



## PATENTS ACT 1977

BETWEEN

AutoStore Technology AS

Claimant

and

Ocado Innovation Limited

Defendant

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PROCEEDINGS

Reference as to entitlement under sections 12 and 13 in respect of EP3795501

HEARING OFFICER

Phil Thorpe

Mr Selmi QC for AutoStore Technology AS  
Mr Lykiardopoulos QC for Ocado Innovation Limited

Hearing date: 02 February 2022

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## DECISION ON COSTS

### Introduction

1. This is a decision on costs in relation to an entitlement reference brought by AutoStore Technology AS (AutoStore) under section 12 in respect of patent application EP3795501 in the name of Ocado Innovation Limited (Ocado). The reference was filed on 16<sup>th</sup> July 2021.
2. Ocado filed a counterstatement on 2<sup>nd</sup> August 2021. This was before the reference had been formally served on them however, they had noted that copies of the statement of grounds had been filed by AutoStore at the EPO together with a request dated 16<sup>th</sup> July 2021 that the prosecution of EP3795501 be stayed. The patent at that stage had not been granted though the EPO had indicated on 9<sup>th</sup> July 2021 that it intended to grant the patent. The EPO subsequently stayed grant proceedings on the patent as from 16<sup>th</sup> July 2021.
3. In its counterstatement, Ocado argued that:

“the statement of the grounds discloses no reasonable grounds for bringing the claim and the claim has no real prospects of success. Further the reference constitutes an abuse of process designed to hold up the grant of EP 501”

Ocado went on to request that the claim be struck out or summarily dismissed.

4. The IPO responded to both sides on 10<sup>th</sup> August 2021 noting:

“The Hearing Officer notes that there are other disputes currently between the parties and that the IPO recently declined to deal with another reference between the parties. Given that there appears to be some overlap between this reference and the previous reference and given the broad nature of the dispute between the parties, the IPO is also minded to decline to deal with this reference but will allow the parties 4 weeks should they wish to make submissions on the matter. If either party wishes to be heard on the matter then they should indicate in their submission. You are therefore invited to make submissions on this point if you wish within four weeks of the date of this letter, that is by 14 September 2021.”

5. Both sides responded indicating a preference for the matter to remain within the jurisdiction of the comptroller with Ocado also urging a speedy resolution of its request for strike out or summary judgement.

6. A hearing was therefore scheduled for 12<sup>th</sup> November 2021 to consider the request for strike out or summary judgement and the question of whether the comptroller should decline to deal with the reference.

7. In a letter dated 8<sup>th</sup> November 2021, AutoStore noted:

“In the course of preparing for the hearing scheduled for 12 November, it has become clear to AutoStore that the patent application in question is invalid. In *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267, Jacob LJ said at [88]:

*If the patent or part of it is clearly and unarguably invalid, then we see no reason why as a matter of convenience, the Comptroller should not take it into account in exercising his wide discretion. The sooner an obviously invalid monopoly is removed the better from the public point of view. But we emphasise that the attack on validity should be clear and unarguable. Only when there is self-evidently no bone should the dogs be prevented from fighting over it.*

In this case, it is clear that the Comptroller does not presently have jurisdiction with respect to validity because the application has not proceeded to grant. In the circumstances, and if the patent application ultimately proceeds to be granted in the EPO, AutoStore will oppose the patent in opposition proceedings. This seems to be the soonest mechanism by which this invalid monopoly will be removed.

Further, we note that this action is one of several ongoing actions between the parties in the UK, with others in the United States and Germany, and several opposition proceedings in the EPO.”

8. Having set out more details on these various ongoing actions, the letter went on to conclude that:

“AutoStore is cognizant of the numerous ongoing disputes between the parties in various forums, including in the UK. The two High Court actions currently involve no

fewer than six patents each and throw up complex questions of fact and law. This entitlement action would also throw up important questions of fact and law. In the interests of procedural economy, AutoStore is withdrawing this entitlement action.

