

CHAPTER 16

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16 COMPLEX PROBLEMS

DISCLOSURE

16.01 Rule 86 provides the comptroller with the powers of a High Court judge as regards the discovery and production of documents. However the comptroller does not have the power to punish summarily for contempt of court. Where a party fails to comply with an order by the comptroller for disclosure, it is open to the other party to apply to the High Court for enforcement. Alternatively, the other party could apply to the comptroller for an order striking out the first party's case.

Initial Request between the Parties

16.02 Normally a party seeking disclosure will first approach the other side privately (ie not through the Office) in the hope of reaching agreement on the matter. If a request for disclosure comes to us, this is usually because, though admittedly not always, the parties have not been able to reach agreement.

16.03 On receipt of a request, the other side should be asked for their comments on the matter before the request is referred to the HO. A period of two weeks may be allowed for this. There may be no need to stay the proceedings at this point. However if you are in doubt, you should refer to the HO.

PECS:- A1 to attach a request for indexing and scanning to the response and send to Index and Scanning Section (doc code is AGNTL-LIT). Team = Inter Partes; User = Case Officer; Message = "See letter"

If views of other side sought, B2 should create letter in Word and manually import. A copy letter should be issued to the other side.

If case needs to be referred to HO, Case Officer will need to create minute and manually import. Send Message = "PSM".

16.04 Deleted

16.05 If the disclosure issue is not resolved, the HO can be asked to decide the matter.

Request to the Comptroller

16.06 The details of the request for disclosure should be filed together with the views of the other side. The parties should indicate whether they wish the HO to decide the matter on the papers or wish to be heard in the matter. The matter is then referred to the HO.

PECS: See above for actions

Decision by the Hearing Officer

16.07 See Patent Hearings Manual paragraphs 3.44 - 3.48 concerning the criteria that HOs will use in exercising their discretion with regard to the ordering of disclosure.

16.08 The HO may order that a list of documents which are or have been in a party's possession be made available to the other side. When the party concerned has provided such a list, the documents may be inspected by and copies supplied to the other party. The HO will lay down a timetable for these stages.

STAY

Parallel Proceedings before the Court or EPO

16.09 A stay in *inter partes* proceedings may be requested if there are parallel proceedings in the Court or before the EPO.

16.10 The party requesting the stay should file the details of the request including reasons. The views of the other side should be canvassed. Additionally, the parties should indicate whether they wish the HO to decide the matter on the papers or wish to be heard in the matter. The matter is then referred to the HO.

16.11 The HO will decide the matter taking all the circumstances of the case into account - see Patent Hearings Manual paragraphs 2.73 - 2.76.

PECS:- A1 to attach a request for indexing and scanning to responses received and send to Index and Scanning Section (doc code is AGNTL-LIT). Team = Inter Partes; User = Case Officer; Message = “See letter”

Letter to other side created and imported using manual import (doc code is LETTER-LIT)

If case needs to be referred to HO, Case Officer will need to create minute and manually import. Send Message = “PSM”.

Stay of Court proceedings

16.12 Court proceedings may be stayed pending the outcome of proceedings before the Office eg under section 71 and 72 (*Hawker Siddeley Dynamics Engineering Ltd v Real Time Development Ltd* [1983] RPC 395).

Parallel EPC Proceedings before a Competent Authority of another State

16.13 Any reference under section 12 for an EP patent application will be stayed if proceedings before a competent authority of another state, which is a party to the EPC, are already in being (see section 82(7) and MOPP 82.06).

Parallel proceedings before the Comptroller

16.14 Entitlement proceedings before the comptroller may be stayed pending revocation proceedings also before the comptroller (see *Raychem Ltd v Caradon MK Electric* - section 37; *Loblite v Caradon MK Electric* - section 72).

16.15 The HO may stay revocation proceedings at the request of the claimants pending consideration of amendments requested by the proprietors (MOPP 72.13).

