

PATENTS ACT 1977

BLO / 117 / 90

IN THE MATTER OF an application for
the restoration of Patent No 1596738
in the name of Linkrose Limited

DECISION

Patent No 1595738 dated 21 November 1977 ceased on 21 November 1987 through non-payment of the renewal fee in respect of the eleventh year by the due date or within the immediately following period of six months allowed by Section 25(4) upon payment of the renewal fee and the prescribed additional fee.

An application for restoration of the patent was made on 4 November 1988 by Linkrose Limited and, after the office had communicated to the proprietor the view that the requirements of Section 28(3) had not been met, the matter came before me at a hearing on 22 February 1990 and at a continuation thereof on 1 October 1990 following an adjournment to allow the filing of further evidence. On both occasions the proprietor was represented by Mr T.M. Gregory of A.A. Thornton and Co., and Mr M. Wright attended on behalf of the office.

The evidence in support of the application consists of two statutory declarations by Dr A P Boyes, now the sole director of Linkrose, together with two exhibits; two statutory declarations from Mr J Ellis, a former director of Linkrose who resigned during the relevant period, together with an exhibit in the form of a letter to Dr Boyes; and statutory declarations from each of Anthony Keating, solicitor for Dr Boyes; and Dr A.J. Biddlestone and Dr J.M. Winterbottom, both colleagues of Dr Boyes at the University of Birmingham. I have directed that some of this evidence be treated as confidential under rule 94(1).

The inventors for Patent No. 1596738 are Dr Boyes and Professor S.R.M. Ellis. The company Linkrose Limited was set up to exploit the invention but since neither inventor wished to become a director on the grounds that they were not men of business, the directors appointed were Mrs M. Boyes, the wife of Dr Boyes, and Mr J Ellis, the son of Professor Ellis. The latter is a chartered accountant and undertook as a spare time activity the administration of the company, dealing with financial matters including authorising payment of patent renewal fees. In 1986 Mrs Boyes was replaced by Dr Boyes but this had little effect on the running of the company while Mr Ellis remained as a director. However the latter nominally resigned his directorship in early 1988, officially informing Gallafent & Co, the company's patent agents, and Dr Boyes of his resignation in letters written on 26 April 1988. This left Dr Boyes as sole director. The company has always consisted only of its director or directors; there are no employees. Thus responsibility within Linkrose for patent renewal during the relevant period began with Mr Ellis and was transferred to Dr Boyes for the last three and a half weeks of the extended period.

Under the arrangements which had been followed for a number of years for the renewal of the patent, Gallafent and Co would send reminders to Linkrose at their registered office, the home address of Mr Ellis, and copies would be sent to Dr Boyes and to the address of the accountancy practice of Mr Ellis. On instruction from Mr Ellis, renewal fees for the 6th, 7th and 10th years were paid within the normal period allowed, and those for the 5th, 8th and 9th years within the extended period, the latest time being 14 February in 1986. In respect of the 11th year also Gallafent & Co sent reminders, two before the renewal date and four subsequently, the last one being sent on 25 April 1988; that final reminder was sent within a day of Mr Ellis writing to Dr Boyes to inform him officially of his resignation and of a letter from Mr Ellis to Dr Boyes dated 26 April 1988 the text of which I now reproduce.

"I have received a final overdue renewal reminder from Gallafents and having passed on all previous reminders to you then I presume you will take the appropriate action.

"I have also written to them informing them as to the change of registered office."

Dr Boyes became a director of Linkrose Limited in March 1986 on the resignation of his wife at the beginning of what he describes as lengthy and acrimonious divorce proceedings which were concluded in February 1987 with him obtaining custody of his two daughters, then aged 14 and 8. Since then he has continued on his own to bring up his daughters while working at Birmingham University. Subsequent to the conclusion of the divorce proceedings there appears to have remained a significant degree of conflict with his ex-wife, as confirmed by Dr Boyes' solicitor Mr Keating who refers particularly to problems relating to access and to removing the children from the jurisdiction of the court for the purpose of holidaying abroad. All these factors combined to produce a considerable amount of stress and adversely affected his general physical health.

Dr Langrick reports that he first saw Dr Boyes on 18 April 1986 with a very severe eye infection resulting from severe stress and poor general health, and that he saw Dr Boyes five more times over the next two years generally with minor illnesses which reflected a reduced state of resistance. Between July 1988 and March 1989 he was seen by two of Dr Langrick's colleagues under similar circumstances. Dr Boyes states that in November and December 1987, and in the following February and March he was quite seriously ill with a viral infection, and recovered only slowly. I can accept from the evidence that, during 1987 and 1988, Dr Boyes was not able to perform his professional duties with the expected degree of efficiency and that this state of affairs extended into April 1988, I also accept that Dr Boyes continued to be under mental stress and in poor general health for some time after that.

