



the Office's refusal to allow restoration. That letter was forwarded to Mr Sean Dennehey, Director of Patents at the Patent Office for consideration and reply. In his letter to Mrs Holdham of 26 May 2004, Mr Dennehey described in more detail why the evidence she had supplied was insufficient. He explained that she had not provided supporting evidence covering the period March to December 2001 when the fee could have been paid. In particular he explained that she had not furnished documentary evidence from a medical practitioner which showed that during that period her health problems prevented her from paying the renewal fee or arranging for someone else to pay it on her behalf. Mr Dennehey also explained that she had not provided evidence covering that period which showed that she had diligently attempted to seek financial assistance or that she had insufficient financial resources to pay the fee. He also said that because the assault she had suffered was outside the relevant period it could not be taken into account in considering her application for restoration. Mr Dennehey said he was prepared to allow Mrs Holdham to file further evidence and extended the deadline to 2 July 2004.

- 5 In the event, no further evidence was forthcoming by 2 July 2004 and so the Office wrote again to Mrs Holdham on 21 July 2004 repeating the reasons for its preliminary view and concluded by stating that her restoration application would be finally refused unless, within one month from the date of the letter she requested to be heard in the matter.
- 6 On 30 July 2004, Mrs Holdham wrote again to the Office stating that the problems she encountered in 2000 were relevant as they went on well into 2001, including the affect of the assault she had suffered. She explained that during 2001 the only income she was receiving was her State Widow's Pension and Navy Widow's Pension as her Disability Living Allowance (DLA) and income support had not been reinstated. She also says that she had been unsuccessful in her efforts to obtaining financial backing. Moreover, she says she was suffering from several new health problems. Enclosed with the letter were copies of various documents relating to the assault incident including a letter from the Procurator Fiscal's Office stating that it had been decided that no further proceedings would be taken against her alleged assailant.
- 7 In its subsequent letter of 10 August 2004 the Office explained that it was still not satisfied that Mrs Holdham had demonstrated that the assault, health and financial problems were sufficient during the critical period of 26 March to 26 December 2001 to prevent her from paying the renewal fee and so was not prepared to change its view that restoration should be refused. Mrs Holdham was given a final extension until 21 August 2004 to ask to be heard in the matter and replied on 16 August requesting a hearing. This was followed by a further letter to the Office on 12 September 2004 in which she explained that she was endeavouring to obtain evidence from medical practitioners and would be asking her lawyers to provide information about her financial situation.
- 8 In its subsequent letter of 20 September 2004 the Office granted Mrs Holdham a further period of 14 days to provide further evidence. However, nothing was received and so the Office wrote to her again on 11 October 2004 to say that arrangements would be made to fix a date for a hearing.
- 9 Mrs Holdham's DLA, which amounted to over £200 per month, was withdrawn on 2

August 2000. When asked at the hearing how she had managed to pay the eighth year renewal fee in October 2000 she said, speaking under oath, that she used the money she received on 1 October 2000 from her Navy pension. She then paid the remaining £72 for the three months of extension fees, which was also due, in December 2000 using the Navy pension she received on 1 December 2000 and the following month's payment which was paid early. However, she says she could not afford to do the same for the ninth year renewal fee because the income support she had been receiving was reduced and eventually withdrawn while her rent had been increased.