The withdrawal will also have the effect of disposing of the forthcoming hearing to determine whether to transfer this entitlement action to the High Court and to hear Ocado's application on strike out. AutoStore respectfully requests that the UKIPO promptly indicate that these entitlement proceedings have been discontinued and this hearing vacated."

9. The hearing scheduled for 12<sup>th</sup> November was therefore cancelled and the parties informed that the entitlement proceedings were terminated subject only to the matter costs. Both sides were invited to make submissions on the question of costs.
10. Ocado filed their submission on 24<sup>th</sup> November 2021 in which they requested an off-scale award of £131,354.31. This was resisted by AutoStore in their submission of 14<sup>th</sup> January 2022 where they argued that Ocado was not entitled to costs and, even if they were, then it should be in line with the Comptroller's published scale.
11. The matter of costs subsequently came before at a hearing on 2<sup>nd</sup> February 2022 where AutoStore were represented by Mr Selmi QC instructed by Kirkland and Ellis International LLP and Ocado were represented by Mr Lykiardopoulos QC instructed by Powell Gilbert LLP.
12. In advance of the hearing both sides provided skeleton arguments for which I am grateful.

### **Comptroller's power to award costs – The Law**

13. Section 107(1) of the Patents Act 1977 provides that:

The comptroller may, in proceedings before him under this Act, by order award to any party such costs or, in Scotland, such expenses as he may consider reasonable and direct how and by what parties they are to be paid.

14. It is however the established practice of the comptroller to award costs in accordance with a published standard scale of costs, as set out in [Tribunal Practice Notice \(TPN\) 4/2007](#). The scale costs are not intended to compensate parties fully for the expense to which they have been put, but to represent a contribution to that expense.
15. This policy reflects the intention that the IPO be a low-cost tribunal for litigants and builds a degree of predictability as to how much proceedings before the IPO may cost them.

#### *Costs where one party withdraws*

16. Both sides accept that the Comptroller has wide discretion on the issue of costs and that each case needs to be considered on its merits. AutoStore points to paragraph 5.37 of the Hearings Manual<sup>1</sup> which specifically says that

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<sup>1</sup> [Patents Hearing Manual](#)

the Hearing Officer retains a discretion as to whether to award costs against a claimant in circumstances of withdrawal. It seeks to draw from this that the comptroller treats winning a case (where the usual approach is to award costs to the successful party) and differently from withdrawing (where there is no usual approach).

17. Whilst it is indeed necessary to consider each case on its merits, the general or usual approach in proceedings where one party withdraws from proceedings is to make an award of costs to the other side. At the hearing I expressed slight surprise that neither side, but Ocado in particular, had not sought to use the publicly available database of IPO decisions to counter AutoStore's assertion on this point. Even a cursory review of cost decisions would show that the usual approach is to make an award of costs where a party withdraws. Examples of such decisions include [O/618/18](#), [O/247/16](#) and [O/144/13](#) with two of these decisions also considering the question of off-scale costs. I would also add that *Rizla Ltd.'s Application*<sup>2</sup> was, like here, a section 12 entitlement dispute where one party withdrew and where the deputy judge was required to decide between an on-scale or off-scale cost award. All of these decisions lend support to the usual practice being to award costs where a party withdraws. The notable exception to this being cases where the parties settle, and costs are covered within the terms of any settlement with typically each side bearing their own costs. That is not the case here.

18. Considering the circumstances of the case here, which I discuss in more detail in the following paragraphs, I am satisfied that a cost award to Ocado is warranted in this case. The question then becomes should this be an award in line with, or off the published scale.

#### *Off-scale cost awards*

19. The Hearing Officer retains discretion to depart from the published scale if the circumstances warrant it. In *Rizla Ltd's Application* it was noted that the wording of section 107

“conferred on the Comptroller a very wide discretion with no fetter other than that he must act judicially. If he felt it was appropriate, an award of compensatory costs could become the norm”.

