HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Nov 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M26/2022
File Title:	Thaler v. Commissioner of Patents
Registry:	Melbourne
Document filed:	Transcript
Filing party:	HCA
Date filed:	14 Nov 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

[2022] HCATrans 199

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No M26 of 2022

B e t w e e n -

STEPHEN THALER

Applicant

and

COMMISSIONER OF PATENTS

Respondent

Application for special leave to appeal

GORDON J
EDELMAN J
GLEESON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA AND BY VIDEO CONNECTION

ON FRIDAY, 11 NOVEMBER 2022, AT 12.30 PM

GORDON J: In accordance with the protocol for remote hearings, I will announce the appearances of the parties.

MR D. SHAVIN, KC appears with **MS C.I. CUNLIFFE** for the applicant. (instructed by Allens)

MS S.J. GODDARD, SC appears with **MR H.P.T. BEVAN, SC** and **MR G.S-C. TSANG** for the respondent. (instructed by Australian Government Solicitor)

GORDON J: Yes, Mr Shavin.

MR SHAVIN: If the Court pleases. This application arises out of a patent application by Dr Thaler by an invention made by an artificial intelligence, which he has called DABUS. It was created, programmed and owned by him. Although any person may apply for a patent, the Commissioner of Patents deemed the application lapsed because Dr Thaler, the applicant, did not nominate a human inventor. Dr Thaler was required to nominate an inventor by reason of regulation 3.2C(2)(aa) of the Patents Regulations, and the Court will find a copy of that at application book pages 107 to 108.

An appeal to the Federal Court was allowed by Justice Beach, the Full Federal Court overturned that decision. This application is brought seeking leave to appeal from the decision of the Full Federal Court. It will determine whether inventions invented by artificial intelligence are patent-eligible subject matter. This case turns on the meaning of the word "inventor". "Inventor" is not defined in the *Patents Act*. Section 15(1)(a) does not purport to be and is not a definition of the term "inventor". It simply defines a class of inventors that may be granted a patent, and that class is a class of inventors who is a person - - -

EDELMAN J: Mr Shavin, do you accept that an assumption underlying section 15 is that every invention must have an inventor?

MR SHAVIN: Yes.

EDELMAN J: Was it common ground below that the applicant was not the inventor?

MR SHAVIN: Yes. The applicant says he was not the inventor - - -

GORDON J: So, Mr Shavin, your answer to that question, is that because he chose to, in effect, prepare and file his application in a particular way?

MR SHAVIN: Yes, although Dr Thaler says that the machine was the inventor. He programmed the computer but he said that the way in which

the computer was programmed is it acted independently in its selection of subject matter and in its generation of the invention. So, he says that he truly was not the inventor, but DABUS, the artificial intelligence, he says was the proper inventor.

EDELMAN J: It may be, though, that the binary possibilities that your submission sets up, which is that either the inventor is the artificial intelligence or there is no inventor, contrary to the underlying assumption of section 15, is an opposition that may not be accurate if, for example, it is possible for the applicant to be the inventor.

MR SHAVIN: The way in which this matter has come before the Court, your Honour, is that the issue has arisen before there has been any examination of the application. So, the application was filed by Dr Thaler, nominating DABUS as the inventor. The Commissioner took the view that because a person had not been nominated as the inventor the application would lapse. So, none of the substantive factual matters underpinning the application have yet been examined because it has been effectively rejected at the outset.

GORDON J: Does that mean that it is an inappropriate vehicle to consider these issues? The reason why we are asking these questions, Mr Shavin, is that as you are no doubt well aware, there are other cases involving this applicant around the world, including, as I understand it, one in the United Kingdom, where this issue seems to be, at least, a live issue. I accept that the statutory framework might be different, but it seems to us that the framing of the application itself is an issue.

MR SHAVIN: In the United Kingdom, your Honour, the Supreme Court has granted a hearing which has been fixed for the 27th of February next year.

EDELMAN J: But that is also to determine questions as to whether Mr Thaler could have written on the application that he had a genuine belief that he was the inventor.

MR SHAVIN: We would say, with respect, there is no material difference, because here, what Dr Thaler had to do was identify something as the inventor. We say that he has done that correctly. He has identified the inventor, which is DABUS. It is our submission that, properly construed, section 15 of the Act does not require that the inventor, so nominated, be a natural person.

