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PATENTS ACT 1977

IN THE MATTER of  
Patent Application No 8316974  
(Serial No 2141912) by  
Theodor Opatowski

DECISION

Dr Opatowski's application was filed on 22 June 1983, published on 9 January 1985, and was subsequently examined under Section 18. As seen by the Patent Office, the time available under Section 20 of the Act and rule 34 of the Patent Rules 1982 for putting the application in order expired on 22 December 1987 with examiner's objections under Section 18(3), contained in a letter dated 31 July 1986, still outstanding. As seen by Dr Opatowski, the examiner's earlier objections were answered in a letter dated 5 May 1986, and, hearing no more, he assumed that a patent would be granted in due course.

I now have to decide the status of the application, and a hearing for the purpose was appointed for 4 May 1988. Dr Opatowski attended the hearing in person, and the examiner, Mrs P M R Clarke, was also present.

The relevant statutory provisions are Section 20 of the Patents Act 1977, and rules 34 and 100 of the Patents Rules 1982, as amended by the Patents (Amendment) Rules 1987. Section 20(1) provides:-

"If it is not determined that an application for a patent complies before the end of the prescribed period with all the requirements of this Act and the rules, the application shall be treated as having been refused by the comptroller at the end of that period, and section 97 below shall apply accordingly."

The "prescribed period" is prescribed in rule 34, and I am satisfied that it ended on 22 December 1987. (Section 97 provides that an appeal lies to the Patents Court from the comptroller's refusal). I can paraphrase Rule 100 by saying that I have power to extend the time limit prescribed by Rule 34 if the applicant's failure to comply with it was "attributable wholly or in part to an error, default or omission on the part of the Patent Office, but not otherwise."

I now need to consider:-

- a) whether, on 22 December 1987, the application complied with the requirements of the Act and Rules, so that it would have been lawful for the Comptroller to grant a patent on the application, and
- b) any facts relevant to rule 100 that would justify any extension of the time limit prescribed by rule 34 for putting an application in order for grant.

The application is concerned with agricultural spraying apparatus, defined by claim 1 as follows:-

1. Agricultural spraying apparatus comprising a vehicle which is specially designed or adapted to carry, launch retrieve and service a special aerial module which is construed by the use of ram-jets at the blade tips so as to be safe for operation in the 'avoid curve' of standard helicopters and which carries a special spraying system of flow rate and droplet size appropriate to an unusually slow operating speed and to substantial penetration of thick foliage which in turn is achieved by mounting the spraying bar so far forward ahead of the rotor through flow that the droplets are entrained by the following discrete vortex pattern which has been intentionally generated by the module's design and slow speed of operation and which carries the droplets into the crop, homogeneously

distributing it within.

Claims 2-4 and 9 are appendant to claim 1; they refer to further features of the agricultural spraying apparatus, and no objection has been taken to them. Claims 5 and 6 are directed to the aerial module itself, claim 7 is directed to the vehicle itself. Claim 8 is for agricultural spraying apparatus as described, and no objection has been taken to that.

The first matter for consideration, as I have said, is whether the application was in order on 22 December 1987. Having heard Dr Opatowski, I am quite satisfied that the central inventive concept of his application is that of having a crop-spraying helicopter in which the spraying bar is so located as to be ahead of the downwash from the rotor blades in normal operation. Dr Opatowski added that the feature of having ram jets at the rotor blade tips was not essential from a crop-spraying point of view but it was an important safety feature because the increased inertia of the rotor assembly reduced the minimum safe operating speed (that is, the speed below which a crash would be inevitable in the event of complete engine failure). He therefore wanted his monopoly to be restricted by including ram jets.

So far, therefore, the application would justify the grant of a monopoly in a crop-spraying helicopter characterised by having ram jets at the blade tips, and by the disposition of the spray bar. It would clearly then be allowable to have a monopoly in agricultural spraying apparatus consisting of such a helicopter (or aerial module, as Dr Opatowski calls it), combined with a land vehicle for carrying, launching, retrieving and servicing it. However, the claims as they stand do not comply with the requirements of the Patents Act in the following respects:-

- a) Claim 7, which is directed to the land vehicle itself, does not relate to the inventive concept I identified above.
- b) Claims 1, 5 and 6 contain expressions which are

explanatory rather than descriptive; that in itself is not necessarily bad, but the expressions are too imprecise for use in a definition of the patentee's monopoly. The expressions I refer to are "so as to be safe for operation", "standard helicopters", "special spraying system," "vortex pattern which has been intentionally generated by the module's design and slow speed of operation" (all in claim 1), "slow forward speeds", "required .... vortex", "specially generated", "slow speed of operation", and "substantial penetration" (in claim 5).

I therefore find that the application was not in order as required by section 20 on 22 December 1987, and I next consider whether that time limit might be extended.

The alleged facts on which it might be possible to extend any relevant time limits are that Dr Opatowski did not receive the Official Letter of 31 July 1986, nor a final reminder sent to him by the Office on 24 September 1987.

Dr Opatowski's address for service at the material time, as communicated in his letter dated 5 May 1986, was:-

c/o Barclays Bank  
1 Lower Northam Road  
Hedge End  
Southampton SO3 4FN

Unfortunately, the Official Letters of 31 July 1986 and 24 September 1987 mis-spelt the word "Northam" as "Northern" in the address for service. This was, in my view, undoubtedly an irregularity in procedure within the meaning of rule 100, but it does not necessarily follow that the error resulted in the letters not reaching Dr Opatowski.

In fact Dr Opatowski brought to the hearing a letter to him from Barclays Bank, which says:-

"I note that the Patent Office claim to have sent two letters addressed to yourself on 31st July 1986 and 24th September 1987 through this Office.

We can find no trace here if these letters were in fact received although the latter would have been received after your Account had been transferred to Bedford and we would therefore have passed it on to that Branch.

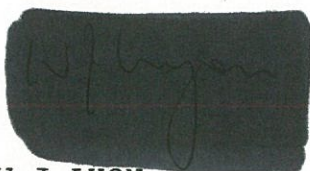
Unfortunately, since the letters to be forwarded to customers are not logged I cannot state categorically that they were never received."

I accept as a fact that at least the Official Letter of 31 July 1986 did not reach the Bank, and while it does not inevitably follow that this was due to the Patent Office's mis-spelling of the address, I think it would offend against common sense to say that there was probably some unknown cause of the loss of that letter. I am therefore satisfied that the mis-spelling in the Patent Office of Dr Opatowski's address resulted in its not reaching him. In consequence, I have the power under Rule 100 of the Patents Rules 1982 (as amended), to extend the time limit prescribed by Rule 34, and I hereby extend, to 4 August 1988, the time for putting the application in order.

Further discussion took place at the hearing about the wording of the claims, but I think it is necessary only to say here that it was agreed that the examiner would write to Dr Opatowski

enclosing a set of claims incorporating the amendments that were discussed. Dr Opatowski could then of course accept them or criticise them as he thought best, and if necessary, another hearing can be appointed to resolve any problems.

Dated this 13 day of MAY 1988

A black rectangular redaction box covering a handwritten signature.

W J LYON

Superintending Examiner, acting for the Comptroller