20. There is no hard and fast rule defining circumstances that might justify an off-scale award and each case needs to be considered on its merits. Section 5.47 of the Patents Hearings Manual does provide some examples of behaviour that might suggest an off-scale cost award. These include:

- delaying tactics, failure without good cause to meet a deadline, or other unreasonable behaviour, particularly where the other side is put to disproportionate expense;
- a claim launched without a genuine belief that there is an issue to be tried;

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<sup>2</sup> *Rizla Ltd's Application* [1993] RPC 365

- seeking an amendment to a statement of case which, if granted, would cause the other side to have to amend its statement or would lead to the filing of further evidence, if the amendment had clearly been avoidable;
- unreasonable persistence in a course of action that has been indicated in a Preliminary Evaluation to be inappropriate;
- costs associated with evidence filed in respect of grounds which are not pursued at the substantive hearing (though a party should not be deterred from dropping an issue which, in the light of the evidence filed by the other side, it now realises it cannot win);
- unreasonable rejection by the party that eventually loses of efforts to settle the dispute before the proceedings were launched or a hearing held;
- unreasonable refusal by that party to attempt alternative dispute resolution;
- failure to attend a hearing;
- breaches of rules;

21. The guidance goes on to note that an off-scale award should seek to recompense for any unnecessary costs incurred because of any unreasonable behaviour. It is not intended to be punitive.
22. Ocado's main argument is that these proceedings were launched without a genuine belief that there was an issue to be tried and were then maintained notwithstanding that fact before being dropped without notice prior to the first contested hearing. Ocado say all this was done as a ruse to delay the grant of EP3795501 at the EPO.

*The entitlement grounds advanced by AutoStore*

23. Before turning to the pleadings, it is useful to provide a little background on the parties and their patents and patent applications which are at the heart of this case. The AutoStore Group, of which the claimant here is a part, specialises in robot technology. According to their submissions, they invented, and continue to develop, the AutoStore system, a modular robotic storage and retrieval system. The AutoStore system has apparently been installed in over 30 countries and is used by a wide range of businesses, including retail and e-commerce businesses. Central to this case is AutoStore's patent WO 2014/090684 (the "PCT") which was published on 19<sup>th</sup> June 2014, and which relates to a remotely operated vehicle for picking up storage bins from a storage system. The statement of case notes in respect of the PCT that:

The inventive vehicle is characterized in that the second section comprises a cavity arranged centrally within the vehicle body. This cavity has at least one bin receiving opening facing towards the underlying storage columns during use. In addition, at least one of the two sets of vehicle rolling means is arranged fully within the vehicle body.

The central arrangement of the cavity in the vehicle body relative to the second direction (Y) effectively remove[s] the undesired torque, thereby improving the stability of the robot or vehicle. This arrangement also results in a lifting and transporting process having a weight distribution with a high degree of symmetry.

Furthermore, the arrangement is more space efficient relative to the prior art robot illustrated in figure 2 since the roller means does not give any additional extensions in at least one of the two robots moving directions (X and Y). Production of smaller sized robots or vehicles is also rendered possible.

24. The aforementioned prior art and the vehicle of the invention in the PCT are shown in figures 2 and 3 respectively.

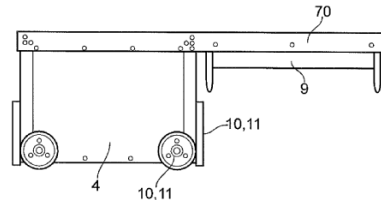


FIG. 2 (Prior Art)

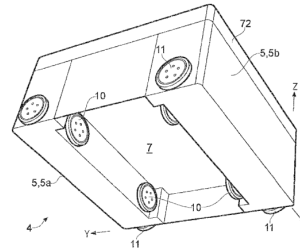


FIG. 3

25. The Ocado Group carries on business both as an online grocer, licensor of the Ocado Smart Platform ("OSP") and provider of online grocery fulfilment services. The OSP comprises both software and hardware for operating an online grocery business. The hardware includes a grid system ("the OSP Hive") and robots ("the OSP Bots"). The OSP Bots move about the OSP Hive to retrieve and deliver goods to packing stations. The Ocado Group has several physical grocery fulfilment centres (also known as "customer fulfilment centres" or "CFCs") in the UK which utilise the OSP.

