 13 January 2011, only two working days before the date originally fixed for the convened hearing, Media CAT's lawyers attended the court offices with 27 notices of discontinuance. They also asked the court to vacate the proposed hearing. In the event, Judge Birss refused to accede to that request and the proposed hearing went ahead as originally indicated by the court, albeit a week later.⁷

Among the issues which the court had to consider were the following:

1. The standing of Media CAT to maintain these various actions in its own name.
2. Whether the facts pleaded were sufficient to establish that the various defendants were guilty of infringement of copyright.
3. Whether Media CAT was entitled to discontinue the actions unilaterally.
4. The use of the *Norwich Pharmacal* procedure in circumstances such as these.

Media CAT's standing

In the letters sent out to the individuals, Media CAT's lawyers claimed that it was

- (i) a copyright protection society, whose members were the owners of the copyright in the works;
- (ii) the exclusive territorial licensee of the rights in the work; and
- (iii) the representative of the owners of copyright or the exclusive licensees of that copyright.

As the judge observed, in fact it is none of these. What emerged at the hearing was that Media CAT's alleged entitlement to bring suit was based on contracts with the various copyright owners which purported to give to it

.....all rights necessary to allow [Media CAT] to inquire, claim, demand and prosecute through the civil courts where necessary any person or persons identified as having made available for download a film for which [an agreement] was expressly licensed.

4 Media CAT's lawyers were ACS:Law. The 'moving light' behind that firm appeared to be Mr Andrew Crossley.

5 *Media CAT v A* [2010] EWPC 17.

6 *Media CAT v Billingham* [2010] EWPC 18.

7 There were several other background events set out in the judgment which add colour but which are not germane to the issues dealt with in this paper. Those readers who wish to have full details are recommended to refer to the judgment.

They also purported to give Media CAT the ‘sole and exclusive right to demand, collect and receive all revenues in respect of illegal file sharing’ upon the terms of the agreement. As the judge said:

The extent to which it is legally possible for a company like Media CAT to acquire the rights it claims in relation to copyright is open to question and has not been tested in court.

The judge drew attention to the way in which the letters sent out by Media CAT, contrasted with the position as set out in the Particulars of Claim served in the proceedings. Although the Particulars of Claim stated that Media CAT ‘represented’ the copyright holders, they did not go so far as to suggest that Media CAT was a copyright protection society or an exclusive licensee. What they did do was to cite the contractual provision set out above. And as the judge indicated, this raised a question mark over Media CAT’s ability to be the claimant in a copyright case, something which would be obvious to any lawyer with experience in IP matters, but which would not be obvious to lay individuals.

The judge clearly viewed these letters as misleading. He was urged by the defendants’ counsel to find that in light of the way in which the position had been put more accurately in the Particulars of Claim, the letters of claim must have been deliberately misleading. He declined to do so on the grounds that he did not have sufficient information before him at this hearing. Nevertheless, in his subsequent costs judgment⁸ he stated that in his judgment the letters were ‘*plainly negligent and may well be improper*’. He declined to use them as a basis for a wasted costs order against the solicitors but only on the grounds that it would be difficult to establish what unnecessary costs had been caused by these letters and that any such costs were likely to be outweighed by the costs of disentangling them from the general costs of the action.

Did the pleaded facts establish liability for infringement of copyright?

In its letters of claim, Media CAT sought to align itself with the decision of Mr Justice Collins in *Polydor v Brown*,⁹ a short judgment on an application for judgment in default in a case concerning unauthorized file-sharing of musical works. The allegation against the defendant in *Polydor* was infringement of copyright by

making the works available to the public. The evidence showed that the shared directory of the computer, which was connected to the internet by means of an account in the name of the defendant with an ISP running certain P2P software, was making available more than 400 audio files to other users of that P2P network. The defendant admitted that he had used the P2P software, but claimed to be unaware that by doing so he was distributing music. As Collins J stated:

connecting a computer to the internet, where the computer is running P2P software, and in which music files containing copies of the claimants’ copyright works were placed in a shared directory, falls within . . . the infringing act . . . it does not matter whether the person knows or has reason to believe that what they are doing is an infringement, because innocence or ignorance is no defence . . .

