

Quo Vadis Patent Litigation: *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC) - In Search of the Bigger Picture on Patent Validity

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Abstract

In October 2019 the Constitutional Court (CC) handed down judgment in the matter of *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC). This is its first judgment dealing with the validity of a patent and, as it concerns issues that go to the heart of patent law, the judgment potentially has far-reaching implications for patent litigation in South Africa.

At issue was the question of whether a court's finding of patent validity on one ground in a revocation hearing ought to have a bearing on a subsequent infringement hearing on the same patent, to the extent that the alleged infringer is barred from raising a different ground to attack the validity of a patent. In essence, did the attempt to do so offend the principle of *res judicata*? This was a direct appeal to the Constitutional Court after the High Court ruled that it did so offend, and the Supreme Court of Appeal refused leave to appeal. The Constitutional Court was deadlocked on this issue, with the result that the decision of the High Court refusing *Ascendis'* application to amend to introduce a new ground of attack stands, and the *res judicata* objection was upheld.

The decision raises important questions about the application of the principle of *res judicata* in such cases where the Patents Act allows dual proceedings for revocation and infringement actions, the meaning of provisions of the Act as they relate to the certification of patent claims, and the broader public interest considerations implicated in patent law adjudication.

This note observes that while the outcome sends a strong signal about the courts' displeasure at attempts to prosecute "repeat litigation", an unsatisfactory outcome is that patents can apparently be validated on the basis of merely one of the mandatory requirements for patent validity as required by the Act. It argues that such an outcome is undesirable and does not serve the public interest. This is because it closes the door to further challenges while potentially thousands of patents, which would not have passed the validity test had they been subjected to substantive examination, remain on the patent register.

Keywords

Intellectual property; patent law; *res judicata*; interpretation of statutes; public interest.

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1 Introduction

The recent Constitutional Court judgment in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation*¹ (hereinafter referred to as *Ascendis*) is the first judgment by our highest court dealing with the validity of a patent, and as it concerns issues that go to the heart of patent law, this judgment may have far-reaching effects on patent litigation in South Africa. As to how the judgment advances the law, the deadlock means that the CC was not dispositive of the issue, and the decision of the High Court, which was the subject of the appeal, stands by default, as it were. Its impact may be felt in the manner in which future litigants (as well as courts) approach similar disputes, aligning with one or other of the two equally-supported judgments.

This case centred on an application by Ascendis Animal Health (the Applicant) to amend its pleadings in infringement proceedings brought by Merck Sharp Dohme (the First Respondent) to include the defence of invalidity on the ground of lack of obviousness, after failing to prove invalidity on the ground of novelty in a revocation action it had brought against Merck.² The ground of obviousness was not raised in the revocation hearing. Merck responded with a counterclaim for an amendment to its own papers to include the defence of *res judicata* in relation to the validity challenge. The case raised a number of complex legal questions.

The crux of the dispute is as follows: In proceedings between two parties over a patent, where there are parallel proceedings in terms of which party A claims revocation and party B claims infringement, does the court's finding in the revocation proceedings that B's patent is valid have a bearing on the infringement proceedings – such that A cannot raise the defence of invalidity because doing so would offend the principle of *res judicata*?

The Gauteng High Court said yes and refused the application, the Supreme Court of Appeal (SCA) refused leave to appeal,³ and the Constitutional

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¹ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC) (*Ascendis*).

² *Ascendis* para 5.

³ *Ascendis* para 6.

Court (CC) was split down the middle and gave two lengthy and diametrically opposed judgments.⁴ The first judgment was authored by Khampepe J, and the second by Cameron J. The core contention between the two judgments related to the application of the doctrine of *res judicata* in the context of litigation concerning the validity of a patent. Khampepe J took a strict, technical approach of the "same cause of action" requirement, concluding that because the *facta probanda* of proving invalidity on each of the various grounds of revocation were different, despite the fact that they all related to the validity of the patent, raising one ground in revocation proceedings and subsequently another in infringement proceedings does not trigger *res judicata*. Thus, Khampepe J would allow the amendment by Ascendis. The second judgment took a more purposive approach to *res judicata*, concluding that the point of the doctrine was to prevent piecemeal litigation on what it deemed the same issue – patent validity - and that this was such a case. Cameron J would find in the same manner as the High Court and deny the amendment.