26. The patent application in issue here was filed by Ocado on 24<sup>th</sup> July 2014 and published as EP 3795501 ("EP'501" or "the Patent"). Following the lifting of the stay after AutoStore withdrew from these entitlement proceedings, the EPO granted the patent on 20<sup>th</sup> January 2022. The patent also relates to robotic devices for handling storage containers or bins in a store comprising a grid of stacked units. The vehicles are shown in the following figures taken from the patent with figure 6 showing a cut-out of container receiving body 120.

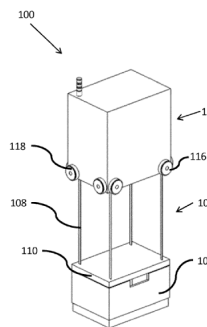


Figure 5

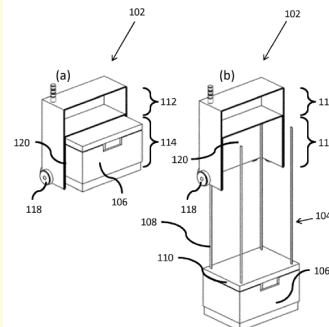


Figure 6

27. The granted claim which has remained substantially unchanged since filing reads:

1. A load handling device (100) for use in a storage system comprising a grid frame containing a plurality of stacks (12) of containers,

the load handling device (100) being suitable for being arranged above the stacks (12) of containers and the load handling device (100) being capable of lifting a container (106) from a stack and moving the container (106) laterally to another location,

wherein the load handling device (100) comprises two sets of wheels (116, 118) for supporting the load handling device (100) on rails above the stacks, the two sets of wheels comprising a first set of wheels (116) for engaging with a first set of rails (22a) to guide movement of the device in a first-direction, and a second set of wheels (118) for engaging with a second set of rails (22b) to guide movement of the device in a second direction,

wherein one or both sets of wheels (116, 118) are configured to be raised and lowered with respect to the other set of wheels (116, 118),

characterised in that

the load handling device includes a container-receiving space (120) into which the container can be lifted,

the container-receiving space (120) being arranged beneath a vehicle module (112), in which components such as power components, control components, drive components and lifting components are housed,

and wherein one or more wheel lift motors (188) or other wheel lift devices are housed in the vehicle module (112) for raising and lowering one of the sets of wheels (116, 118) with respect to the other set of wheels (116, 118).

28. Significant here is also the claim to priority in EP 3795501 from GB1314313.6 (the priority document or GB'313) which was filed on 9<sup>th</sup> August 2013. I discuss this in more detail shortly.

#### *The pleaded case*

29. In entitlement disputes it is not uncommon for there to be suggestions that one party has misappropriated information given to it by another party. It is quite common for the parties in dispute to have had some form of working relationship prior to the dispute. In its statement of case, AutoStore does refer to Ocado representatives inspecting AutoStore systems and Ocado purchasing and operating an AutoStore system in 2012. However as confirmed by Mr Selmi at the hearing, none of that forms any part of AutoStore's pleaded entitlement claim.

30. Rather AutoStore's entitlement claim is that to the extent the invention and/or any of the claims of EP3795501 is to a load handling device with an internal cavity, then that is information Ocado obtained from the published PCT patent. In other words, Ocado saw the contents of the PCT on its publication and then filed the patent in issue for the same invention. It goes on to note