Accordingly, he gave the judgment for the claimant.

The letters from Media CAT’s lawyers enclosed a copy of the judgment in *Polydor*. This was no doubt intended to indicate to the recipients of these letters that the court had already ruled that the use of P2P software amounted to an infringement of copyright. But, as Judge Birss pointed out, while that may constitute an infringement of copyright, and on the facts of *Polydor* was found to do so, it does not necessarily follow that use of P2P software will always involve an infringement. In particular, the judge highlighted the following:

- Action had been taken against the individuals in whose name the IP addresses were registered with the ISPs. However, there was no evidence that those individuals were responsible for the acts in question (cf *Polydor*). As the judge pointed out, they could have been carried out by someone else who had been given unlimited access to the routers, or by someone who had been provided with access for a limited purpose but who had misused that authorization, or indeed by an unauthorized ‘hacker’.
- No doubt, in order to close off those possibilities, Media CAT included within its claim an allegation that the software in question had been used *inter alia* by ‘someone who gained access to the Internet connection due to the router having no or no adequate security’. They then pleaded that the defendants had by themselves, ‘or by *allowing* others to do so’ infringed. But section 16(2) of the Copyright Design and Patents Act 1988 (‘CDPA’) provides that copyright is infringed by someone who does or *authorizes others to do* any of the restricted acts listed in

8 [2011] ECPCC 11.

9 [2005] EWHC 3191 (Ch).

section 16(1). As the judge pointed out, Media CAT's claim was based on equating 'allowing' with 'authorizing'. But 'allowing' is not necessarily the same thing as 'authorizing': indeed one could argue that they are significantly different. A person may allow another to use his motor car; it does not follow that he has authorized that person to break the speed limit.

- There were several other difficulties with this plea. First, as quoted, what happens if the owner of the router permits another to have access to use his/her internet connection in general and, unknown to their owner, the 'authorized' user accesses P2P software and infringes copyright? Does the act of authorizing use of an internet connection for legitimate purposes carry with it automatically 'authorization' of any infringements? Furthermore, does simply leaving an internet connection 'with no or no adequate security' render the owner of the connection liable for infringement by others piggy-backing on the connection? Is that not the equivalent of saying that, if I leave the keys in my car and someone steals it, I am liable for any damage they cause if they have an accident? And finally, what does 'no adequate security' mean in this context? Routers have different levels of security, so how 'adequate' does the security have to be before one can avoid liability?

All these points highlighted potential difficulties with Media CAT's claim, or at the very least, indicated issues which needed to be determined before liability could be established. The problem was that, given the nature of the defendants, it was unlikely that any of them would have the sufficient knowledge and/or resources to enable those issues to be argued before the court.

Could Media CAT discontinue the various actions?

Rule 38.2 CPR provides that a claimant may discontinue its claim at any stage, save in certain limited circumstances. One of those circumstances is that where there is more than one claimant, a single claimant may not discontinue unless every other claimant consents in writing or the court gives permission.¹⁰

Under Rule 38.4 CPR, a defendant may apply to have a notice of discontinuance set aside. One of the bases upon which the courts have previously held that

a notice of discontinuance may be set aside is where it is an abuse of the process.

Under Rule 38.7 CPR, a claimant who has discontinued after the defendant has filed a defence requires permission of the court to bring a subsequent claim against the same defendant arising out of the same, or substantially the same facts.