Given that neither judgment was able to secure majority support, the judgment of the High Court denying the amendment stands. In reaching this impasse, unfortunately, the Constitutional Court left us with many fundamental issues unresolved. In this note we discuss the two judgments and review some of the unexplored areas that continue to plague the future of patent litigation. Given that the core issue in this judgment was *res judicata*, this will be the focus of this paper.

2 Background

In 2011 Ascendis filed an application for the revocation of a patent held by Merck on two grounds. Firstly, that it was not novel; secondly, that it did not involve an inventive step – in other words: that the patent's claims were "obvious".⁵ The patent, granted in 1998, related to an anti-parasitic formulation used on cattle. Merck filed a counterclaim on the grounds that Ascendis had been selling a product under the trademark "Ivermax LA Platinum" marketed as an anti-parasitic for cattle and swine which, it claimed, infringed on its patent. Ascendis' plea in defence of the infringement application attacked the validity of Merck's patent on the same grounds as in the revocation application, namely novelty and obviousness.

This occurrence is fairly commonplace in patent litigation in South Africa, and in such cases the infringement proceedings are stayed, pending the

⁴ *Ascendis* para 3.

⁵ *Ascendis* para 7.

outcome of the revocation proceedings, since the infringement question turns on the issue of whether the patent was valid in the first place.

During the course of the revocation proceedings Ascendis abandoned the ground of obviousness, instead focussing its attack on the validity of the patent on the ground that it lacked novelty. Ascendis was successful in the court of first instance, and the High Court held that the patent was not novel as its claims had been disclosed in a prior patent filed in 1992.⁶ However, Merck's appeal to the SCA was upheld.⁷ Having succeeded in defending the validity of its patent, Merck then proceeded with its action for infringement.

Subsequent to the judgment of the SCA, Ascendis sought to amend its plea in the infringement application in order to remove the defence that the patent was not novel (which had been defeated in the revocation application), to retain the ground of obviousness (which it had abandoned in the revocation proceedings) and to introduce a third, new, ground, namely inutility.⁸ Merck opposed the application for amendment and filed its own application to amend its replication to Ascendis' plea in which it raised *res judicata* and, additionally, filed an application for an interim interdict to prevent Ascendis from continuing to infringe its patent by the sale of Ivermax LA Platinum.⁹ Merck contended that the interdict was necessary because Ascendis was deliberately frustrating proceedings, as the patent was close to expiry.¹⁰

In the interim interdict proceedings, Louw J found that Ascendis was attempting to re-try the matter of the patent's validity by amending its pleadings in the infringement proceedings.¹¹ This strategy amounted in the Court's view to piecemeal litigation, specifically as it related to the defence of invalidity based on obviousness, which it had raised in the earlier revocation proceedings but had abandoned, and was attempting to revive in the infringement application. The court granted the interim interdict sought by Merck.¹² When the matter of the amendment was heard in the High Court, Van der Westhuizen J echoed these sentiments, holding that since the cause of action in the revocation proceedings and the defence to the

⁶ *Ascendis* para 12.

⁷ *Ascendis* para 14.

⁸ *Ascendis* para 15.

⁹ *Ascendis* para 16.

¹⁰ *Ascendis* para 16.

¹¹ *Ascendis* para 17.

¹² *Ascendis* para 19.

interim proceedings was the same, namely the validity of the patent, Merck's amendment to its replication to include *res judicata* must be upheld.¹³

Aventis attempted to appeal the dismissal of its amendment application. Following refusal by the High Court and Supreme Court of Appeal, leave to appeal was granted by the Constitutional Court. Aventis' contention was that the High Court had erred in dismissing its application for the amendment on the basis of *res judicata*. Ascendis contended that each statutory ground for revocation of a patent is a separate cause of action and that by advancing a new and further ground of invalidity, it was raising a new cause of action.¹⁴ The Court *a quo* disagreed, concluding that the validity of a patent is a single cause of action which may be attacked on one or more of the various grounds in section 61 of the *Patents Act* (the Act).¹⁵ Thus, a party may not bring several claims before the court on the question of validity, each on a separate ground, as this would constitute piecemeal litigation – the exact kind of nuisance the principle of *res judicata* seeks to avoid.¹⁶ It was this issue - whether Ascendis' application ought to be dismissed on the basis that raising invalidity as a defence in infringement proceedings after a patent had been found to be valid in the context of revocation proceedings was *res judicata* - that the Constitutional Court had to grapple with.