- 10 When asked what efforts she had made to obtain money to pay the fee, Mrs Holdham said she applied to the Royal Navy Benevolent Trust for assistance in paying rent arrears but without success. She says she also applied for a grant from the Carnegie Trust in Dunfermline but was also unsuccessful. Mrs Holdham says she did not approach her bank for a loan in 2001 because it had constantly refused her money in previous years and, as she was no longer receiving a DLA or Navy Pension, there was even less chance of her obtaining a loan. She also said that the bank had imposed an overdraft limit on her of £10.
- 11 At the hearing I said I would allow Mrs Holdham a period of one month to provide information about her income and expenditure during the period in which the renewal fee could have been paid. The documents she subsequently filed on 5 April 2005 comprise a collection of papers, many of which do not appear to have a bearing on the period in question. However, among the papers is a letter dated 23 July 2001 from Fife Council about arrangements agreed with her to reduce her rent account balance and a letter dated 14 September 2001 from the Soldiers, Sailors, Airmen and Families Association (SSAFA) refusing her request for assistance.
- 12 With regard to her health problems, in her letter of 25 January 2003 Mrs Holdham lists various debilitating illnesses from which she was suffering. Attached to her subsequent letter of 2 May 2003 is a copy of a hospital report dated 31 October 2000. The report explained that on 6 October 2000 she was admitted to hospital with numerous health complaints, primarily chest pains, and that she was discharged the following day after the pain had settled. In her letter of 7 August 2003 Mrs Holdham says she was greatly weakened by her health problems which affected her ability to respond to the Office's rule 39(4) renewal reminder letter.
- 13 In her letter of 12 February 2004 Mrs Holdham says she had been subjected to harassment from certain individuals in her local community which made her fear for her personal safety. She also says that she was assaulted by her boyfriend which caused further distress. At the hearing she said that although these occurred in 2000 the stress it caused her persisted into 2001 including the period during which the renewal fee could have been paid. She also explained that another source of concern to her was that no tests had been carried out to identify the reasons for the medical conditions, notably the cause of the tremors and migraine she was experiencing. She also said that she was affected psychologically by the absence of any support from her partner and family in her efforts to promote her invention.

## **Assessment**

14 The requirements for restoration are set out in Section 28(3) of the Patents Act 1977. That section was amended with effect from 1 January 2005 by replacing the standard, which required the Comptroller to be satisfied that the proprietor took “reasonable care” to see that the renewal fee was paid, with a requirement that the Comptroller has to be satisfied that the failure to pay the renewal fee was “unintentional”. However, the new standard only applies to patents that ceased on or after 1 January 2005. Therefore, in the present case it is the standard of “reasonable care” that still applies.

15 In deciding this matter it is helpful to bear in mind the following direction given by Justice Laddie in *Continental Manufacturing & Sales Inc’s Patent* [1994] RPC pages 535 to 545:

“The words ‘reasonable care’ do not need explanation. The standard is that required of the particular patents acting in ensuring that the fee is paid”.

16 It is important therefore that I take into account all the surrounding circumstances and decide in light of those circumstances whether reasonable care has been taken. To this end, I propose addressing the three main reasons Mrs Holdham has said contributed to her failure to pay the renewal fee, namely her health problems, stress, caused by harassment and physical abuse, and lack of funds.

#### *Health problems*

17 I do not doubt that Mrs Holdham was suffering from health problems at the time the renewal fee could have been paid. However she has still not furnished any proof, by way of reports or signed statements from medical practitioners, that her ailments were such as to have caused her to fail to pay the renewal fee. In fact the evidence suggests that she was actively engaged in numerous and quite demanding tasks during the period when the renewal fee could have been paid, including seeking financial assistance, pursuing various legal actions and preparing for an exhibition. Mrs Holdham said herself at the hearing that at the time she was dealing with “more issues than one person would be expected to be concerned with”. All this suggests to me that she was capable of managing her affairs during the critical period. Moreover, the fact that her DLA had been withdrawn suggests that the Department for Works and Pensions did not consider her health to be sufficiently bad as to warrant such payments. I am not therefore persuaded that her state of health was a factor that prevented her from paying the renewal fee.

#### *Stress*

18 It is clear from what Mrs Holdham has to say that there were many matters that were troubling her and that these could well have caused her stress and clouded her judgment to some extent. However, as I have said, there is clear evidence that she was able to cope with many tasks. Whilst, therefore, I have a considerable sympathy for Mrs Holdham, I am not convinced that the stress she was under was such as to have affected her ability to act in a reasonable manner and ensure the renewal fee was paid.

19 I think it is also worth noting that much of the health and stress related problems Mrs

Holdham was experiencing existed in 2000 yet they did not prevent her from paying the eighth year renewal fee. She also referred to battling through all her problems to continue with her exhibition which appears to have occupied most of her time.

*Lack of funds*

- 20 In considering the financial aspect of Mrs Holdham's case it is helpful to refer to comments by the judge in *Ament's Application* [1994] RPC 647. In that case Justice Aldous commented that:

"I have come to the conclusions that a patentee who merely establishes inability to pay does not establish that he has taken reasonable care to see that the fee is paid. To establish that, he must go further and show that he wanted to pay and that he had taken reasonable care to ensure that he was in a position to pay."