The various defendants objected to Media CAT's proposed discontinuance of the claims. They did so on the following bases:

- (a) Under Rule 19.3 CPR, where a claimant asserts a remedy to which other persons are jointly entitled, all parties so entitled must be parties to the action unless the court otherwise directs. The defendants argued the owners of the copyright in the various films enjoyed concurrent rights and thus they were effectively 'claimants' within the meaning of Rule 38.2 CPR. And since they had not consented to the claims being discontinued, Media CAT had not complied with Rule 38.2 CPR.
- (b) Section 102 CDPA provides that, in the case of an action by a copyright holder or an exclusive licensee, the party bringing the action may not proceed with it unless the other party is joined to the action, either as a claimant or a defendant. The defendants argued that a notice of discontinuance was in effect 'proceeding with the action' and that this could not take place without the copyright owners being joined.
- (c) That in any event the proposed notice of discontinuance would be an abuse of process.

Rule 38.2 CPR

The defendants pointed to Rule 19.3 CPR as being mandatory. Therefore, they argued, it would be wrong for Media CAT to be able to avoid the provisions of Rule 38.2 CPR by having failed to observe a mandatory provision of some other Rule in the first place.

The judge accepted that, if the case were to go forward, an application would have to be made under Rule 19.3 CPR to join the copyright owners, but the question was whether Rule 38.2 CPR allowed the only then existing claimant to discontinue without permission. The judge concluded that Rule 38.2 CPR was clear on its terms and it would not be right to read into the provision a requirement for permission which was not present. In part, the judge based his reasoning

¹⁰ The previous Rules of the Supreme Court provided that once an action had reached a certain stage, it could not be discontinued without the leave of the court. That was changed with the advent of the CPR, presumably to make it easier for litigants to discontinue actions and thus

less inclined to maintain weak cases. The basis of the change is to put the onus on the defendant to object to an action being discontinued, rather than requiring the claimant to seek permission to discontinue in the first place.

on the House of Lords decision in *Castanho v Brown & Root*,¹¹ a case under the old Rules of the Supreme Court (RSC). In that case, the claimant had sought to discontinue an action in the UK after he had secured an admission of liability by the defendant; this was so that he could then bring a similar claim in the USA arising out of the same cause of action. The potential advantage was that he could seek much larger damages in the courts of the USA. Although it was clear that the RSC as then drafted should have included a requirement that a claim which had reached that stage could only be discontinued with the permission of the court and that the omission of the requirement for permission was obviously an error on the part of those drafting the RSC, the fact was that the RSC were clear on their face and the House of Lords refused the suggestion that a requirement for permission should be implied.

Section 102 CDPA

However, section 102 CDPA was a different matter as far as the judge was concerned. Section 102(1) is in the following terms:

Where an action for an infringement of copyright brought by the copyright owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the copyright owner or, as the case may be, the exclusive licensee, may not, without the leave of the court, proceed with the action unless the other is joined as plaintiff or added as a defendant.

The prohibition is against ‘proceeding with the action’. Media CAT argued that in reality they were not proceeding with the action at all; they were seeking to do the exact opposite and discontinue it. Thus the question was whether discontinuing an action was tantamount to ‘proceeding’ with it.

Again, basing himself on *Castanho v Brown & Root*, the judge was prepared to hold that it was. The issue in *Castanho* was slightly different in that the question was whether a notice of discontinuance could constitute an abuse of the process of the court. In the Court of Appeal, Shaw LJ had stated that it seemed to him

...to be an inversion of logic to speak of an act which purports to terminate the process as being an abuse of that process.

However, in the House of Lords, Lord Scarman was not so troubled. He said:

I am not sensitive to the logical difficulty. Even if it be illogical (and I do not think it is) to treat the termination of legal process as an act which can be an abuse of that process, the principle requires that illogicality be overridden, if justice requires. The court has an inherent power to prevent a party from obtaining by use of the process a collateral advantage which it would be unjust for him to retain; and termination of that process can, by any other step in the process, be so used.

Based on this statement, Judge Birss was prepared to read section 102 CDPA as requiring the court’s permission for a licensee to take any further step in the case and in his judgment a notice of discontinuance was such a step.¹²

Abuse of process

In *Castanho*, Lord Scarman talked about the court intervening if the notice of discontinuance resulted in a ‘collateral advantage’ to the claimant. The question was whether there would be such a collateral advantage accruing to Media CAT if it was allowed to discontinue? The answer in the judge’s view was ‘yes’.