3 Judgments in the Constitutional Court: Should *res judicata* apply?

The first judgment in the Constitutional Court concluded that while both the revocation and infringement applications relate to the validity of a patent, the Act provides for two separate proceedings, which ultimately have two different outcomes.¹⁷

The first judgment adopts a bifurcated view of revocation and infringement proceedings, and thereby endorses Ascendis' argument that each ground

¹³ *Ascendis* para 25.

¹⁴ *Ascendis* para 21.

¹⁵ Section 61 of the *Patents Act* 57 of 1978 (the PIA).

¹⁶ *Ascendis* para 22.

¹⁷ *Ascendis* para 46. In supporting this assertion, Khampepe J refers to certain differences between applications for revocation and infringement: Whereas revocation is an application (i) open to any party, (ii) ordinarily brought through written evidence, and (iii) the onus is on the applicant; an infringement application may (i) only be brought by a patent holder, (ii) takes the form of an action, where oral evidence is the norm, and (iii) the burden of proof is on the patent holder.

of revocation is a separate cause of action because each requires the applicant to prove different *facta probanda*.¹⁸ As such:¹⁹

When the Legislature has endorsed two separate proceedings with their own rules and remedies then it would be wrong for this Court to conclude that the findings in the revocation proceedings have a final effect on the infringement action for causes of action which have not actually been adjudicated upon in revocation proceedings. It might lead to the dual proceedings being nugatory and of no effect because a finding on the revocation proceedings could be carried over to the infringement action.

As Khampepe J saw it, it would be erroneous to conclude that determinations on the validity of a patent in revocation proceedings could be final for the purposes of infringement proceedings on the basis of *res judicata*, because these were separate proceedings in terms of the Act and should thus be adjudicated separately. Given that each of the grounds of action was, according to the first judgment, a separate cause of action, the real question was whether an applicant could raise or rely on a cause of action which had not been adjudicated on in the revocation proceedings.

The question that arises is: can a patent found to be invalid in revocation proceedings still be valid for the purposes of infringement proceedings? Or conversely, can a patent found to be invalid in infringement proceedings be regarded as valid for the purposes of revocation proceedings? Khampepe J points to the differences in the way the Act outlines proceedings for revocations and infringement – especially as it relates to remedies – as a reason for treating them in a mutually exclusive fashion, stating that "[w]e should be slow to undermine the objective of the Legislature unless it leads to a constitutionally untenable outcome or an intolerable absurdity."²⁰ It has been argued, however, that our courts' approach to legal proceedings on patent validity has on occasion resulted in one such an absurdity, because it permits a patent holder whose infringement claim against one alleged infringer has been defeated to sue others for infringing the same patent.²¹ It is thus conceivable that a patent holder whose claim to a patent is tenuous (and has not been sustained by a court hearing the first infringement claim)

¹⁸ *Ascendis* para 52.

¹⁹ *Ascendis* para 47.

²⁰ *Ascendis* para 48.

²¹ Vawda 2019 SA/PLJ 194-195. The author remarks on "the anomalous practice in infringement proceedings that, even if it were found that the invention was not patentable, it would remain valid absent a counterclaim for revocation. The *Strix* judgment cites with approval the dicta in *Thomas Grant v Winkelhaak Mines Limited* that '(e)ven if a defence of invalidity is successful, thereby defeating an infringement action, the patent remains on the register and the proprietor can sue others on the patent.'"

could "try his luck" by seeking to enforce the patent against multiple future alleged infringers and possibly have his claim upheld in those instances. This could be the case because, for the purposes of infringement proceedings, the outcome is valid only between the litigants in an action – even though it *de facto* relates to a question that is of interest to all potential infringers, and society at large, namely, whether the patent satisfies the criteria for patentability required by section 25 of the Act.

