



7 July 2009

**PATENTS ACT 1977**

BETWEEN

Power Stow A/S

Claimant

and

RASN A/S

Defendant

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PROCEEDINGS

Reference under section 71 of the Patents Act 1977 in  
respect of patent number EP 1248726

HEARING OFFICER

Phil Thorpe

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**DECISION**

**Introduction**

- 1 This decision is concerned with the question of whether I should strike out a reference under section 71 for want of prosecution.

**Background**

- 2 EP 1248726 B1 (“the patent”) entitled “An apparatus for loading and unloading aircrafts” was granted 14 July 2004. The proprietor of the patent, who is the defendant in this action, is RASN A/S.
- 3 On 26 November 2007, Power Stow A/S (“the claimant”) filed Form 2/77 and a statement in which it sought a declaration of non-infringement under section 71. It argued specifically that its own device did not fall within the scope of claim 1 of the patent and furthermore that at least claim 1 of the patent lacks novelty or an inventive step.
- 4 Due to the need to resolve some small deficiencies in both the original statement and the subsequently filed counterstatement, and as a result of the odd short extension of time, it was not until November 2008 that the Office was able to invite both parties to agree a timetable for the evidence rounds and the hearing.

The parties subsequently agreed on a timetable. This required the claimant to file its evidence in chief by 16 January 2009.

- 5 On 4 February 2009 the claimant's attorney, Mr South, telephoned the Office to state that his client may not proceed with the case in light of the costs involved. The following day Mr South emailed the Office to state that he was "*awaiting instructions from his client in light of advice on costs involved due to the complexity of the case*".
- 6 The Office contacted Mr South on the 12 February 2009 to check on the status of the case. Mr South advised that he was awaiting instruction from his Danish instructing agents, who in turn were taking instruction from the claimant. Mr South stated that he would endeavour to provide at least a further status report by 20 February 2009.
- 7 Mr South emailed the Office on 24 February 2009 to advise that his instructing agents had been in contact with the claimant, who had been travelling on business. He was however still seeking further instruction and hoped to have more information by 27 February 2009.
- 8 No contact was received from claimant and therefore the Office telephoned Mr South again on 5 March 2009 in an attempt to ascertain the status of the case. Mr South advised that the status had not changed and that he still had not received instruction from the claimant.
- 9 In a letter dated 10 March 2009 the defendant formally requested that the application under section 71 be struck out for want of diligent prosecution. This was copied to the claimant who was also invited to comment on the request. The claimant made no specific response to the request.
- 10 Both sides subsequently agreed that I should decide the matter of the strike-out without a hearing and on the basis of the papers. This is what I will now do.

### **Ruling**

- 11 There is an onus on any party involved in litigation to prosecute their case diligently. This is especially true for a party who has launched an action such as this one in which questions regarding the validity of a patent have been raised. Until those questions are resolved, there will necessarily be uncertainty not just for the patentee but also for third parties.
- 12 In this case a period of over 18 months has now passed since the claimant launched the action. The defendant's fax of 26 November 2008, in which both parties agreed a timetable for the prosecution of the case, required the claimant to file evidence by 16 January 2009. The claimant failed to file any evidence by that agreed date and despite numerous attempts by the Office to establish the status of the case, has failed to give any credible reasoning as to why no evidence has been filed. The claimant has also not given any indication of how it intends to move the case forward and has provided no argument as to why I should not strike out the case.

- 13 I am satisfied therefore that the conduct of the claimant amounts to an abuse of process. The defendant has been left in a state of uncertainty for a considerable length of time and it would be unfair to prolong that uncertainty any longer. I therefore strike out the proceedings for want of prosecution.

### **Costs**

- 14 The defendant in its letter of 10 March 2009 has indicated that it will seek an award of costs at the appropriate time. Since I have decided in its favour, the defendant is entitled to an award. The only issue to decide is the size of that award. I am conscious that neither side has made any submission on that point, so I will allow them 2 weeks from the date of this decision to do so. Any submission should cover the question of whether it is appropriate in this case for an award off the Comptroller's published scale to be made.

### **Appeal**

- 15 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

**Phil Thorpe**

Deputy Director acting for the Comptroller