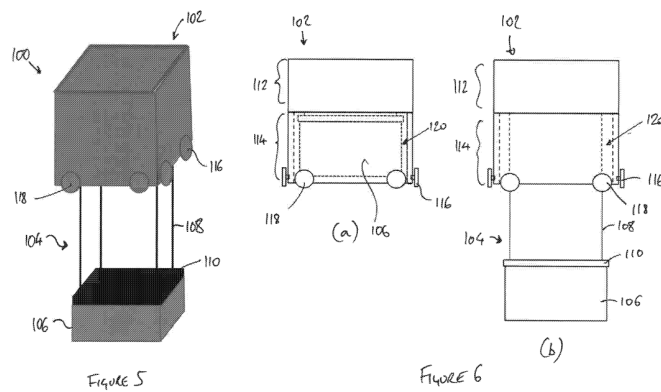
that each alleged invention claimed and/or disclosed in the Patent vests with AutoStore though notable, other than the reference to the load handling device with an internal cavity, it does not identify what these inventions or inventive concepts are.

31. Ocado's response is that the invention disclosed in patent EP3795501 was clearly disclosed in the priority document and thus cannot be based on the PCT patent which was published after the priority document had been filed. It goes on to note that even though AutoStore has referred only to the feature of the load handling device having an internal cavity, to the extent that the patent discloses anything not disclosed in the priority document, then that material is also not disclosed in the PCT patent.
32. In defending the pleaded case at the hearing, Mr Selmi sought to paint the key area of dispute as being the correct characterisation of the invention disclosed in each of the patent, the PCT and GB1314313.6 and whether the invention now claimed in EP3795501 is the same as disclosed in GB1314313.6.
33. He made a further point that the statement of case was signed with a statement of truth, in this instance by Nicola Dagg partner at Kirkland & Ellis International L.L.P, and this should be taken as support that the case was launched with a genuine belief it could succeed. There is nothing before me to suggest that Ms Dagg did not genuinely believe her client's case. What matters however is not what Ms Dagg thought but whether I believe the claim was in effect hopeless. That turns on whether it would have been readily apparent to any reasonable person that the feature of the load handling device having an internal cavity was clearly disclosed in the priority document.

*The disclosure in GB1314313.6*

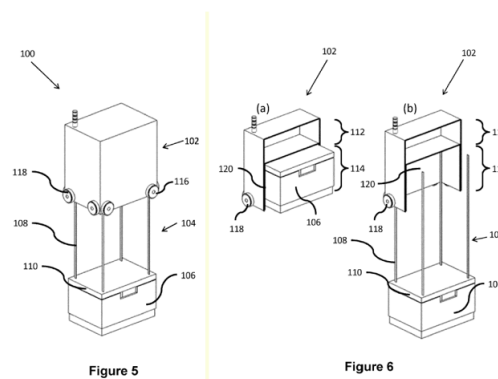
34. Ocado argues that it was self-evident that the concept of a load handling device with an internal cavity as in the patent in issue was already part of GB1314313.6. AutoStore has not responded to this allegation despite having an opportunity to do so both in its submissions and at the hearing.
35. It only takes a cursory look at GB1314313.6 to see that Ocado are right. Indeed, it is readily evident from for example figures 5 and 6 (shown below) and the accompanying description that GB1314313.6 does disclose a load handling device with an internal cavity as envisaged by the patent in issue.





“The wheels 116, 118 are arranged around the periphery of a cavity or recess 120, known as a container-receiving recess, in the lower part 114. The recess 120 is sized to accommodate the bin 106 when it is lifted by the crane mechanism 104, as shown in Figure 6(a). When in the recess 120, the bin 106 is lifted clear of the rails beneath, so that the vehicle 102 can move laterally to a different location.” (Page 10 – Lines 26-30)

36. The similarity is evident when the above figures are compared with figures 5 and 6 from the patent that I have already discussed, and which are replicated below.



37. In addition to the clear disclosure of this feature in GB1314313.6, it is also worth noting that the question of whether the patent was entitled to its priority was considered by the EPO during the examination of the patent. Mr Selmi unsurprisingly confirmed that AutoStore was aware of the progress of the patent during its examination at the EPO and the various communications related to that examination.

