



23 December 2011

PATENTS ACT 1977

BETWEEN

Kenneth Farr

Claimant

and

Orbis Corporation

Defendant

PROCEEDINGS

Reference under section 37 of the Patents Act 1977
in respect of patent number EP(UK) 1268313

HEARING OFFICER

Phil Thorpe

COSTS DECISION

Introduction

- 1 This is a decision on costs which follows the substantive decision dated 17 June 2011¹ where I found against Mr Farr in his claim that he was entitled either jointly or solely to the invention set out in EP(UK) 1268313. In that earlier decision I deferred the question of costs pending further submissions from the parties. These have now been provided in writing and also at a hearing on 28th October 2011. At the hearing Ms Emer Bollinghaus of Kilburn & Strode appeared for the defendant and Ms Jane Lambert of NIPC Law appeared for the claimant. I am grateful for the assistance provided by both Ms Bollinghaus and Ms Lambert but would like to thank Ms Lambert especially for agreeing to represent Mr Farr essentially on a pro-bono basis.

Costs before the comptroller

- 2 It is long-established practice for costs awarded in proceedings before the Intellectual Property Office (IPO) to be guided by a standard published scale. The

¹ BL/O/214/11

scale costs are not intended to compensate parties for the expense to which they may have been put, but merely represent a contribution to that expense. This policy reflects the fact that the IPO ought to be a low cost tribunal for litigants, and builds in a degree of predictability as to how much proceedings before the IPO may cost them. The standard scale for proceedings commenced prior to December 2007 is set out in Tribunal Practice Notice (TPN) 2/2000².

- 3 The Tribunal Practice Notice also states that a Hearing Officer may depart from the published scale of costs and even award costs approaching full compensation to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour. Ms Lambert referred me to two earlier office decisions where this was considered. For reasons that will become clear, I do not need to say any more on these earlier cases.
- 4 Orbis argues that the circumstances of this case are such as to warrant an off-the-scale cost award in its favour. In particular it argues that Mr Farr's behaviour has been unreasonable throughout the proceedings. This has prolonged the dispute and added to the cost. Orbis has provided some details of the costs it incurred. These included the costs of both its UK based and US based representatives. In respect of the latter it has provided a declaration from its US based attorney, Mr Roger Stein, in support of the arguments put forward by Ms Bollinghaus.

The Proceedings

- 5 I set out the history of these proceedings in some length in my substantive decision. For the purpose of this decision I need refer to just a few aspects of that history. The first is that the case has undoubtedly taken longer than it should have to resolve. Orbis argues that Mr Farr's behaviour contributed significantly to this. I will come on to that shortly. What is not in dispute is that the proceedings were effectively stayed for a not insignificant period whilst the parties attempted to settle their differences. Again there is now some dispute as to whether this was really a genuine attempt on the part of Mr Farr to settle the dispute.
- 6 I should also mention that early in the proceedings Orbis had requested summary judgment/dismissal of the case. A preliminary hearing was held on this which was attended by both sides. In a decision dated 11 June 2008³ the Hearing Officer, Mr Peter Back decided that Mr Farr did at least have a case to argue and that it would be wrong to conclude at this stage that he has no reasonable chance of success. Accordingly he refused Orbis' request for summary dismissal. Mr Back retired in the course of these proceedings.
- 7 On the substantive matter of entitlement only Mr Farr submitted any form of evidence. This comprises a range of documents which in his view supported his case. A substantive hearing was held on 7 January 2011 at which Mr Farr appeared in person. The defendant chose not to attend the hearing.
- 8 Those are the key points of these proceedings. I should also mention that there is,

² <http://www.ipo.gov.uk/tpn22000annexa.pdf>

³ BL O/161/08

as often is the case, more between the parties than just this entitlement dispute before the IPO. Mr Farr also sought to oppose the patent before the EPO. Ms Bollinghaus noted that her client had not sought to recover its costs before the EPO. She also helpfully clarified that her client was not seeking as part of this action to recover any of these costs associated with the proceedings before the EPO. There is apparently also an existing royalty agreement between the parties relating to other intellectual property rights. It was suggested to me that Mr Farr's motivation for bringing these proceedings was to help him secure an increase in the royalty rate. I will address that shortly.

Mr Farr's general behaviour

- 9 I will start with Mr Farr's general behaviour during the proceedings. Mr Farr chose to represent himself throughout the proceedings. He was entitled to do this. Orbis however claim that he was obstructive, uncooperative and often reluctant to follow the guidance provided to him by both the IPO and also Orbis' representatives. Ms Lambert, who has some experience of litigants in person including through her role as a mediator and arbitrator, recognised that litigants in person can be infuriating. But in order to depart from the scale she argued that Mr Farr's behaviour needs to be much more than infuriating. She argued that her client should not be penalised simply because he was a litigant in person. I fully agree. However clearly there is a point where infuriating behaviour crosses into unreasonable behaviour. That Mr Farr crossed this point is essentially what Orbis is arguing. It has highlighted a number of particular aspects of Mr Farr's handling of the case that in its view takes his behaviour into the realms of unreasonableness. Before I consider these I would note for the record that for all his faults as a litigant I did not find Mr Farr to be obstructive or uncooperative in my dealings with him. He was, as often is the case with litigants in person, perhaps too closely involved to clearly see what he needed to do to succeed with his case.