EDELMAN J: Mr Shavin, your submission would have a great deal of force if it were possible to exclude, immediately, without any possibility of argument, the possibility that the applicant was not the inventor, because

then, once that possibility is excluded, one is left with either a presumption of the section that every invention must have an inventor – on your submission – that is wrong. Or, alternatively, an approach an inventor does not need to be a natural person, which meets some of the difficulties that the Full Court has identified. But the difficulty for this Court is that without having any submissions about the starting point, which is whether a natural person here could be the inventor, we are groping in the dark.

MR SHAVIN: Save as to this, your Honour, that it is common ground between the parties, there is an agreed statement of fact between the parties. So, the Commissioner does not dispute, as a fact, that DABUS is the inventor – that Dr Thaler is not the inventor. So, the only issue before the Court - - -

GORDON J: But that – sorry, Mr Shavin, to interrupt – but that submission just then is the problem. Is it an agreed fact that Mr Thaler is not the inventor is the agreed fact, when the real question is, was he the inventor of DABUS itself – giving rise to this, in effect, question that is being considered by the United Kingdom Supreme Court?

MR SHAVIN: The problem, your Honour, is this – that there is no other mechanism for getting the case to that point. Because the application has been rejected, effectively, by the Commissioner at the outset before there has been any consideration of the application, we can never get to the question of DABUS and the inventor and whether section 18 is otherwise satisfied.

EDELMAN J: There is an easy way the question could have been raised, which could have been if the applicant had listed himself as the inventor and the Commissioner and had rejected that on the basis that he was not the inventor but the artificial intelligence was the inventor, which would then have given rise to the prospect that nobody, for the purposes of section 15, was the inventor.

MR SHAVIN: The difficulty with that course, your Honour, is that it is a course that Justice of Appeal . . . . . found unattractive, and that was that the inventor is encouraged to file an application nominating a fact he does not believe to be true. Now, in the Legal Board of Appeal in Europe it was suggested he could nominate Mickey Mouse, effectively, as the inventor and then the application would be satisfied. But that requires the inventor to fill in an application with a fact stated that he believes to be untrue.

EDELMAN J: You are assuming that it is purely a question of fact and that it involves no issues of law.

MR SHAVIN: Well, it is a factual question that appears, in our respectful submission, to be raised by the regulation. If I could take your Honour back to the regulation at application book 107, what it simply provides is a formalities check, and remembering we are dealing simply with a formality at this point:

> (2) The applicant must:
>
> . . .
>
> (aa) provide the name of the inventor of the invention to which the application relates.

Now, it would be quite improper, in our respectful submission, to say that Dr Thaler would have to put a name there that he believed not to be the correct name. He has provided a name. He satisfied the formalities. He provided the name DABUS. In our respectful submission, having satisfied the formalities, the application ought to then have been accepted, not deemed withdrawn by the Commission, and so the application could then be examined in the ordinary course and we would have a prosecution of the application.

But because the application has been pre-emptively deemed withdrawn because the Commissioner has stated that she does not believe that putting the name of an artificial intelligence complies with the formalities requirement of the regulation, the matter cannot go further. In our respectful submission, it would be inappropriate for this Court to say that the law is that an inventor, in satisfying the formalities requirement of the regulation, must nominate the name of a person that the applicant does not believe to be the inventor. That would be a quite perverse outcome, in our respectful submission.

What Dr Thaler is doing is trying to complete the form honestly, with integrity and to the best of his knowledge, information and belief. He has done that. He has included a name. In our respectful submission, that satisfies the formalities requirement. Then the question would be – and that is why it is raised in this application for consideration by this Court – as to whether that is appropriate. Otherwise, there is no other way for the issue to be raised other than by requiring an inventor to falsely complete the formalities requirement.

It is that basis, your Honour, that we say that this is indeed an appropriate case for special leave. There can be no other way to get this question before this Court, given the Commissioner agrees that Dr Thaler is not the inventor. In those circumstances, there is no other way to overcome the formality.

Now having overcome the formality, we then say it is done properly and appropriately and on consideration of section 15 of the Act properly understood in its context, the primary judge was correct, the Full Court was in error. We say that this is a matter of significant public importance and that it is a matter where there is a serious question of error. Now, obviously a determination of that error would require a fully constituted appeal – an appeal that would . . . . . day.

GLEESON J: Mr Shavin, your grounds of appeal and special leave questions are not directed specifically to 3.2C of the regulations. Are you correct - - -

MR SHAVIN: No, because of the way – your Honour is quite right, I am sorry.