This state of affairs also raises valid concerns about equality before the law and the rule of law, because some parties may be punished for infringing while others are not, even though both parties engaged in the same action. An additional concern is whether it is in the public interest that a patent which has been found not to satisfy the statutory requirements remains on the register. Yet another serious concern relates to two separate courts in proceedings between the same parties finding the same patent to be valid and invalid respectively, since both proceedings relate to the same basic question of whether the patent meets the criteria for patentability in terms of section 25 of the Act.

It is suggested that there is a need to re-think the question of patent validity in broader terms which transcend the narrow and technical boundaries of court procedures and age-old legal canons. For Cameron J, writing the second judgment, the key issue in this case was its implications for patent litigation, namely, whether courts should allow multiple-stage defences in relation to patent validity in patent disputes, and thereby allow litigants (be they the patent holder or challenger) multiple bites at the cherry, the first bite in revocation, and the second in infringement proceedings.²² In the view of the second judgment, the notion of multiple-stage defences was not acceptable. As Cameron J states: "This is not how enforcement of patents should most fairly and efficiently work".²³ This is because the alternative approach would mean that nothing deters a potential infringer from frustrating the patent holder's rights by bringing multiple claims on each of the grounds of validity in the process of both revocation and infringement proceedings.²⁴ More preferable would be to raise all arguments on every ground of revocation or defence to infringement in a single action, to enable the court to give full consideration to the question of the validity of a patent. The second judgment departed from the first's approach to the question of *res judicata*, and instead looked to the purpose of the doctrine which, it

²² *Ascendis* para 107.

²³ *Ascendis* para 107.

²⁴ *Ascendis* para 108.

argued (as the SCA did), was exactly to avoid the kind of repeat litigation which may arise in relation to what is fundamentally a dispute between the same parties (the patent holder and the alleged infringer) litigating over the same subject matter (the validity of the patent).²⁵ Commenting on the origins of this principle, Cameron J states:²⁶

But the doctrine's roots lay in good sense and fairness. This demanded wider application that barred repeat cycles of litigation on less stringent exaction of the 'same cause of action' requirement. And that happened. First, in *Boshoff*, in the early twentieth century, and then through a line of more recent Appellate Division and Supreme Court of Appeal decisions.

And so it has become well accepted that enforcing the requirements of *res judicata* should yield to the facts in each case. Thus, the doctrine was enforced when a plaintiff demanded the same thing on the same ground, or (which is the same) on the same cause for relief, or further, where the same issue had been subjected to final previous judicial determination.

Thus, the current position in our law is that the enforcement of the rules of *res judicata* is not set in stone,²⁷ but instead yields to the overall purpose of this principle in avoiding the nuisance of the unnecessary duplication of adjudication between the same parties on what are essentially the same legal issues. And so the second judgment concurs with the SCA's application of *res judicata*, but emphasises that the principle should not be applied inflexibly:²⁸

The default position [in patent litigation] should be that a previously unsuccessful revocation applicant is precluded from raising the validity of the patent in a subsequent damages claim. And if this is unfair, then the court should allow the later defence to be raised, exceptionally, for that reason.

On account of Ascendis' actions in this case, including its abandonment of the ground of obviousness it later sought to revive, the second judgment held that the interests of justice favoured treating the SCA's judgment as conclusive of the patent's validity. The second judgment, read together with that of the SCA, would appear to signal the death-knell of piecemeal litigation, which has constrained the courts in dealing holistically with questions of the validity of patents. Henceforth, litigants must be able to present all their arguments on the various grounds of invalidity in a single claim, on pain of falling foul of the doctrine of *res judicata*.

²⁵ *Ascendis* para 110.

²⁶ *Ascendis* paras 112-113.

²⁷ *Ascendis* para 112.

²⁸ *Ascendis* para 123.

But was this finding necessary? The first judgment argues it is not, given that the Act itself already contains mechanisms to deter such vexatious litigation that does not require a departure from the bifurcated proceedings for which the Act provides.