- 21 Justice Aldous also made the following statements in his decision:

"That may require seeking financial assistance and in appropriate cases taking reasonable care to avoid impecuniosity"

"A party, who intends to pay a renewal fee but cannot do so, must establish that he has taken reasonable care to pay. That requires him to establish that his inability to pay has not resulted from any lack of reasonable care."

- 22 The first thing I need to consider therefore is whether Mrs Holdham intended to pay the renewal fee at the time it could have been paid. What is clear from the evidence she has furnished and what she said at the hearing is that she was preoccupied with exhibiting the product covered by her patent, including acquiring funds for the cost of displaying it at exhibitions. There is little, if anything, to indicate that she had taken any action to see that the renewal fee was paid, including acquiring or setting aside money to pay the fee. Consequently, there is little evidence to show that she intended to pay the fee. In fact, during the hearing Mrs Holdham indicated that the criticism she was getting from her family and former partner about her preoccupation with displaying her invention caused her to have doubts about continuing with her efforts to exploit it.

- 23 The evidence Mrs Holdham has supplied and the statements she made at the hearing suggest that she relied on various benefits as a source of income. For example, a letter dated 15 August 2001 from The Benefits Agency in Dunfermline to her solicitors, refers to her Income Support, Widow's Benefit and Occupational Pension. Also among the papers are copies of two letters from the SSAFA, one dated 6 August 2001 confirming that she had been awarded £350 from the Royal National Benevolent Trust (RNBT) towards the cost of a cooker and another dated 14 September 2001 stating that the RNBT could not assist with rent arrears. This correspondence is a clear indication that Mrs Holdham was experiencing financial difficulties. However, despite making it clear to Mrs Holdham at the hearing that it would be helpful if she provided details of her income and expenditure in 2001 and how it had changed from 2000, no such information was included among the collection of documents she filed on 5 April 2004. Hence, I still have no clear information about her financial situation.

- 24 The funding Mrs Holdham was seeking from the Carnegie Trust was to help her cover the cost of exhibiting her product while the funds she was seeking from the SSAFA was to cover the cost of a domestic cooking appliance and to help her pay her rent. Also, at the hearing she referred to paying for the cost of her exhibition and having her poetry printed. In fact, she admitted that the exhibition “was taking up money” and that she paid previous renewal fees late “because the money would be being used, for example, for printing up poetry or something for the exhibition”. What is lacking is any evidence that Mrs Holdham endeavoured to obtain funds specifically to pay the renewal fee.
- 25 The obvious place to go to borrow money would have been the bank but Mrs Holdham indicated that she made no attempt to obtain a loan from her bank to pay the renewal fee because the bank had refused to lend her money in previous years. Although I asked her to supply a letter from her bank confirming that they were not prepared to lend her money in 2001, she has not included such evidence in the collection of documents she has furnished since the hearing. Moreover, she said that on previous occasions the bank had suggested she approach venture capitalists, yet there is no evidence that she did so or that she approached any other institutions to obtain funding to pay the renewal fee.
- 26 I also note that in her letter of 7 August 2003 she admits to receiving the rule 39(4) reminder but says she mistakenly believed she was allowed to pay the fee “indefinitely”. I can see no reason why she would think that as the official reminder letter makes it clear that the fee had to be paid with extension fees within six months from 26 June 2001. Moreover, she paid the fees in time for previous years, including in 2000 when she was also suffering from various ailments and experiencing stress related problems, so I can see no reason why she should believe that she had an indefinite time to pay the ninth year fee. Indeed, if she thought she could pay at any time, then that would suggest that she was under no compulsion to seek funds to pay the fee in 2001 which undermines any argument that she intended paying the fee within the prescribed period.
- 27 In the absence of supporting evidence, it is difficult for me to conclude that Mrs Holdham took reasonable care in trying to obtain financial assistance to ensure she was in a position to pay the ninth year renewal fee.

### **Conclusion**

- 28 Whilst I have considerable sympathy for Mrs Holdham I am not persuaded that her state of health and the stress she was experiencing in 2001 was such as to prevent her from seeking the necessary funds and paying the ninth year renewal fee. Moreover, whilst I appreciate that she was experiencing financial difficulties, I have no evidence before me that shows that she made diligent efforts to obtain funds to pay the renewal fee. It follows that I am not satisfied that Mrs Holdham has demonstrated that she took reasonable care to see that the renewal fee was paid. It is with some regret therefore that I must refuse this application for restoration.
- 29 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

M C Wright  
Assistant Director acting for the Comptroller