GLEESON J: My question then is, are they sufficient to deal with the issue that you are now articulating?

MR SHAVIN: Yes, your Honour, because the way in which the matter was approached by the Full Court below was that the formality was not properly completed, because, under section 15 of the Act, the inventor had to be a natural person.

If I could direct your Honours' attention to paragraph 14 of our special leave application, we have noted this. So, that the determination of the question of law under the statute will determine the question as to whether the formality under regulation 3.2C(2)(aa) has been properly complied with.

EDELMAN J: Mr Shavin, you have to bring yourself within 15(1)(c) of the statute, do you not?

MR SHAVIN: Or (b), yes.

EDELMAN J: But you rely on (b) and (c)?

MR SHAVIN: Yes, we do.

EDELMAN J: What meaning do you give to the word "derives", then?

MR SHAVIN: A broad meaning, so that - - -

EDELMAN J: A broad meaning that does not mean "derives"?

MR SHAVIN: No, not at all. In our respectful submission, Justice Beach considered properly the meaning of "derive" and found that it is in fact capable of encompassing our facts. He dealt with this at paragraphs 178 to 185. So, the meaning "derives" equals:

> receive or obtain . . . to get, gain, or obtain –

and:

> "obtained", "got", or "acquired" –

and it has this meaning which has been considered by this Court in the context of taxation law. If I could perhaps take the Court to that, it is at application book pages 41 and 42. The Court will see that the primary judge carefully considered this issue. He looked at the explanatory memorandum, and then in paragraph 180, he noted:

> the word has been given its ordinary meaning in the context of revenue legislation . . . where it was taken to mean "obtained", "got", or "acquired," and also *Brent v Commissioner of Taxation* (1971) 125 CLR 118 at 427 to 428, where it was taken by Gibbs J to mean "to draw, fetch, get, gain, obtain (a thing from a source)".

Then he considered other authorities, so that, in our respectful submissions we are seeking to obtain from the word "derive" its normal and natural meaning as considered by this Court. For example, one can derive a title from a possessory title. That was well-established even in Blackstone's days.

GORDON J: The issue has to be about title, does it not?

EDELMAN J: One never, ever derives a title from a possessory title unless it is conveyed, Mr Shavin. There is a difference between original title, which one gets from possession, merely possession of something, and acquisitive title. The language here is derivative title. It is a very, very basic error to confuse possession in the context of original title with derivative title.

MR SHAVIN: Though, your Honour, if your Honour breeds cattle, you derive a title to the offspring from the ownership - - -

EDELMAN J: No. You get original title to the offspring, Mr Shavin.

MR SHAVIN: But that would then give Dr Thaler original title to the invention from the inventor in the way that the farmer gets a title to the offspring by owning the cow. Now this, in our respectful submission, is

where the application of these principles is a matter for the proper consideration of this Court.

So that, in approaching the issues that the Court has raised with me, it is our respectful submission that the application has been properly founded. It has arisen because of the agreement between the parties. The applications, the formalities and the determination as to whether that application is correct, having regard to the proper construction of section 15 of the Act then, in our respectful submission, the approach adopted by the Full Court to ignore the language of section 15, to ignore the use by the legislature of the word "or" between each subsection, to ignore the fact that the legislature has chosen where it wants to refer the inventor as the person in paragraph (a) it has done so explicitly, and in (c) and in (b) it did not do so explicitly, which gives rise, as a matter of construction, to section 15 not being bound by the inventor in (a) as found by the Full Court. And it is in that context, in our respectful submission, that there is a serious question of error.

Then, for the matter of the determination, that would be a matter for the appeal. Now, in respect of paragraph 15(1)(b), the court found there had to be an assignment from the inventor. But that is plainly not correct. You can be entitled to an assignment from a person other than the inventor. Indeed, in most cases in the application of section 15(1)(b) there would be no contractual relationship at all between the person who has an equitable interest and the person from whom the assignment is obtained.

We set out the circumstances in which that can occur in our special leave application and we have identified the references to the reasons of the primary judge which support it. And that is why, your Honour, we say we rely upon both 15(1)(b) and 15(1)(c). In our respectful submission, properly construed, they support us. Properly construed, supporting us means that, indeed, the formalities have been satisfied.

GORDON J: I think that is your time, Mr Shavin.

MR SHAVIN: If the Court pleases.

GORDON J: Ms Goddard. I think you are on mute.