38. The question of priority in those proceedings was explicitly raised in third party observations filed anonymously on 11<sup>th</sup> May 2021 where it was argued that:

“Claim 1 lacks the right to priority. Whenever the location of the drive components are referred to in the priority document GB1314313.6, it is stated as being in the vehicle module or upper part of the load handling device, see for example: page 6 lines 1-9; page 7 lines 24-26; page 10 lines 34-37; page 11 lines 15-21; and page 11, lines 32-33. As such, a load handling device in which the drive components are not located in

the "upper part" of the load handling device cannot be clearly and unambiguously derived from the priority document."

The observations went on to argue that without a valid priority claim, the patent was invalid in light of the disclosure in WO2015/193278.

39. The EPO initially notified the applicant that it agreed with these observations in a letter of 21<sup>st</sup> May 2021. Ocado's representatives responded on the same day noting that:

**"Priority**

Verbatim basis of the priority application

The wording of claim 1 is identical to the wording found in the priority application. In particular, the wording relating to the vehicle module (claim 1, lines 23-25) is repeated verbatim on page 6, lines 2-4 of the priority application.

The expression "vehicle module, in which components such as ... are housed" is used in an identical context, and it has an identical meaning in the priority application and in the claim of the present application.

For this reason alone there cannot be any loss of priority."

40. The letter went on to note that since the claim was entitled to its priority, then WO2015/193278 is not citable as prior art. The EPO responded on 9<sup>th</sup> July 2021 that it intended to grant the applicant with the claims essentially unamended. Hence it would have been clear to anyone following this exchange of correspondence that the EPO was satisfied that the patent was entitled to its priority.
41. From a simple examination of GB1314313.6, coupled with knowledge of the case file for the patent in issue, it should have been readily apparent to AutoStore that the feature of the load handling device having an internal cavity was known to Ocado well before the PCT was published.
42. Ocado also highlight the circumstances surrounding AutoStore's withdrawal a few days before the scheduled hearing. It notes that AutoStore has not really clarified what prompted this withdrawal. In the letter dated 8th November 2021 that I have already referred to, AutoStore noted that:
- "In the course of preparing for the hearing scheduled for 12 November, it has become clear to AutoStore that the patent application in question is invalid."
43. Despite having several opportunities to do so, AutoStore has not explained what it was that was discovered or realised during the course of the proceedings that led them to withdraw. Ocado argue that they withdrew because they knew their case was hopeless and would be struck out. AutoStore only real observation is that it is not a requirement for a party to explain precisely why it is withdrawing from an action. I accept that. However, where that withdrawal is being used in part to justify a claim for an off-scale cost award, then it would have been in the interests of AutoStore to shed more light on their reasons for withdrawing.

44. Mr Selmi did refer to ongoing proceedings in Germany where AutoStore has been defending itself against an action brought by Ocado in respect of several utility model based on, or covering similar, subject matter to the patent in issue here. Mr Selmi noted that very recently the German court had indicated that the proceedings at least in part had been stayed because of concerns about the validity of the utility models. Mr Selmi also noted that a German court had also questioned the validity of one of the utility models prior to Christmas. However, as Mr Lykiardopoulos was keen to point out none of this predated the decision of AutoStore to withdraw from these proceedings. He also was at pains to highlight that any suggestion that the German courts had found any of the utility models to be invalid was wrong.

45. Hence AutoStore has not provided any real justification for withdrawing and I believe in the circumstances it is right for me to conclude that there was no new piece of prior art or indeed anything new that they discovered that would have justified withdrawing the action. I would add that there is no evidence from the public patent case file of any third-party observations being filed around that time or indeed subsequently.

46. The letter of 8<sup>th</sup> November 2021 went on to note that:

“In the circumstances, and if the patent application ultimately proceeds to be granted in the EPO, AutoStore will oppose the patent in opposition proceedings. This seems to be the soonest mechanism by which this invalid monopoly will be removed.”

47. Mr Selmi confirmed at the hearing that the intent of AutoStore in launching these entitlement proceedings was to prevent the patent being used against AutoStore. As Mr Selmi accepted at the hearing, had AutoStore been able to demonstrate that the PCT did disclose the invention in the patent and that the patent was not entitled to its priority, then the patent would have been shown to be invalid.