The judge identified in particular two such advantages. The first was potential re-litigation by the copyright holder. By the time of the hearing, some of the defendants had served defences; as indicated above, Rule 38.7 CPR meant that, if Media CAT discontinued those actions, it could not bring a similar claim against those defendants without permission of the court. However, on the face of it that would not apply to the copyright holders themselves since they were not parties to the claims and therefore had not discontinued. Thus, allowing Media CAT to discontinue at this point, without first joining those copyright holders, would still leave the copyright holders free to take action in the future. This provided added strength to the argument under section 102 CDPA since, as the judge pointed out, one of the purposes of that section is to avoid defendants being troubled by separate actions in respect of the same alleged infringements.¹³

The second collateral advantage was the avoidance of judicial scrutiny. In this respect, the judge listed a number of issues which gave rise to concern and which

exclusive licensee. Thus it might be considered a moot point as to whether s 102 CDPA had any application in the first place!

13 See para 79 of referring to paras 15–17 of the 17th Edition of Copinger on Copyright.

11 HL [1981] AC 557.

12 One point which the judge appears to have skated over is that s 102 CDPA only applies to actions by the copyright holder or the exclusive licensee. However, as stated in its Particulars of Claim, Media CAT did not claim to be either and the judge had also held that they were not an

he considered ought to be reviewed by the court. Some of these have already been dealt with above. On top of those, there were also concerns about the activities of Media CAT's lawyers:

Media CAT and ACS Law have a very real interest in avoiding public scrutiny of the cause of action because in parallel to the 26 court cases, a wholesale letter writing campaign is being conducted, from which revenue is being generated. This letter writing exercise is founded on the threat of legal proceedings, such as the claims before this court . . .

Note that ACS Law's interest is specifically mentioned in the previous paragraph because of course they receive 65% of the revenues from the letter writing exercise . . . Whether it was intended to or not, I cannot imagine a system better designed to create disincentives to test the issues in court. Why take the letters to court and test the assertions, when one can just write more letters and collect payments from a proportion of the recipients?

On that basis, the judge held that the notices of discontinuance should be set aside. He also indicated that, were it not for the post-hearing events (as to which see below), he would have been minded to provide Media CAT a short period during which to join the copyright owners or obtain permission under section 102 CDPA to proceed without it, failing which the actions themselves would be struck out. However, in the light of such events, he did not feel able to make those orders.

The Norwich Pharmacal orders

Another factor which exercised Judge Birss was the potential for abuse of the *Norwich Pharmacal* jurisdiction. As he observed, it had been decided in previous cases that it was not a requirement for granting the relief under *Norwich Pharmacal*, that the applicant had to bring court proceedings against the alleged wrongdoer.¹⁴ At the same time, however, the respondent to a *Norwich Pharmacal* application for disclosure may well have little or no direct interest in the alleged underlying cause of action. In the real world, the main interest of an entity against whom disclosure is sought (such as an ISP) will be to secure the protection of a *Norwich Pharmacal* order so that it cannot subsequently be accused of misusing the subscriber's confidential and/or personal data, but it is unlikely to be minded to test in any way the underlying cause of action. This is understandable; it is not 'its fight' and in practice it is prob-

ably far cheaper and easier for an ISP simply to carry out a computerized search in its records for the IP addresses, print off the names of the subscribers, and hand them over to the claimants' lawyers, than becoming involved in a legal challenge to the underlying cause of action, especially if one includes the potential costs liability as well.¹⁵ But potentially that can give rise to the types of abuse which the judge had to consider in the cases before him.