4 The relevance of section 74 of the *Patents Act* to the issue of *res judicata*

One of the core issues in contention between the first and second judgments was the interpretation of section 74 of the Act, which provides:

- (1) If in any proceedings the validity of any claim in a complete specification is in issue, the commissioner or the court, as the case may be, finding that claim to be valid, may certify to that effect.
- (2) If in any subsequent proceedings the validity of that claim is unsuccessfully attacked by any party, that party shall, unless the commissioner or the court, as the case may be, otherwise directs, pay to the other party his full costs, charges and expenses as between patent agent or patent attorney or attorney and client so far as that claim is concerned. (underlining added)

For Khampepe J this provision clears the way for subsequent challenges by the same party to the validity of a patent, albeit on different grounds, with an "internal mechanism" to sanction the abuse of process with a punitive costs order.²⁹

The second judgment and the SCA read section 74(2) differently, citing the case of *Alcatraz Integrated Intelligent Systems v Intergra-Set* (hereinafter *Alcatraz II*), which determined that "any party" in this provision must be interpreted as "any *other* party", that is, section 74 does not apply to the party which had originally challenged the validity of the claim which was then certified in terms of subsection (1) of section 74.³⁰ Makgoka J's justification for this conclusion is as follows:³¹

In this regard it was argued on behalf of the applicant that 'any party' referred to in the sub-section is wide enough to include a party who had previously unsuccessfully applied. I do not agree. On a proper construction of the sub-section, I conclude that 'any party' refers to a third party. Should the Legislature had (sic) intended otherwise, it would have made it clear that such party includes a previously unsuccessful party. In any event, I am of the view that the position contended on behalf of the applicant, would lead to absurd

²⁹ *Ascendis* para 85.

³⁰ *Alcatraz Integrated Intelligent Systems (Pty) Ltd v Intergra-Set (Pty) Ltd* 2010 BIP 94 (CP) (*Alcatraz II*).

³¹ *Alcatraz II* para 19.

results, in that there could be no finality of the questions in an action as between the parties.

Unfortunately, there is no further elaboration on why this interpretation of section 74 is deemed to be the "proper construction". As this is a matter of statutory interpretation, the validity of this conclusion by the court in *Alcatraz II* may be examined with reference to the principles of statutory interpretation.

In cases where existing law (in this case, the common law) has purportedly been altered by a statute, reference must be made to the common law presumption that, "an enactment does not alter the existing law more than is necessary",³² which has been described as the "most fundamental of all the presumptions".³³

In such cases, a departure from the existing law must be made explicitly clear in the enactment, such that the interpretation of that provision as altering the current law is a "necessary" inference, and "not merely a possible one".³⁴ As stated by the court in *Commissioner of Taxes v First Merchant Bank of Zimbabwe*:³⁵

It is a seminal presumption in statutory construction - indeed, the most fundamental of all the presumptions, often referred to as 'a sound rule' – that the Legislature does not intend to alter or modify the existing law more than is necessary. Thus, any intention to do so must be declared *in clear and unequivocal language*; or the inference must be such that the inevitable conclusion is that the Legislature did have such an intention.³⁶

This presumption gives credence to the court's finding in *Alcatraz II* – which was endorsed by the SCA and the second judgment in the CC – that section 74, properly construed, does not alter the common law position that a single party may not instigate repeat litigation on the same issue. To interpret section 74 as the first judgment proposes is indeed a *possible* inference, but so is the interpretation endorsed by the second judgment. There is nothing in the wording of section 74, we suggest, that clearly or unequivocally leads to the conclusion that this provision was intended to be an alteration of the common law position on *res judicata*. The more tenable interpretation is that section 74 exists to deter third parties from bringing baseless and potentially

³² *Hlatshwayo v Hein* 1999 2 SA 834 (LCC) 839G-H.

³³ Devenish *Interpretation of Statutes* 159.

³⁴ *Kent v South African Railways* 1946 AD 398 405.

³⁵ *Commissioner of Taxes v First Merchant Bank of Zimbabwe* 1998 1 SA 27 (ZS).

³⁶ *Commissioner of Taxes v First Merchant Bank of Zimbabwe* 1998 1 SA 27 (ZS) 30G-I.

abusive or vexatious litigation against claims in a patent which the court has already adjudicated.