MS GODDARD: I think your Honour is right. Thank you. May it please the Court. Your Honours, we embrace your Honours' initial concern with the framing of the question before the Court and to whether this is an appropriate vehicle. We submit the question raised by our friends is not a question of public importance in the way it is framed.

The question whether an artificial intelligence system can be an inventor is one which has been self-generated by this applicant worldwide, so far without much success. To create a test case, we would say, out of a theoretical question of law and promote that worldwide does not elevate the question to a matter of public importance and the applicant has not shown the issue as yet to be a pressing one by, for example, demonstrating large amounts of patent filings and/or conflicting decisions on this question. There is just no evidence of that in the matter before your Honours, and - - -

EDELMAN J: Ms Goddard, do you accept that the Commissioner's position throughout, and perhaps still, is that in these circumstances the applicant was not the inventor of the invention?

MS GODDARD: Yes, your Honour, because that was an agreed fact, as your Honours will see listed in paragraph 8 of the Full Court's decision.

EDELMAN J: But it may involve questions of law as well as questions of fact.

MS GODDARD: Yes, your Honour, and the Full Court alluded to that in paragraph 121 of their decision. Indeed, it precludes the perhaps more interesting question of – the legal question of identifying the person who is, in fact, the inventor and the court expressed those concerns and we embrace them, but it was certainly the case we have come to meet, is as identified in the agreed facts and, of course, there are always attendant difficulties with that kind of factual - - -

EDELMAN J: If that factual and legal position is correct, and Dr Thaler is not the inventor, then there is a significant hole in the operation of section 15 because it means that you can have an invention but no inventor.

MS GODDARD: Yes, your Honour, that is a question of difficulty, although there are, of course, other ways of – we would submit there are certain policy considerations that might arise that the legislature might want to consider in terms of creating perhaps sui generis rights for this area of invention, but that is a matter for policy and for consideration of the legislature, really, after submissions are made from all interested parties. We submit that - - -

GORDON J: Is that right, Ms Goddard? I do not quite understand your answer to Justice Edelman there, I am sorry. Is that position, given what is set out in paragraph 121, on application book 90?

MS GODDARD: I think paragraph 121 is really concerned with the question of, as we understand it, the limited facts that the Court was entitled to address and that embraces questions of whether or not – their Honours

did not opine as to what their attitude may have been had there been one human inventor out of a number, but I hear what your Honour says.

EDELMAN J: Part of the difficulty for me, Ms Goddard, is if this were to be accepted to be an important question, it is very difficult to see how the question could ever be agitated before this Court, given the Commissioner's position that a natural person cannot be the inventor of an invention that is generated by the creativity of artificial intelligence.

MS GODDARD: Your Honour, we do not disagree with that because, of course, the whole structure of the Act and the regulations – as their Honours explained in going through the regulations – is that the Act is to bring in the entitlement requirement – the consideration of an entitlement requirement at an early stage – at the rudimentary stage, in particular in this context of the PCT application.

EDELMAN J: Are there any other facts that this Court would need to determine, as part of the application, whether or not the applicant was the inventor? We know that the applicant was the creator of the source code and that DABUS was something that the applicant was responsible for maintaining. Are there any further facts that this Court would need?

MS GODDARD: Your Honour, certainly there may well be. They are just not the facts that we have come to meet in that there would be all sorts of interesting questions as to what – to program the computer, who is in charge of asking the computer what to develop or in what way, what to have regard to and many other facts.

GLEESON J: Ms Goddard, if special leave were granted, would the respondent want to make a contention of the kind that Justice Edelman just identified?

MS GODDARD: Your Honour, from the point of view of the Commissioner of Patents, it is a sufficiently interesting question to understand whether the Act in its current form – that is, regulation 3.2C and section 15(1), and other sections of the Act – are, indeed, limited to identifying the inventor of a patent as being capable of being fulfilled only by a human person – a person with legal capacity.

GLEESON J: My question is really coming out of the fact that, as I understand it, Mr Shavin has made it fairly clear that his client does not wish to contend that he is the inventor. So, the proposition that he is the inventor is going to have to be propounded by someone. Would that be your client?

MS GODDARD: It could not be, your Honour, in this case, given the agreed facts – the way the matter has been run all the way, and the facts that were agreed from the very beginning - - -

EDELMAN J: Would it be the Commissioner's position, then, that the Act permits of the possibility in every circumstance of artificial intelligence that there is an invention with no inventor?