48. Jacob LJ. noted in *Markem*<sup>3</sup> that the Comptroller has wide discretion in terms of orders that can be made in entitlement proceedings, including acting on clearly invalid patents. That however would not have been an option here as AutoStore recognised in its letter of withdrawal. If I had allowed the action to proceed and if AutoStore had succeeded, then I could presumably have ordered the application to proceed in their name and they then could have allowed it to fail or be surrendered. Not only was any of that unlikely, but it would also have taken considerably more time than simply allowing the EPO examination to proceed and then opposing the grant in opposition proceedings.

49. I asked Mr Selmi at the hearing if the aim was to invalidate the patent as quickly as possible, whether it would have made more sense rather than launching these entitlement proceedings before the comptroller, to indeed wait for its grant and then to oppose it in opposition proceedings. He appeared to accept that was correct though he did rightly point out that AutoStore had resisted my initial suggestion that I should decline to deal with this case. In doing so it had argued that the matter could be dealt with more

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<sup>3</sup> *Markem v Zipher* [2005] EWCA Civ 267

expeditiously by the IPO which he suggested goes against any claim that AutoStore was seeking to delay the grant of the patent. There is some merit in this argument however on balance I believe the actions of AutoStore in launching these entitlement proceedings and requesting that the examination proceedings be stayed at the EPO were clearly intended to delay the grant of EP3795501. This is evident from the weakness in its initial case which I have discussed above and which in my opinion, and importantly which AutoStore would have appreciated, had no prospect of success. This coupled with AutoStore's unexplained withdrawal immediately before the hearing lead me to conclude that on balance that their behaviour has not been reasonable and that an award off-scale is justified.

50. I should for completeness note that Mr Selmi also referred me to a decision of the Oslo Court in an earlier entitlement case between the parties noting that Ocado had been sanctioned by the Court for one of its arguments. This he suggested highlighted that Ocado is not a neutral party and that at times in the wider dispute its actions had been questionable. I make no comment on that other than to say I cannot see its relevance to the issue before me here.

#### *Quantum of any off-scale cost award*

51. Having determined that an off-scale award is merited, I turn now to the question of how big such an award should be. I have been referred to several previous cost decisions including *Statoil*<sup>4</sup> and *Diamond*<sup>5</sup> where awards off the published scale were made. Given the fact specific nature leading to cost awards, there is a limit to what can be learnt from previous decisions. Indeed, in both *Statoil* and *Diamond* much of the discussion centred on what proportion of the costs incurred were the result of the unreasonable action. In contrast that question does not really arise here as the unreasonable action of AutoStore was in launching the proceedings with no genuine belief it could succeed hence Ocado is entitled to an off-scale award for essentially the entirety of the proceedings.

52. Mr Selmi emphasised that in both *Statoil* and *Diamond* a full determination of the issues was made before the matter of costs was considered. This provided the hearing officer in each of those cases with established findings of fact on which to base the cost award. In contrast there has been no determination of the issues in dispute here. However, as I noted above the circumstances here are different in that it was the bringing of a case with no genuine belief of success in the first place that warrants an off-scale cost. That was something that I have concluded was or should have been self-evident and hence the lack of a full determination of the entitlement case does not prevent me from making a cost award even off-scale.

53. As widely recognised, off-scale costs in relation to proceedings before the Comptroller are intended to recompense for any unnecessary costs incurred because of the unreasonable behaviour. Ocado has submitted a breakdown of costs amounting to £131,354.31. The breakdown details expenditure

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<sup>4</sup> *Statoil ASA v University of Southampton* BL O/268/05

<sup>5</sup> *Dr Geoffrey Diamond and the University of Warwick* BL O/701/18

against individuals. Noteworthy is that the breakdown refers to expenditure incurred by four different Counsels, three of who are Queen's Counsel, and from the instructing attorneys, three partners, two senior associates, two associates and various paralegals.

