

Micawberism, homeopathy and plausibility

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by Rachel Mumby

Those readers who are unfamiliar with the excessively optimistic outlook of Mr Wilkins Micawber in Charles Dickens's novel *David Copperfield*, would be forgiven for having had to look up the word "Micawberism" on reading it in the judgment of Floyd J (as he then was) in *Blacklight Power Inc. v The Comptroller-General of Patents* [2008] EWHC 2763. However, having been introduced to the term, those readers with a conventional scientific view of the world, would arguably be justified in using it on learning about the eleven patent applications which are the subject of the recent judgment of Roger Wyand QC, sitting as a Deputy High Court Judge in the case of *Oleg Ilich Epshtein v the Comptroller General of Patents, Designs and Trade Marks* [2016] EWHC 1511 (Ch), on appeal from the UK IPO.

All eleven applications had been rejected by the UK IPO on the basis of lack of industrial applicability and sufficiency (plausibility). The claimed compositions and medical uses are to ultra-low dilutions of antibodies, so low that, statistically speaking, the compositions do not contain a single molecule of the antibodies. (Some might think that this is game over, but no, read on...).

Applying Floyd J's test in *Blacklight*, the hearing officer had considered whether, on the materials before him, there was a substantial doubt about the plausibility of the inventions; and whether on the balance of probabilities there was a reasonable prospect that matters would turn out differently on a fuller investigation. He held that both limbs were satisfied and thus rejected the applications (he thought the available data merely showed a mixture of the placebo effect and a series of experimental anomalies).

However, Roger Wyand QC disagreed with his analysis and remitted the applications back to the UK IPO for further consideration. This was because, despite there being "*no doubt that the claimed effects are difficult to believe*", the plausibility of the therapeutic effect had, in fact, been shown to be established by data in the applications (including a double-blind placebo controlled study in 146 children), and the hearing officer had misinterpreted *Blacklight*, thus set the bar too high, by requiring a plausible scientific theory behind the therapeutic effect to be explained.

The judgment can be found [here](#).