16.16 Opposition to surrender under section 29 may be stayed pending section 72 proceedings (MOPP 29.06).

DECLINE TO DEAL

- 16.17 The comptroller has discretion under section 8(7) and similarly under section 12(2) and 37(8) and 72(7) to decline to deal with a question if it appears to him that it involves matters which “would more properly be determined by the court”. In such a case any person entitled to do so must issue a claim form in the court within 14 days of the comptroller’s decision.
- 16.18 See Patent Hearings Manual paragraphs 2.77 - 2.83 for further details.

CONFIDENTIALITY (Rule 53)

- 16.19 The comptroller has discretion to direct that a document other than a patent form, or any part of a document, be treated as confidential, when so requested by the person filing the document or any party to the proceedings to which it relates.
- 16.20 Since the public are generally entitled to inspect documents relating to a patent, or application for a patent after ‘A’ publication, a request for confidentiality should not be granted unless it is considered justified for the reasons given.

Confidential evidence on a restricted basis

- 16.21 Sometimes a party will go further and seek to submit evidence it does not want the other side to see. Any party to the proceedings has a right to see all the evidence before the comptroller on which the other party relies, so there can be no question of the hearing officer admitting evidence that one party has not seen. However in suitable cases it may be sufficient to grant access to the confidential evidence on a restricted basis, eg to allow the document to be seen only by the other party’s legal representatives and/or by an independent expert, or to require strict undertakings on confidentiality. See Chapter 3 of the Patent Hearings Manual paragraphs 3.36-3.39..

Treatment of the rule 53 request

- 16.22 The rule 53 request must be made within fourteen days of the filing of the document or receipt of the document by the comptroller, an examiner or the Office and include reasons for the request (rule 53(3)).

- 16.23 If the request is not supported by reasons, the sender should be telephoned and asked to submit detailed reasons in writing within fourteen days from the date of filing the request. A telephone report should be issued and the case suitably diarised.
- 16.24 The document(s) containing the confidential information should be placed on the "not open" part of the proceedings file pending consideration of the request. However, any document which is submitted with the rule 53 request including the accompanying letter should remain on the "open" part of the file (eg a letter that simply contains the rule 53 request).
- 16.25 In a few cases, the rule 53 request may appear in a letter which also contains some or all of the confidential information/supporting reasons to which the rule 53 request relates. In those cases, the letter should be placed on the "not open" part of the proceedings file. It will be necessary for the person to request that this letter is also to be treated as confidential.
- 16.26 When all of the required documentation has been received and placed on the appropriate part of the file, the case should be referred to the HO for consideration of the request.
- 16.27 If the request for confidential treatment is allowed, the HO may direct the following:
- (a) Inform the sender in writing accordingly;
 - (b) For evidence not scanned to the PECS file at this stage, for example, endorse the front of each of the documents which have been accorded confidential treatment with the stamp below.

This document is to be treated as confidential
by direction of the comptroller under Rule 53 of
the Patents Rules 2007 dated -----

At the end of any appeal period the B3 will sign the certificate. Place the documents which have been accorded confidential treatment into an envelope and stamp the envelope "not open to public inspection". Place the envelope on the "not open" part of the proceedings file.

- (c) For evidence to be scanned to the PECS file, for example, action as below
- (e) If confidentiality is allowed for only certain parts of a document, the full document will be treated as either as in (b) or (c) above. The redacted version (a copy with the confidential parts omitted) will be treated as Open to Public Inspection and should be added to the relevant file accordingly.

16.28 The copy of the official letter which informs the sender that the rule 53 request has been allowed should be added to the PECS file and made Open to Public Inspection.

16.29 It is possible for a document to be accorded confidential treatment for a limited period only. Where this applies, the action should be taken as above but the case should be diaried as appropriate and the position subsequently reviewed by the HO

16.30 Once the relevant period has expired, if a document is not to be accorded confidential treatment, it will be necessary to inform the sender accordingly. The B2 should write to the sender, cancel the rule 53 stamp on any relevant paper document(s) and arrange for them to be scanned to the "open part" of the PECS file. If the document has already been added to the PECS file, the B2 should change the status to 'Open to Public Inspection', amend the document code and remove the annotation. The certificate should then be moved to the closed part of the file.

PECS:- When the document is sent for scanning, ensure the index and scanning sheet shows the document is NOPI. Once the document has been

scanned into PECS, the B2 should check the status, set the document code as CONFIDENTIAL and add an annotation – “Not open to public inspection”.