Mr Farr's motivation for bringing the case

- 10 Orbis argues that Mr Farr's motivation for bringing the entitlement dispute was solely financial. In particular he was seeking a one off payment or an increase in his existing royalty rate. I do not know whether that was the case. However even if it was then that on its own would not be sufficient to justify an award off scale. More would be required. For example I would need to be convinced that the case was launched without a genuine belief that there was an issue to be tried. Orbis has suggested that this might have been the case however as I believe I make clear in my substantive decision, there was in my view a genuine question of entitlement to be answered. Hence I can see nothing in terms of why the case was launched to justify an off the scale award.

Mr Farr's unclear and unsolicited submissions

- 11 Ms Bollinghaus refers me to the often unclear and hard to decipher submissions put in by Mr Farr and to other correspondence either put into the proceedings or sent direct to Kilburn and Strode that had no bearing on the case. I am not able to comment on any correspondence sent by Mr Farr to Orbis that was not copied to the IPO. Clearly to the extent that it had no bearing on the case then Orbis was free to

ignore it. In terms of Mr Farr's submission to the IPO then I would agree with Ms Bollinghaus that they did lack focus and at times were difficult to follow. They were at time unnecessary. But I do not believe that in content or quantity they were unreasonable. They were rather indicative simply of someone unfamiliar with litigation.

Length of the proceedings

- 12 As I recognised in my earlier decision, these proceedings were unusually lengthy. That in itself is not justification for making an award off scale. What I need to decide is whether Mr Farr's actions unreasonably lengthened proceedings to the extent that it resulted in Orbis incurring unnecessary costs. Having reviewed the case I do not think that this happened. At times Mr Farr made unsolicited submissions. His submissions were as I have noted often not clearly focused on the issues in hand. But I do not believe that unduly lengthened proceedings. The extra time that this case took was the result mainly of the following: a significant period where proceedings were stayed pending discussions between the parties; delays resulting in having to deal with a number of preliminary issues most notably Orbis' motion for summary dismissal and its offer to surrender the patent; and also regrettably delays within the IPO stemming in part from the retirement of the original hearing officer. Hence whilst Mr Farr's obvious unfamiliarity with the procedure did lengthen proceedings, I do not think that the effect of this was such as to justify an award off scale.

Mr Farr's pursuance of a case clearly launched more than 2 years after the grant of the patent

- 13 Orbis' strongest point is in my view that Mr Farr persisted with his case even though it was clear from early in the proceedings that the evidential burden against him was high because of his failure to launch the action within the 2 year period specified in section 37(5). In the preliminary decision the Hearing Officer made it clear to Mr Farr that he needed to prove that Orbis knew that it was not entitled to the patent. Mr Farr indicated at the time that he had further evidence to submit on this. In the event what additional evidence that Mr Farr did submit could best be described as flimsy. I am however satisfied that Mr Farr did attempt to obtain further evidence on this point in particular witness statements from some of the people present at the key meetings. And in his preliminary decision on the strike-out motion, the hearing officer noted that "even the evidence filed to date, as confusing and non-contemporaneous as some of it may be, invites the deeper consideration a full hearing will allow". Hence on balance I do not believe that Mr Farr's decision to continue with the action to a hearing was unreasonable.

Attempts to resolve the dispute through mediation

- 14 Ms Bollinghaus' final point related to Mr Farr's conduct in respect of the attempts made by the parties to settle the dispute through mediation. I should note that it transpired in the hearing on costs that information on the mediation that was most likely privileged had been submitted by Orbis to the IPO back in 2009. In the event I do not believe that even with this information I am in a position to find that Mr Farr unreasonably rejected Orbis' effort to settle the dispute.

Conclusion & Order

- 15 I have considerable sympathy for the defendant in this case. Litigants in person such as Mr Farr can be infuriating. But they are a fact of life and any proceedings involving one or more litigant in person may well not flow as smoothly as it would if experienced litigants are involved. But that in itself is not a sufficient reason to depart from the published scale of costs. Something more is needed. In this instance I do not believe that Orbis has clearly demonstrated this something extra. In reaching this conclusion I have considered individually each aspect of Mr Farr's behaviour highlighted by Orbis. I have also considered the entirety of the proceedings. Hence I do not intend to depart from the published scale. There is however some discretion provided within the published scale and I intend to make use of that to reflect in particular the extra time and effort required by Orbis to deal with the various submissions from Mr Farr.
- 16 At the hearing on costs I asked the parties whether there were any costs outstanding from the earlier preliminary hearing. Having considered the various submissions and the earlier decision I have decided that there are not. I therefore base this cost decision on the remainder of the proceedings.
- 17 I order the claimant, Mr Kenneth Farr to pay the defendant Orbis Corporation the sum of one thousand three hundred and fifty pounds (**£1350**) as a contribution to its expenses. 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

- 18 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