5 The bigger picture: the public interest in conclusively determining the validity of patents

Both judgments in *Ascendis* have their "blind spots" which have resulted, in our view, in many unanswered questions and an unsatisfactory outcome.³⁷ As already discussed, our concern with the first judgment is that it does not satisfactorily negotiate the problem of repeat litigation that its approach entails. It also fails to overcome the hurdle of section 74(2), as to whether the statute itself bars *Ascendis* from raising in infringement proceedings defences in addition to the one raised and defeated in revocation proceedings. On the other hand, while the second judgment's interpretation of the *res judicata* principle is more tenable, its approach is not without its flaws. Particularly worrying is its endorsement of the approach adopted by the High Court and SCA in settling the question of patent validity.

This begs the underlying question which is of paramount importance to the bigger picture of patent litigation in South Africa: what "conclusively determines" a patent's validity? Can it be determined on merely one of three requirements of section 25 of the Patents Act having been considered and decided? The effect of the approach adopted by the Commissioner, the High Court, the Supreme Court of Appeal and the second judgment appears to suggest this. This approach is deeply problematic, and potentially gives the green light to many patents whose validity has not been established after satisfaction of the requirements for patentability as required by section 25 of the Act. The second judgment's failure to interrogate this aspect is disappointing.

Our criticism is based on South Africa's depository system of patent applications, in terms of which the substantive merits of the application are not considered, and the patent is granted on compliance with formalities, including the declaration of the applicant that "to the best of my/our knowledge and belief, if a patent is granted on the application, there will be no lawful ground for the revocation of the patent".³⁸ This is hardly a high standard for granting extremely strong rights with far-reaching consequences emanating from the exercise of these monopoly rights. The

³⁷ It is for these reasons the authors see no merit in aligning themselves with either the first or second judgment – the fundamental gaps in the reasoning of both judgments leave something to be desired.

³⁸ Form P3 in GN R2470 in GG 6247 of 15 December 1978.

depository system has always been premised on the understanding that the validity of every patent could be tested by the courts either in revocation or infringement proceedings.³⁹ It is erroneous in our view to certify a patent as valid when the litigation is limited to a single requirement for patentability. It is our contention that there is a duty on our courts to interrogate the issue of the validity of a patent in its entirety when seized of such a dispute. This inability to do so over decades of patent litigation in our view risks rendering meaningless the role of the superior courts as the final arbiters of patent validity.⁴⁰

To its credit, the first judgment references the public interest in patent disputes, asserting that, "we must not lose sight of the fact that testing the validity of patents is in the public interest because patents create artificial monopolies". As these artificial monopolies result from the lack of a substantive examination of patent applications, the first judgment notes that it falls to private parties to regulate this system, and "instead of deterring litigants, who are working both in a private capacity and for the public interest, there should be an inclination to encourage them to bring more revocation challenges, not to create extensions in the common law that increase the costs and risks of doing so."⁴¹ The second judgment, regrettably, has nothing to say on this critical aspect.

6 Conclusion

The future of patent litigation in the wake of the *Ascendis* judgment remains uncertain. The judgment of the High Court and the second judgment in the CC intend to send an unequivocal message to potential litigants that strategies of intentionally dividing one's claims regarding the validity of a patent in order to prolong the litigation process will not be entertained. How this message will be received and enforced by other courts remains to be seen. In the final analysis, though, the stalemate in the CC has the potential to endorse decisions made invariably in favour the rights of the patent holder (as has happened in this case) while not giving sufficient consideration to the broader public interest served by thoroughly examining all the patentability requirements to establish validity, and removing undeserving patents from the register. While the application of the principle of *res judicata* to avoid unnecessary and vexatious litigation is clearly appropriate in at least some cases, we suggest that a strict adherence to the doctrine

³⁹ See generally, Burrell *Burrell's South African Patent and Design Law* 110-111.

⁴⁰ Vawda 2019 *SAIPLJ* 196-197.

⁴¹ *Ascendis* para 100.

would not necessarily serve the public interest optimally, especially if it results in the validity of patents not being thoroughly ventilated in and considered by our courts.

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List of Abbreviations

CC	Constitutional Court
SAIPLJ	South African Intellectual Property Law Journal
SCA	Supreme Court of Appeals