MS GODDARD: At this stage, your Honour, there would be possibly – the Commissioner's decision is that the Act permits only of a human inventor. That is the - - -

GORDON J: That does not really answer the question, Ms Goddard.

MS GODDARD: I am sorry.

GORDON J: The question is quite specific, and that is whether the Act submits the possibility that, in relation to artificial intelligence, that that invention has no inventor. So, the answer has to be yes, does not it?

MS GODDARD: Yes, I think so, your Honour, that is right. Although it is, of course, possible – it would be possible for one to determine that the inventor is a human being, even when the artificial intelligence, so called a machine, has invented - - -

GORDON J: This is where I have some concern, which I raised with Mr Shavin at the outset. You opened your submissions by saying that this had been created, this case, by Dr Thaler, in a sense because before in which he lodged his application with the office was in a particular form. Is that a section 15 construction question which would be before us like it is before the UK Supreme Court, in a sort of analogous way? Or is that an issue that is not before us?

MS GODDARD: No, your Honour, we submit that, in a sense, the Full Court was correct to leave that procedural question as being properly addressed, and properly dealt with by the regulation and section 15(a). That is partly because, as we see from the explanatory statement of the regulation, the regulation is intended to bring in – to ensure that the entitlement of the applicant to be granted the patent is clear. That puts it a slightly different circumstance from the UK legislation where perhaps a bare belief might suffice in that, as your Honours explained in the UK *Thaler Case*.

But, your Honours, we submit that in short, the Full Court's construction of the term "inventor" was correct and the Court did not fall into any error, and properly analysed – sorry, I withdraw that, that the

inventor must be a natural person follows from the ordinary meaning of the word "inventor", as well as the history and the structure of the Act. That is, the ordinary meaning is a person who performs the human action of making an invention.

It has been that way for 400 years, sine the *Statute of Monopolies*, and it is what it means in the historical patent legislation – the 1903 Act and the 1952 Act. Our friends agree with that. There is no change in the 1990 Act intended by the slightly different wording of section 15(1). Our friends' suggestion that there has been some radical change, we submit, when your Honours look at the section – which we do not have time to do now – is not borne out. They both deal with either the inventor who is a person – all three Acts deal with the inventor as a person – or a person who somehow derives title. In the old Acts, it was directly by assignment, here there is a more general concept of derivation of title.

We submit that is important to recognise – just taking a moment for what your Honour Justice Edelman just raised with my friend – what is the title of the right? Sections (b) and (c) of 15 do not grant some sui generis entitlement to a patent. It has to be somehow conveyed by the inventor, we say, and that is, what right is that? The right is a right to apply for the patent, and the machine never has a right to apply. We refer to the decisions on that, including Justice Emmett's decision in *University of British Colombia v Conor Medsystems Inc*, and there is some discussion about it by Lord Justice Arnold in the UK case.

Once one analyses our friends' approach – it is appropriate to consider the question now because our friends, the applicant, Dr Thaler, will never have a right to apply. I suppose there are two questions. One is, does the inventor have to be a human person? But even if that were decided against us, Dr Thaler would not succeed – but that is a question for another day, perhaps. We submit that the Full Court was correct in saying that 15(1)(b) and (c) do not arise at this stage, because the steps in regulation 3.2C says you have got to name the inventor. The court held at 84 that the inventor is the same under the regulations as it is in the Act. That is perhaps not surprising, and our friends embrace that.

Section 15(1)(a) says "the inventor" is, in 15(1)(a), a person who is the inventor of a patent. If the inventor is not a person within 15(1)(a), then that is the end of it, we submit. That is the simple answer to my friends' case. Otherwise, your Honours, we say that the court's elaboration on the history is without – it is not a case where the court has let the historical position to take over the ordinary meaning. The ordinary meaning is a person that accords with the cases on section 15, but also accords with cases like *D'Arcy v Myriad*, and the majority there – Chief Justice French and

Justices Kiefel, Bell, and Keane, at paragraph 6, where a patentable invention is "something brought about by human action".

That is the current position. That meaning accords with the dictionary definition, which the Deputy Commissioner relied on in his reasons, which was recorded by the Full Court at paragraph 32 – and the Macquarie online definition, which was recorded by the primary judge at paragraph 98, that is:

> someone who invents, especially one who devises some new process –

For our friends to say that "inventor" means an "agent noun", we submit, is a non sequitur because, though our friends are using what is really a linguistic function – or derivation – to rewrite the ordinary meaning, of course agent nouns can be done by persons or machines but it depends on the noun from which the agent noun hails. It does not follow that just simply because an inventor is an agent noun, it means that the act can be done by a person or machine. One has to look to the ordinary meaning of a term.