If it is agreed that the document should be kept confidential, the annotation should be amended to read “R53 confidential not open to public inspection”. A copy of the appropriate certificate should then be added. Check with B3 re adding electronic signature to certificate (to be found on ‘H’ drive under PECS/ Certificates). The certificate with the signature should be manually imported – import date to be the same as that of the original document.

If confidentiality is accorded to part of the document, this part should remain confidential; however a redacted version may be filed which will then be open to public inspection. If a redacted version is received, use the appropriate doc code and annotate “Redacted version open to public inspection”.

EXTENSION OF TIME (EOT)

- 16.31 The period provided for filing the counter-statement, and the timetable set for the filing of evidence are expected to provide sufficient time for the parties to complete the required actions. Whilst there are no hard and fast rules, once a timetable for the proceedings has been set, HOs will grant extensions only in exceptional circumstances. When granted, they will only be as long as strictly necessary.
- 16.32 When considering a request for an extension of time, the HO will apply the general principles and the case law underlying the exercise of discretion and will seek to keep delay to a minimum. It is most unlikely that postponement of the hearing itself would be allowed.
- 16.33 A party requesting an extension should keep their request to the minimum necessary to deal with the difficulty that has given rise to it, should state clearly the time period required, should provide a clear and convincing explanation of the steps that they have taken to meet the original deadline, and should explain the nature of the difficulty.

16.34 The effect of any extension of time on the other party must be considered. To this end the other party's views should be canvassed, preferably by telephone, before a decision on whether or not to allow the extension is made. Where an extension of time is allowed, Litigation Section or the HO will consider the effect on the timetable as a whole and if appropriate make any changes necessary so as not to disadvantage the other side.

PECS:- A1 to attach a request for indexing and scanning to responses received and send to Index and Scanning Section (doc code is AGNTL-LIT). Team = Inter Partes; User = Case Officer; Message = "See letter"

If the letter relates solely to an extension of time request, the B2 should change the document code to EOT-LIT and annotate "EOT request received".

If case needs to be referred to HO, Case Officer will need to create minute and manually import. Send Message = "PSM".

If EOT is allowed, create letter and manually import. Add annotation "EOT request filed on allowed".

TERMINATION/WITHDRAWAL OF GB PATENT APPLICATIONS BEFORE PUBLICATION

16.35 In an entitlement dispute, it is not appropriate for the Office to take any irrevocable action which might be to the detriment of the claimants should they subsequently be found to be entitled to the patent application. In section 8 entitlement proceedings, it is important that the relevant Formalities Group be informed of the proceedings so that an application is not terminated/withdrawn without the matter being referred back to Litigation Section. The procedure outlined below should be followed.

Warning to the relevant Formalities Group

16.36 When the B2 is appointed for a section 8 entitlement in respect of a GB patent application which has not been published, the following action should be taken by the B2:

PECS:- Update the front of the electronic file with the label: Litigation Proceedings
Annotate the front cover of the dossier “Do not terminate case without consulting
Litigation Section”.

Create minute to Formalities Manager and manually import. Send message
“PSM”.

Action by Formalities Group

16.37 If, before publication, termination action is due or a request to withdraw the patent application has been made, the Formalities Manager will contact the B2. The B2 officer should then refer the case to the HO for appropriate action.

16.38 Deleted

NO COUNTER-STATEMENT FILED

16.39 If no counter-statement has been filed, the application/reference is deemed to be unopposed (see MOPP 72.09).

16.40 It is possible that the defendant did not receive the original official letter or the counter-statement has been sent but has not yet reached the file. Consequently, in order to ensure that the defendant is not disadvantaged, an official letter should be issued inviting comments from the parties (see annex 1).

16.41 If a counter-statement is filed in response to the official letter, the defendant will need to request a retrospective extension of time before the counter-statement may be admitted. If this is opposed by the other side, the case should be referred to the HO for further procedure.