While the judge may have had misgivings, he accepted that it was no part of his function in the hearing before him to second guess the decision given at the *Norwich Pharmacal* order stage, nor should he postulate whether the material before the Master on that earlier hearing was sufficient to show that the claimant could ultimately succeed at trial. But he did go on to suggest that perhaps in future, in similar applications, the court might wish to consider whether it ought to manage the subsequent use of the identities disclosed. Among the suggestions the judge put forward were:

- possibly making a group litigation order under CPR Part 19 from the outset and providing a mechanism for identifying test cases at an early stage before a letter writing campaign begins;
- appointing a neutral solicitor to supervise the process in the same way that it has now become practice to appoint a neutral supervising solicitor on Anton Piller orders;
- also possibly giving consideration to making the claimants comply with section 102 CDPA—the judge commented that although section 102(3) CDPA clearly says that section 102(1) CDPA does not affect the granting of interlocutory relief, on one view a *Norwich Pharmacal* order has some elements of final relief about it because that action ends once the order is made.

It remains to be seen whether the courts will follow the suggestions put forward by the learned judge.

Events following the hearing

To quote from the judgment:

On 26 January [the hearing having taken place on 24 January] I received a letter from ACS Law the letter also states that Media CAT has ceased trading as it has become insolvent and that ACS Law is no longer instructed save to consent orders already notified to the

¹⁴ *British Steel v Granada Television* [1981] AC 1096, per Lord Fraser at 1200; *Ashworth Hospital Authority v Mars Limited* [2001] 1 WLR 2033, per Lord Wolf CJ at paras 41–47.

¹⁵ Of course the same considerations may not apply to entities such as newspapers and broadcasters which do have a significant interest in protecting their sources.

court. The letter concludes with the statement that the claimant has asked Mr Crossley to notify the court that it ceased all activities and will not at any time in the future be sending letters or pursuing anyone in relation to alleged infringements of copyright. Also ACS Law will close permanently on 31 January 2011 and there will be no successor practice.¹⁶

However the matter did not stop there. As stated, the defendants sought a wasted costs order against Mr Crossley and ACS Law and also orders under section 51 of the Senior Courts Act 1981 that they should be liable for the costs of the action. The issues dealt with on that application are possibly of less direct interest to IP practitioners; they are primarily directed to circumstances when such orders are appropriate. Accordingly, in brief:

- Wasted costs orders were sought against the solicitors on a number of grounds relating to the way in which they had conducted the action. In light of previous cases, the judge rejected the majority on the grounds that they were either inappropriate or would be disproportionate in that the costs of proving them was likely to be a substantial proportion of the amount of costs in dispute in the first place. However, he did make wasted costs orders in relation to:
 - The revenue-sharing arrangements pursuant to which the solicitors were entitled to retain 65 per cent of the proceeds of any litigation and
 - The services of the notices of discontinuance which the judge had previously ruled were an abuse of the process and were intended to avoid judicial scrutiny of the activities of the claimants and their solicitors.
 - The judge ruled that because of the revenue-sharing arrangements with the alleged copyright owners, the solicitors stood to gain personally from the litigation and had an interest in it. As such it was arguable that they should be liable for the defendants' costs as funders of the action. Accordingly, he ruled that they should be joined to the proceedings for the purposes of determining whether they should in fact be liable.

Comment

Judge Birss was punctilious in declining to come to any conclusions in respect of matters which were not

directly before him and on which he considered that he did not have sufficient evidence. Nevertheless, it is clear that he had concerns about the activities of Media CAT and the part which its lawyers had played. The judge was clearly exercised by the possibility that, having regard to the way in which the letters before action were framed, many of the recipients may have been persuaded to pay up rather than face the embarrassment of challenging the letters and being exposed as viewers of pornography. And it was also clear that he considered that the demanded payment of £495 might well be out of proportion to any actual damage suffered by the copyright holders.

It is difficult to find fault with the reasoning of the judge, particularly as regards the potential abuses arising from the *Norwich Pharmacal* jurisdiction. It is worth commenting that when Anton Piller orders were first promulgated, they were generally considered to be a 'good thing'. No one would suggest that they are not an extremely useful tool in the armoury of the courts and indeed section 72 of the Supreme Court Act 1981¹⁷ was enacted so as to preserve the value which can be obtained by the use of such orders in appropriate circumstances. Nevertheless, various cases have highlighted the potential abuse which might arise from the unfettered use of such orders especially where the recipient of the order was in a small way of business and would not have the means with which to take on claimants who possessed much greater resources. It was to overcome the potential for abuse while ensuring that these orders remained available that the court put forward the concept of the neutral supervising solicitor.

