

PATENTS ACT 1977

BETWEEN

Loadhog Limited

Claimant

and

Polymer Logistics BV

Defendant

PROCEEDINGS

Application under section 72 of the Patents Act 1977 in
respect of patent N° GB 2,440,699 B

HEARING OFFICER Stephen Probert

COSTS — PRELIMINARY HEARING**Introduction**

- 1 This decision concerns a request for an interim award of costs above the Comptroller's published standard scale. The request is made by Mr Keith Beresford of Beresford & Co. on behalf of the defendant in this revocation action, Polymer Logistics BV ("Polymer"). The claimant, Loadhog Ltd ("Loadhog"), resists the request, and is represented by Mr Mark Pearce of Dickinson Dees.
- 2 The request was made at a Case Management Conference on 10th December 2009. At that time, it appeared to me that neither Mr Pearce nor Mr Beresford were sufficiently prepared to deal with the matter, so I directed that both parties have seven days in turn in which to provide me with written submissions on costs (including a detailed breakdown of costs from the defendant). I have now received and considered these written submissions and, as agreed at the CMC, I make this decision as to costs based on the papers of the case
- 3 The standard scale for proceedings commenced on or after 3 December 2007 is set out in Tribunal Practice Notice (TPN) 4/2007. Both parties agree that the Comptroller has discretion to award costs above the published scale, approaching full compensation, and that he may typically do so "to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour". Mr Beresford says that the defendant has incurred significant costs as a result of

the unreasonable behaviour of the claimant, and he described this unreasonable behaviour under five categories as follows:

- (a) firstly filing a wholly inadequate first Statement of Grounds which totally failed to comply with the well-established and well-known rules as to the required contents for the Statement of Grounds and which pleaded Subsection 72(1)(e) as a ground of invalidity without having any legal basis;
- (b) thereafter pleading, in a completely new (second) Statement of Grounds which replaced the first Statement of Grounds, various matters which have no basis in law, which matters are such that it was, or should have been, obvious to any patent attorney of reasonable competence that those matters have no basis in law;
- (c) arguing, up to the point that the patent office had to fix a hearing date, that those matters having no basis in law should be retained in the Statement of Grounds;
- (d) in those arguments, incorrectly and misleadingly asserting that no case law existed which was relevant to the claimant's pleading in relation to Section 72(1)(e); and
- (e) pleading in a third version of their Statement of Grounds (which was an amendment of the second version) certain matters in paragraphs 9.2 and 9.3 which are irrelevant and have no basis in law (which matters were in due course struck out by formal decision — BL/274/09 — of the Comptroller).

4 The amount that the defendant is seeking to recover at this stage is £14,246.50. In his submissions, Mr Beresford has provided a detailed breakdown showing how these costs were incurred; he says that in the circumstances, I should make an interim award of costs, and not wait until the substantive hearing which is scheduled to take place in April.

5 Mr Pearce, for the claimant, submits that:

“... both the extent of the costs claimed and the extremely detailed nature of the Defendant's Submission are utterly disproportionate with regard to the consequences of the few changes made to the Statement of Grounds and the conduct of the Claimant in these proceedings.”

6 I have read through the detailed submissions of both parties on this issue of costs, and I have concluded that, on the whole, there is nothing particularly unusual about the course of these proceedings to date. More specifically, I do not consider that there are grounds for an award of costs above the published scale.

7 There were deficiencies in the claimant's statement of grounds, but regrettably that is the situation in a relatively high percentage of actions brought before the Office. Whenever a statement of grounds is received in the Office, a member of staff from Litigation Section reviews the statement, and if he or she considers that the statement is deficient in some respect, he or she goes back to the party who filed the statement (several times if necessary) in order to get the statement of grounds amended. Only when the statement of grounds is considered to be clear and adequate is it formally served on the other party(ies) in the proceedings.

8 That is what happened in this case. When the claimant's statement of grounds was received, Mrs Sue Williams from Litigation Section replied to Hulse & Co,

who were representing the claimant at that time, setting out what she regarded as deficiencies in the statement. At the same time, Mrs Williams sent a copy of the original statement of grounds to the defendant's registered address for service (Beresford & Co), with a copy of her letter to Hulse & Co. This took place on 28 July 2008. In her covering letter to Beresford & Co, Mrs Williams wrote:

"These documents have been filed at the UK Intellectual Property Office in connection with the above proceedings. The documents have been sent to you in accordance with rule 77(1) of the Patents Rules 2007 as you are shown in the register as the proprietor of the patent.

Also enclosed for information is a copy of a letter sent today to the claimant. You should note that you are not being invited to file a counter-statement in these proceedings at this time as the statement of grounds is not considered to be in order."

- 9 Consequently in my view there was no need for the defendant to incur any significant (or exceptional) costs in relation to the original statement of grounds. Even after the statement of grounds was formally served on the defendant, there were still some matters pleaded that had no basis in patent law, as Mr Beresford rightly contends. However, I also agree with Mr Beresford that it would have been "obvious to any patent attorney of reasonable competence" that those matters had no basis in law. Therefore I do not understand why the defendant should have needed to spend such a large amount of time and money dealing with matters that obviously had no basis in law. It is no secret that the Comptroller's tribunal is intended to be a low cost tribunal for litigants; that is the main reason for having a standard scale of costs — ie. it builds in a degree of predictability as to how much proceedings before the Office may cost the parties.
- 10 Nevertheless, I have some sympathy with the defendant because when they requested that these matters having no basis in law be struck out of the statement of grounds, the claimant opposed the request and it was necessary to appoint a hearing to determine the issue. Fortunately the parties did not insist on an oral hearing, and I issued a decision (BL O/274/09) on the basis of the papers of the case, striking out the irrelevant matters on 8th September 2009. In line with paragraph 10 of Tribunal Practice Notice (TPN) 4/2007, I think it is appropriate to award costs to the defendant at this stage in relation to the "unattended" hearing on strike-out.
- 11 The published scale of costs indicates a figure in the range £300 to £500 for preparation of submissions, depending on their substance, if there is no oral hearing. Looking at our official file, I see that neither party provided written submissions before the strike-out hearing; instead, the defendant referred me to item 16 of their counter-statement which reads:
- "16. The matters pleaded in the last sentence of item 9.2 and in item 9.3 has no basis in law, in that they have no relevance to any of the statutory grounds for revocation set out in Section 72 of the Patents Act 1977, and consequently these matters should be struck out."
- 12 Although the defendant did not prepare any written submissions on the issue of striking out, it is clear from the detailed breakdown of costs provided by Mr Beresford that some time was spent discussing the issue of striking out, presumably reaching the conclusion that there was no need to provide me with

written submissions on the subject. All this points to an award near the lower end of the range in the published scale.

Order

- 13 I hereby order the claimant (Loadhog Ltd) to pay the defendant (Polymer Logistics BV) the sum of £300 as a contribution to their expenses in connection with preparation for the hearing on striking-out. This sum should be paid within seven days of the expiry of the appeal period below. Payment may be suspended in the event of an appeal.

Appeal

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

S PROBERT

Deputy Director acting for the Comptroller