16.42 If no counter-statement is filed in response to the official letter or the defendant states that he/she does not intend to file a counter-statement, the defendants will forfeit the right to take any further part in the proceedings:

- In section 72 revocation cases (see MOPP 72.09) the HO is then asked to consider whether each specific fact as it is set out in the statement is conceded, except insofar as it is contradicted by other documents available to him. If on this basis it is determined that a ground has been made out, then the patent will be revoked. However, if it is the preliminary view of the Office that no ground has been made out, then the claimant should be informed of this view and offered a hearing before the application is dismissed.
- For all other cases, the HO is asked to consider the case. Again he will largely follow the practice as laid down in MOPP 72.09. He will give such directions as he sees fit. He may require that the claimant files evidence concerning specific points raised in his case before coming to a final decision.

PECS:- Create letter and manually import (doc code is LETTER-LIT)

Doc code for counter-statement is STATECTR.

Doc code for EOT request is EOT-LIT

Where appropriate create minute to HO and manually import. Send message "PSM".

DUTY TO COPY TO OTHER SIDE

Fundamental principle of practice

16.43 In *inter partes* proceedings, there is a fundamental principle of practice whereby each party has a duty to copy to the other side any correspondence filed by them at the Office. This duty is laid down in *VNU Business Publications B.V. v Ziff Davis (UK) Limited* [1992] RPC 269, a case concerned with copyright, where it was held that:

'There is a general principle that a properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part.'

- 16.44 As such, in patent proceedings the Office will copy the Statements of Case to the other side. With regard to evidence however, the parties will be invited to send a copy to each other and to the Office.
- 16.45 In the Design Right (proceedings before comptroller) Rules 1989, the duty to copy to the other side is clearly stated with regard to the counter-statement, though the Office is obliged initially to send a copy of any statement filed to the other side. With regard to evidence, in that the comptroller may give such directions as he thinks fit, the parties are requested to copy any documents filed at the Office to the other side.

Correspondence

- 16.46 Correspondence received in the Office from one party may already have been copied to the other side. If this is the case, such correspondence will usually indicate this by use of the abbreviation 'cc' followed by the name of the other side's attorney. In such a case, there would be no need for the Office to copy such a letter to the other side.
- 16.47 If it is not clear whether the correspondence has been copied to the other side, then the correspondence should be forwarded as soon as possible under an official letter. If no action needs to be taken by the other side, it may be sufficient for the letter merely to state that the correspondence (give details eg date and from whom) is enclosed for information purposes.

Unpublished patent applications

- 16.48 Section 118 and rule 55 do not authorise us to inform a claimant of a patent applicant's address for service in respect of unpublished patent applications. Consequently, the following procedure should be followed:
- The patent applicant should be contacted and asked if he is willing for us to disclose his address for service.

- If he is unwilling for us to do so, then any letter heading indicating the address for service of the patent applicant should be blanked out when copying correspondence to the claimant (see 1.21 – 1.23)

UNCONTESTED ENTITLEMENT CASES

- 16.49 If in any entitlement proceedings under sections 8, 12 or 37, no counter-statement is filed after due warning has been given to the defendants (**see No counter-statement filed above**), the reference is treated as uncontested.
- 16.50 The case should be referred to the HO who will then consider it as if each specific fact set out in the statement were conceded, except insofar as it is contradicted by other documents which are available to the HO.
- 16.51 The HO may give such directions as he sees fit, including provision of evidence.
- 16.52 If he is satisfied that the entitlement should be awarded to the claimant, he will issue a decision on an *ex parte* basis.

PECS:- Create minute and manually import (doc code is MINUTE-LIT).
Create message and send to HO. Message = “PSM”

PARALLEL PROCEEDINGS/CONSOLIDATION OF SUBSEQUENT REFERENCES/APPLICATIONS

Parallel proceedings

- 16.53 There are instances where it may be appropriate for *inter partes* proceedings to run in parallel, for example, where a number of parties oppose a patent proprietors' application to amend a granted patent. In these instances, either the HO or the parties will suggest that consideration should be given to running the proceedings in parallel.
- 16.54 Where agreement is given by the parties, an official letter will be issued noting the agreement of parallel proceedings, a copy of which should be placed on the open

part of the file. The front of the proceedings files should be cross referenced to show proceedings are running in parallel.

