

PATENTS ACT 1977

IN THE MATTER of an application under
Section 71 by Chr. Hansen's Laboratories A/S
for a declaration of non-infringement in respect
of European Patent No 0077109 B1 in the name
of Unilever PLC.

DECISION

An application for a declaration of non-infringement in respect of European Patent No 0077109 B1 was made on 18 February 1991 by the filing of a statement and certain exhibits by Chr. Hansen's Laboratories A/S (the applicants). A counter-statement from Unilever PLC (the proprietors) followed on 13 May 1991. Eventually a date for the substantive hearing was set for 9 June 1995. The intervening period had included a preliminary hearing, as a result of which an amended statement and counter-statement had been filed but a stay pending opposition proceedings in the European Patent Office had been refused, and the various evidence rounds.

As a result of continuing negotiations between the parties the hearing was repeatedly postponed and the next significant event in the proceedings was a letter dated 1 February 1996 from the patent agents representing the applicants. In that letter the Office was advised that as a result of oral proceedings before the EPO Technical Board of Appeal it had been announced that the patent in suit was to be revoked. The written decision of the Board of Appeal, received in the Office on 25 June 1996, confirmed this to be the case.

In the circumstances, whatever was the act in question cannot now be said to be infringing the patent and therefore this decision formally terminates the proceedings. The parties were informed of this view of the Office in a letter dated 11 July 1996 which also invited them to make submissions on the award of costs. Only the Applicants have replied in the time set and this to the effect that as the successful party they request an award of costs in their favour.

In considering the costs that are appropriate in the present case I have had to take into account not only the fact that, because of the revocation of the patent in suit, the applicants are, in effect, the successful party but also that during the proceedings there had been a preliminary hearing which centred on the adequacy of the applicant's statement of case. The Hearing Officer at the preliminary hearing found that the act in respect of which the applicants were seeking a declaration of non-infringement was not clearly and consistently defined in the statement. As a result he gave them time to file an amended statement and made the comment that if the proceedings continued "the failure of the applicants to give clear and full particulars of the act for which they are now seeking a response will be taken into account in the future award of costs upon the outcome of these proceedings".

Although there was some subsequent dispute about the correctness of the Hearing Officer's approach, particularly in the context that the proprietors had failed in their request for striking out and a stay, I do not understand him to have departed in any significant extent from his original thinking on the matter. Thus, taking everything into account, not least that the applicants are overall successful but that their actions brought about the preliminary hearing, I have decided to make no award of costs.

Any appeal from this decision must be lodged within six weeks from the date of this decision.

Dated this 4 day of September 1996



G M BRIDGES

Superintending Examiner, acting for the Comptroller

THE PATENT OFFICE