Norwich Pharmacal orders are not comparable with Anton Piller orders because, in the former, the entity against which disclosure is sought may well be able to defend itself in appropriate circumstances. The real difficulty lies in the fact that in many instances it will have no real incentive to do so and will find it easier and cheaper to cave in. This in turn, as this case demonstrates, can lead to abuses against the ultimate defendants who are less knowledgeable and lack the necessary resources.¹⁸ It remains uncertain whether the courts will adopt the suggestions put forward by the judge.

Of possible greater significance, in the shorter term, is the way in which Judge Birss had taken the initiative to get control of these cases and in effect to sort them

¹⁶ [2011] EWPC 6 at para 114.

¹⁷ Removal of the privilege against self incrimination in cases involving allegations of infringement of intellectual property.

¹⁸ See for example *Thermax v Schott Industrial Glass* [1981] FSR 289; *Columbia Pictures Industries Inc. v Robertson* [1987] Ch 38; *Lock International Plc. v Beswick* [1989] 1 WLR 1268; *Universal Thermosensors Ltd. v Hibben* [1992] 1 WLR 840.

out. Even the most optimistic practitioner would have to concede that the PCC has not lived up to the hopes which all interested parties had when it was first set up in 1990.¹⁹ It is not the place of this paper to discuss the reasons for that. In this instance, the judge was willing to take the initiative and ensure that the cases came before him so that the court could get a grip on them. Such case management is always welcome—and particularly so where, as in this case, it was clear that there was an inequality in the respective parties' legal representation and knowledge of the system in which they had become embroiled. It is also clear that the court shining its light on the darker recesses of these cases represented an unwelcome development for the claimant and something which it wished to avoid.

Judge Birss has already begun to make his presence felt in the court. He has issued a number of judgments in the relatively short time he has been in office; the impression one has is that many more judgments are being published than have hitherto been the case.²⁰ It is clear that he does not intend to have cases hanging around. As he said in his judgment:

... the position at about Christmas 2010 was that there were 27 parallel essentially identical cases in the Patent County Court all coming for hearing together on 17 January 2011. Although in most cases no defence had yet been filed, there were cases in which the defendant had filed a defence and yet no attempt had been made to convene a case management conference to obtain directions and bring these cases to trial. A claimant eager to

pursue their claim would usually be pressing to organise the CMC to get on with the case.²¹

This was in respect of cases which had begun between August and November 2010. Potential claimants in the PCC, be warned.

It is hoped that this apparent enthusiasm of the new incumbent, coupled with the recent changes to the procedural rules, will at last enable the PCC to fulfil the role for which it was originally set up. Although this particular case did not relate to patents, during 2010 there were only 10 High Court trials dealing with issues of patent infringement and/or validity. Compare this with the number of such trials in other jurisdictions, notably Germany. One has to question whether this is because there are no infringements taking place in the UK or whether litigants are becoming put off by the relatively high cost of litigation in this country compared to the other jurisdictions in which they are able to bring suit. That is not to deny that our High Court procedures are particularly suited to large, commercially valuable IP cases, but at the same time all practitioners will agree that there is a desperate need for an alternative forum providing good but inexpensive adjudication of smaller IP cases. The new financial limits in the PCC, both as regards damages and costs, represent a further attempt to make this jurisdiction more attractive. It is hoped that those changes, coupled with the new judge's approach, will mean that that wish will at last become something of a reality.

19 It is proposed that the PCC will be renamed the Intellectual Property Patents Court to reflect the wider range of cases with which it deals. However, it is not certain when this proposal will be brought into effect.

20 On the basis of the Neutral Citation Numbering system it would appear that, in the first six months of 2011, 19 PCC judgments were published.

21 [2011] EWPC6 at para 37.