- 16.55 It may be possible to set the same periods of time for filing evidence for all of the parties who are involved in those particular proceedings, alternatively, it may be necessary to revise the timetable in agreement with the parties and with the consent of the Hearing Officer

PECS:- Annotate the front of each file to show proceedings are running in parallel and list the various files involved (see 1.10)

Consolidation of proceedings

- 16.56 Where a subsequent reference/application is filed involving the same parties as one currently before the Office, a request may be made for consolidation of the proceedings. The proceedings may be, for example, for the same section of the act in respect of different patents or for different sections of the act in respect of the same patent.
- 16.57 The evidence filed in both sets of proceedings ie the earlier, and later case, will then cover both (or more) sets of proceedings which will save the need for duplication of evidence.
- 16.58 Where a request is received, the view of each party should be sought prior to submitting the matter to the HO for consideration. The HO will give the request due consideration ie he will consider, for example, the stage reached in the earlier proceedings and the overall effect on the timetable and any hearing date already agreed.
- 16.59 Where the request is allowed, an official letter will then be issued to the parties to confirm that the proceedings are going to be consolidated. The letter will normally clarify any matters outstanding and any time periods which should be met. The front of the proceedings files should be cross referenced to show the proceedings have

been consolidated and should indicate clearly the lead file. If the request is declined, an official letter should be issued setting out the reasons for this.

PECS:- Annotate the front of each file to show proceedings have been consolidated and list the various files involved. State clearly which is the lead file and include in the annotation that all corres received from the evidence rounds onwards is to be added to the lead file only (see 1.10).

Un-consolidation of proceedings/parallel proceedings

16.60 At any time it may be decided that the proceedings should run independently. This may occur if a reference/application has been withdrawn.

16.61 Where we “un-consolidate” proceedings, the case will be referred to the HO for him to take note. A letter will then be issued to the parties confirming the proceedings are now running independently. The front of the proceedings files should be updated.

PECS:- Remove the annotations on the front of each of the electronic files.

ADDING, STRIKING OUT OR SUBSTITUTING PARTIES

16.62 Generally, in proceedings before the comptroller, it is possible to add or substitute a party. When such a request is made, the comments of the other party should be obtained. The HO should then be asked to consider the request.

16.63 Where one of several claimants wishes to withdraw from the proceedings or the defendants believe that one of the claimants has no cause of action, the HO may strike out that party.

16.64 If a party is struck out, the statement or counter-statement should be amended as appropriate. Amendment of any relevant form will also be necessary.

16.65 If any party is added or substituted in proceedings, then they may either amend the submitted statement or counter-statement or be given the opportunity to file a further statement or counter-statement.

16.66 Any new party must be given the opportunity to play a full part in the subsequent proceedings.

PECS:- To amend a document on PECS, use the Enhance function (highlight the document, right click and select Enhance from the drop down menu). Using the appropriate features from the options available, amend the document accordingly.

WITHDRAWAL OF APPLICATION/REFERENCE

16.67 In *inter partes* proceedings, the Office may be advised at any time throughout the proceedings that an application/reference is to be withdrawn. This is normally due to the parties concerned having reached a settlement and it will therefore not be applicable for the application/reference to proceed before the comptroller.

PECS:- A1 to attach a request for indexing and scanning to the letter received and send to Index and Scanning Section (doc code is AGNTL-LIT). Team = Inter Partes; User = Case Officer; Message = "See letter"

If letter refers to withdrawal, B2 should add annotation "Withdrawal request".

If the case needs to be referred to HO, Case Officer will need to create minute and manually import. Send Message = "PSM".

Any letters issued should be created and imported using manual import.

Letter of withdrawal is received from the claimant and refers to the matter of costs being waived by both parties

16.68 The B2 will write to both parties noting the withdrawal. The letter will also state that, in the absence of comments within 14 days, the Office proposes to treat the matter as withdrawn leaving no matters outstanding. The B2 should also inform the HO of the withdrawal. Any outstanding issues will be dealt with by the B2 and may need to be raised with the HO. In the absence of comments, the B2 will

issue a further letter informing the parties that the Office is treating the matter as withdrawn. If a letter of withdrawal is received from the defendant it will be necessary to obtain a letter of withdrawal from the claimant before taking action on the withdrawal. The case may then be cleared.