In accordance with Section 28(3) of the Patents Act 1977 it is necessary if the present application is to be allowed that I be satisfied that -

- (i) Linkrose took reasonable care to see that the fee was paid by 21 May 1988;
- (ii) the fee was not so paid because of circumstances beyond the control of Linkrose.

There can be no doubt that from before the renewal date until the date of his resignation the responsibility for renewing the patent lay with Mr Ellis, and that thereafter this responsibility passed to Dr Boyes. It is also clear that the system set up to renew the patent was an effective one and had operated well over some years. The system required Linkrose to give the necessary instructions in response to the reminders sent to them by Gallafent & Co. It is equally clear that no fault can lie with Gallafent & Co, who provided a total of six reminders, the last by registered mail.

Thus the failure to renew the patent was due to Linkrose not responding to the six reminders, all of which appear to have been received by both Mr Ellis and Dr Boyes, and it remains for me to determine whether there was lack of reasonable care on their part or whether the failure was caused by circumstances over which they had no control.

In his evidence Mr Ellis states that during the relevant period he was under a great deal of pressure at work. When the usual reminders arrived from Gallafent & Co he took the decision to renew, but decided to delay issuing instructions until matters at work were less hectic. There is nothing exceptionable in that, but when he resigned officially and handed over responsibility to Dr Boyes the patent still had not been renewed and only some twenty-five days of the extended period remained.

It has not been argued that up to this point matters were not under the control of Linkrose, so I must turn my attention to the circumstances prevailing in the final part of the extended period when Dr Boyes was the sole director.

I have already referred to the various pressures to which Dr Boyes was subjected at this time, and to the fact that he was not able to work at full efficiency. Undoubtedly to have the affairs of three companies, (there were two others, besides Linkrose, involved), thrust upon him at the end of April 1988 constituted a yet further burden, particularly when it is remembered that he was not by practice a man of business. The evidence is not entirely clear as to exactly when all the company papers were transferred to him, but the pertinent ones, viz. at least a copy of the final renewal reminder and the letter from Mr Ellis indicating that renewal action was still outstanding, were surely in his possession by the end of April.

It was submitted by Mr Gregory that the circumstances in this case were comparable to those considered in the case of Mead's Patent 1980 RPC 146, and that restoration should be allowed on the grounds that Dr Boyes had simply been unable to respond to the final reminder or deal with the miscellaneous bundle of papers he received from Mr Ellis at the end of April 1988. Although there are broad similarities between the facts of this case and those in Mead's Patent, I think that there are also several significant points of distinction between the two cases.

Mr Mead suffered a mental breakdown and was put under sedation at about the time he would normally have renewed his patent. There is no medical evidence that Dr Boyes suffered a similar mental breakdown, though, as I have said, he was under considerable mental stress and was in a physically run-down condition throughout the relevant period.

Mr Mead was held to have been so disturbed mentally that his failure to respond to the renewal reminders that were sent could be said to have been due to circumstances beyond his control. It was also held that an accident which befell Mr Mead's wife at about the time he received a small royalty cheque could have set him back to the state he was in when he suffered the mental breakdown, so that the receipt of the cheque would not have acted as a reminder that his patent should be renewed.

There is no medical evidence in this case which even suggests to me that Mr Boyes was at any time so mentally disturbed that he was unable to recognise the reminders he received for what they were or to act on the final reminder. Dr Boyes did not act on the first five reminders because he expected Mr Ellis to take the necessary action, and in my opinion there is no satisfactory explanation of why he did not act on the final reminder, which I note clearly stated that the right to renew would lapse on 23 May 1988.

There is no medical evidence to the effect that Dr Boyes was not fit enough to be at work during May 1988 and it appears to me that he was capable of doing his job, even if not wholly up to expectation, and of running other aspects of his life such as looking after his children and arranging a foreign holiday, including giving notice to the Court of his intention to take his children abroad. Indeed, the various pressures on Dr Boyes, with the exception of having to take on the responsibility for the three small companies, had been with him over an appreciable period of time so that one would have expected him to have come to terms with them to a substantial degree.

It was said by Mr Gregory that Dr Boyes had no knowledge of how to go about renewing the patent, having never done it before, but I do not regard that as being a significant factor. There was sufficient time available during which Dr Boyes could have found out what he had to do, simply by

making a telephone call to Mr Ellis or to the company's patent agents.

In summary therefore, I do not consider the circumstances of the present case to be on all fours with those of the Mead case, which were said to be very extraordinary and unusual. After careful consideration I have come to the view that, even if the comptroller is entitled to offer restoration in a case where the proprietor of a patent was so mentally disturbed that he was unable to respond to, or recognise the significance of, reminders sent to him by his patent agent, that would not open the way to restoration when the mitigating circumstances, as they appear to me to be from the evidence in this case, are no more than severe mental stress and accompanying physical run-down of the proprietor.

Accordingly I must refuse the application.

Dated this 18 day of October 1990

K E PANCHEN

Superintending Examiner, acting for the Comptroller



THE PATENT OFFICE