## *KIRIN-AMGEN, INC. V. HOECHST MARION ROUSSELL, LTD.*

*[2004] UKHL 46; [2005] 1 All ER 667 (H.L. 2004), available at 2004 WL 2330204*

The House of Lords rejected the patent construction doctrines of strict textual interpretation and the doctrine of equivalents in favor of a standard based on what a person having ordinary skill in the art reasonably understood himself to be patenting at the time of invention.

Kirin-Amgen, Inc. ("Amgen"), discovered a method of producing erythropoietin ("EPO"), useful for the treatment of anemia, by using recombinant DNA technology. Amgen's method, for which it held a European patent, involved introducing an exogenous DNA sequence coding for EPO into a host cell. Another company, Transkaryotic Therapies, Inc., from whom Hoechst Marion Roussell, Ltd., imported EPO, developed a method involving inserting an endogenous DNA sequence coding for EPO driven by an exogenous upstream control sequence into a human host cell. Amgen claimed Hoechst and TKT (collectively "TKT") infringed its patent, and TKT sought a declaration of noninfringement and a revocation of the patent on grounds of insufficiency. The High Court found one of Amgen's claims invalid and another valid and infringed. The Court of Appeal held that both claims were valid, but that neither was infringed. Both sides appealed, Amgen from the finding of no infringement and TKT from the appellate court's finding of sufficiency.

The Lords dismissed Amgen's appeal and allowed TKT's cross-appeal, revoking Amgen's patent and stating that a person skilled in the art would read Amgen's claim as attempting to patent the discovery of a protein, which is not patentable subject matter. After briefly outlining the doctrine of equivalents, Lord Hoffman described the abandonment of both this doctrine and that of literalism in patent construction in the U.K. in *Catnic Components Ltd. v. Hill & Smith Ltd.*, [1982] RPC 183 (H.L. 1980). Equivalents, according to the Lords, can still be relevant as an evidentiary matter, forming the background knowledge of one skilled in the art. What a person skilled in the art would take a claim to mean, however, is the only appropriate question when constructing a patent's claims. Any other questions, including those arising in the Protocols of Article 69, are intermediate in answering this ultimate inquiry about the person having ordinary skill in the art. The Lords also declared that this approach to patent construction comports with that of Germany and of the Netherlands and is consistent with Article 69 of the Convention on the Grant of European Patents 1973.