Letter of withdrawal is received but does not mention costs

16.69 The B2 will write to both parties stating that in the absence of comments within 14 days, the Office proposes to treat the matter as withdrawn leaving no matters outstanding. The B2 should also inform the HO of the withdrawal. Any outstanding issues will be dealt with by the B2 and may need to be raised with the HO. In the absence of comments, the B2 will issue a further letter informing the parties that the office is treating the matter as withdrawn. The case may then be cleared.

Letter of withdrawal is received from both parties and both confirm that the matter of costs has been resolved

16.70 The B2 will forward the file to the HO with a recommendation that a letter is issued noting that the matter is withdrawn leaving no matters outstanding.

Withdrawal of claimant in section 72 proceedings

16.71 For withdrawal in revocation proceedings see Chapter 14.

SECURITY FOR COSTS

16.72 In many proceedings, where a claimant neither resides nor carries on business in a state that is party to the Brussels Convention, the comptroller can require them to give security for costs under, for example, section 107(4) of the Patents Act 1977 or rule 22(2) of the Design Right (Proceedings before comptroller) Rules 1989, before allowing the proceedings to continue.

16.73 Unless the defendant in proceedings makes a request for security for costs, (see rule 85), there is no need to pursue the matter. If a request is made, the matter may be referred to a HO as he or she may need to advise on the appropriate level of security. Instead of a standard amount such as £900 (as previously) the award should be determined, after consideration of argument and, if necessary evidence, wholly on a case by case basis appropriate to the estimated costs likely to be awarded at it's conclusion (see TPN 2/2000 - paragraph 16). A party can take payment to his/her solicitor to hold for the paying party (see Civil Procedure Rules 25.12 for further information on the manner of payment). The Office also operates an account in the name of third parties in which money can be held. This may be relevant where security for costs is ordered and the party is a private applicant.

PECS:- A1 to attach a request for indexing and scanning to the letter received and send to Index and Scanning Section (doc code is AGNTL-LIT). Team = Inter Partes; User = Case Officer; Message = "See letter"

If letter refers to security for costs, B2 should add annotation "Request for security for costs".

If the case needs to be referred to HO, Case Officer will need to create minute and manually import. Send Message = "PSM".

Any letters issued should be created and imported using manual import.

ENFORCEMENT OF COURT ORDERS

16.74 If a party wishes to enforce an order made by a specific court, it is necessary to apply to the same court in order to request enforcement of the court order.

FILING DOCUMENTS BY FACSIMILE IN INTER PARTES PROCEEDINGS

16.75 In all inter partes proceedings before the Office, facsimile filed documents do not need to be followed by confirmation copies through the normal postal system, unless specifically requested.

16.76 If the facsimile copy is of poor quality it will be necessary to request the original document. (See Tribunal Practice Notice 4/2008).

16.77 Where a party files a document by facsimile only they must make the original available on request.

ANNEX 1

c/o

**Patents Directorate
Concept House
Cardiff Road, Newport
South Wales NP10 8QQ**

Case Officer: 01633 81****
E-mail: xxxxxx@ ipo.gov.uk
Switchboard: 01633 814000
Fax: 01633 814491
Minicom: 08459 222250
DX: 722540/41 Cleppa Park 3
Internet: <http://www.ipo.gov.uk>

Your Reference:

Our Reference: Rm 3Y31/ Name/File Reference

Date

Dear Sirs

Patent No *** (*****): *** under Section *** of the Patents Act 1977 by *******

In the above proceedings, it is noted that the defendants have not filed a counter-statement, under Rule ***** of the Patents Rules 2007, in the period set by the official letter dated ****.

Subject to comments from either party within 14 days from the date of this letter, the Office will treat the case as unopposed. If the case is so treated, the Office will issue further instructions.

It is possible for the defendants to file a request for a retrospective extension of time for filing the counterstatement. However I can not guarantee that the extension request will be granted. Any extension request will require detailed reasons regarding why the extension is needed.

A letter in identical terms is being sent to the other side.

Yours faithfully

Your Name
Litigation Section
Patents Directorate