54. Mr Lykiardopoulos sought to justify the number of Counsel involved by noting that the setting of the hearing for either October or November had resulted in Ocado having to instruct new Counsel as their original Counsel were not available. He also noted that these proceedings were a small part of a much larger multi-jurisdictional dispute between the parties and that it was therefore necessary to allocate an appropriate level of resource to the dispute. I asked whether the broader dispute was a factor that I should take into account in any cost order. Mr Lykiardopoulos suggested it was clearly necessary to take the case seriously and that it was not clear what direction it might take. He also went on to note that even if this had just been a simple entitlement dispute between two reasonably sized companies, that its costs were still reasonable.
55. AutoStore in its letter of withdrawal also touched on the wider dispute and went on to note that "this entitlement action would also throw up important questions of fact and law". Quite what these important questions of fact or law were was not made clear to me. As I have discussed above, the pleaded case simply required a determination of whether the priority document discloses the feature of the load handling device having an internal cavity – if it did then that was the end of the matter. That is not a difficult question of either fact or law. Indeed, AutoStore in its response to the question of declining to deal noted somewhat at odds with its later statement that the case would "require little fact and expert evidence".
56. Further I have not been presented with anything that suggests that the determination here would have a significant bearing on any of the other proceedings. Even if it had then Ocado's position, which it has maintained from the start of these proceedings, that the entitlement case advanced by AutoStore was manifestly bound to fail, would not suggest that extra attention needed to be paid to the handling of these proceedings. Hence there is no justification to take the wider dispute into consideration when considering costs in relation to this case.
57. Mr Selmi helpfully directed me to a passage from Leggatt J. in *Kazakhstan Kagazy Plc v Zhunus*<sup>6</sup> which, whilst recognising that the CPR was not binding on me, did nevertheless provide some useful guidance where a party has chosen to allocate as it sees it more resources to the case than was necessary. The passage notes:

In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and

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<sup>6</sup> *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm)

proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants.

58. AutoStore unfortunately did not put forward what they considered a reasonable sum. They did not for example share with me their costs in these proceedings. I was provided with details of a cost settlement offer made by AutoStore immediately prior to the hearing which they have requested remains confidential. I would observe that the figure mentioned is not widely different from the figure I have settled on though far enough away to avoid any criticism of Ocado for refusing the offer.
59. In *Diamond*, which was a case that involved a substantive hearing lasting two days, and which had the added complication of a litigant in person who ran a number of unreasonably arguments, the full costs claimed by the University was just over £37,000.
60. In both *Statoil* and *Diamond* the requested costs were also "taxed" down reflecting what the Hearing Officers in those cases considered to be the practice in Courts. I asked Mr Lykiardopoulos whether he agreed that this is something the Courts would generally do. His response was that for interim assessments a figure of 70-75% is used which is considered as a reasonable sum that might be recovered from any detailed assessment.
61. So where does this leave me? I have carefully considered the various submissions and have concluded that an off-scale award of £46,000 is justified in this case. I have arrived at that figure having taken the view that the original claim by Ocado of £131,354.31 was excessive for the nature of the case. This is not a criticism of Ocado. It was free to allocate whatever resources it wanted to. However, for the purposes of the cost award I have followed the guidance of Leggatt J. and sought to arrive at a figure that is reasonable in the context of this case. This has not been a matter of exact science but rather me using my judgement and experience to arrive at a suitable figure. I did that by reducing the original claim by 50% to take account of what I considered an excessive allocation of resources given the nature of the case and then applied a further tax of 30% to that figure in line with the approach taken in *Statoil* and *Diamond* and discussed in the previous paragraph.

## **Order**

62. I hereby order that AutoStore Technology AS to pay Ocado Innovation Limited the sum of £46,000 as a contribution towards their costs. This sum is to be paid within 7 days of the expiry of the appeal period set out below.

**Appeal**

63. Any appeal must be lodged within 28 days after the date of this decision.

**Phil Thorpe**

Deputy Director, acting for the Comptroller