Your Honours, those were my submissions, if that - - -

GORDON J: Thank you, Ms Goddard. Mr Shavin, anything in reply?

MR SHAVIN: Perhaps four propositions. We do not say that there is a radical change in section 15, we do say that the form of section 15 now born in the Act extends to encompasses changes in technology of the type envisaged by this Court in *Myriad*.

Secondly, we say that, on its plain construction, it is wrong to say that to be an inventor one must fall within section 15(1)(a) of the Act. The Act itself is not formed in that way and it is clear, for the reasons we identified both in our special leave application and as articulated by the primary judge that, when one looks at 15(1)(b), there is no reference to an assignment having to be an assignment from the inventor. You can have assignments – and commonly do – in circumstances where there is no contractual relationship with the inventor at all, particularly, for example where the inventor is an employee of an organisation that is contracted to the applicant.

Thirdly, we say that our friends seem to have equivocated as to whether this is an important issue or not but, in our respectful submission, at the end it is clear from our friends' submissions that it is an important issue, because if the formality is going to be used as the hurdle to be

overcome, then it is only in a case such as this that that hurdle can be assessed.

EDELMAN J: Mr Shavin, can I just ask you about that point. I understand your submission, which is to the effect that the applicant does not want to describe himself as the inventor, particularly in circumstances where he knows that that application would be rejected and there is no legal decision that would support that conclusion. Do you also say that as a matter of law the applicant is unable to describe himself as the inventor because he did not take the ultimate creative step?

MR SHAVIN: Yes.

EDELMAN J: Which would have the effect, then, that if you were granted special leave that there would be no contradictor to that legal proposition, which may be an important step in your argument on the construction of section 15. Is there any reason why the Court should not appoint a contradictor and, if so, who ought to bear the costs of that contradiction?

MR SHAVIN: In our respectful submission, it is not a matter on which there ought to be a contradictor. The Commissioner has not at any stage in the litigation to date suggested that anyone other than DABUS would be the inventor, and if one considers the stage – the procedural step, there would be no opportunity for the Commissioner to consider any underlying fact. This is a procedural statement at the outset. The Commissioner has not sought to consider the question as to who is the inventor. The Commissioner has rejected the application on the formality.

So, in our respectful submission, it would be inappropriate in this Court to try and open a question which the Commissioner has not raised at any stage, not in its decision, not before the primary judge, not in the Full Court, nor in a manner that the Act contemplates. The Act does not contemplate there will be an opposition as to whether or not a person is the inventor. There simply has to be the articulation of a name by the person who is the applicant.

So, in our respectful submission, it would be inappropriate for this Court to effectively undertake a trial as to whether DABUS was truly the inventor. That would be a matter for prosecution. That would be a matter further down the track, when the Commissioner actually examines the application.

EDELMAN J: Your submission, Mr Shavin, ultimately comes down to the point that this Court, if it were to grant special leave to appeal, needs to

consider the issue on the basis of an underlying legal assumption without a contradictor which may go to the heart of the question?

MR SHAVIN: Yes, because the question of law is, was the Commissioner entitled, merely by the appearance of the name of a non-natural person as the inventor, entitled to reject the application?

EDELMAN J: Yes, but that question of law may carry with it the question of whether or not it is possible to have an invention without an inventor. And your submission is that it is, and there is no contradictor to suggest that it might not be.

MR SHAVIN: Save as to this, your Honour. We say that the question is raised on the face without it being necessary for the Court to investigate what DABUS does. It is our respectful submission that the application having been rejected on the face without an inquiry into fact, the question is to whether that rejection, on the face, was lawful. That is the question which we seek to raise in our special leave application.

GORDON J: I think that is your time, Mr Shavin. The Court will adjourn to consider the position it will take.

AT 1.11 PM SHORT ADJOURNMENT

UPON RESUMING AT 1.15 PM:

GORDON J: The Court is of the opinion that this is not the appropriate vehicle to consider the questions of principle sought to be agitated by the applicant. Special leave to appeal is refused with costs.

Please adjourn the Court to 1.30 pm.

AT 1.16 PM THE MATTER WAS CONCLUDED