



01 September 2009

PATENTS ACT 1977

APPLICANT Irwin Industrial Tool Company

ISSUE Whether patent application
 GB 0906471.8 may be accorded
 divisional status under section 15(9)

HEARING OFFICER J E Porter

Introduction

- 1 Patent application GB 0805443.9 entitled “Improved tape measure” was filed on 26 March 2008 in the name of Irwin Industrial Tool Company. The application was divided out of an earlier application, GB 0706366.2 – and both applications claim priority from a US application dated 3 April 2006. I shall refer to them as “the 2008 application” and “the 2007 application” respectively.
- 2 The 2007 application was granted on 29 April 2008. More importantly for this decision, the 2008 application was granted on 24 March 2009 and notification of grant was published in the Patents Journal on 22 April 2009.
- 3 However, on 15 April 2009 the applicant filed a further application GB 0906471.8, with a request that it be treated as a divisional application under section 15(9), divided from the 2008 application. I shall call this “the 2009 application”.
- 4 The 2009 application was accompanied by a letter which sought the comptroller’s discretion to extend the time period for filing a divisional application. After the applicant’s attorneys sent a second letter on 1 May 2009, discussing the circumstances further, the examiner replied on 7 May 2009 expressing the view that the 2009 application could not be accorded divisional status, because the 2008 application was granted by the time the 2009 application was filed.
- 5 The applicant then requested to be heard, and the matter came before me at a hearing on 1 July 2009. Dr Heather Lawrence of Counsel appeared for the applicant, assisted by Mr John Lawrence of Barker Brettell LLP. The examiner, Mr Michael Leaning, also attended.

The law

- 6 The relevant provision in relation to the filing of a divisional application is section 15(9), which reads:

Where, after an application for a patent has been filed and before the patent is granted -

(a) a new application is filed by the original applicant or his successor in title in accordance with rules in respect of any part of the matter contained in the earlier application, and

(b) the conditions mentioned in subsection (1) above are satisfied in relation to the new application (without the new application contravening section 76 below),

the new application shall be treated as having, as its date of filing, the date of filing the earlier application.

- 7 Also relevant is section 117B, which deals with extensions of time to periods specified by the comptroller. The relevant parts read:

(1) Subsection (2) below applies in relation to a period if it is specified by the comptroller in connection with an application for a patent, or a patent.

(2) Subject to subsections (4) and (5) below, the comptroller shall extend a period to which this subsection applies if -

(a) the applicant or the proprietor of the patent requests him to do so; and

(b) the request complies with the relevant requirements of rules.

(3) An extension of a period under subsection (2) above expires -

(a) at the end of the period prescribed for the purposes of this subsection, or

(b) if sooner, at the end of the period prescribed for the purposes of section 20 above.

- 8 In relation to this provision, rule 109 of the Patents Rules 2007 reads:

(1) A request under section 117B(2) must be—

(a) made in writing; and

(b) made before the end of the period prescribed by paragraph (2).

(2) The period prescribed for the purposes of section 117B(3) is two months beginning immediately after the expiry of the period to which section 117B(2) applies.

9 Rule 107 of the 2007 Rules deals with the correction of irregularities of procedure before the Office, and reads:

(1) Subject to paragraph (3), the comptroller may, if he thinks fit, authorise the rectification of any irregularity of procedure connected with any proceeding or other matter before the comptroller, an examiner or the Patent Office.

(2) Any rectification made under paragraph (1) shall be made –

(a) after giving the parties such notice; and

(b) subject to such conditions,

as the comptroller may direct.

(3) A period of time specified in the Act or listed in Parts 1 to 3 of Schedule 4 (whether it has already expired or not) may be extended under paragraph (1) if, and only if –

(a) the irregularity or prospective irregularity is attributable, wholly or in part, to a default, omission or other error by the comptroller, an examiner or the Patent Office; and

(b) it appears to the comptroller that the irregularity should be rectified.

10 Finally, rule 108(1) of the 2007 Rules is relevant, and reads:

(1) The comptroller may, if he thinks fit, extend or further extend any period of time prescribed by these Rules except a period prescribed by the provisions listed in Parts 1 and 2 of Schedule 4.

11 The period for filing a divisional application (as prescribed in rule 19) is one to which this provision applies.

12 Counsel also made submissions in respect of a number of previous cases, including the decision of the Court of Appeal in *M's Application*¹, the decision of the Patents Court in *Howmet*², and the decision of the comptroller in *ITT Industries*³. I discuss these submissions in my analysis below.

Arguments and analysis

Introduction

13 The question is whether the 2009 application can be accorded divisional status, having been filed after the date of administrative grant of the 2008 application.

¹ *M's Application* [1985] RPC 249

² *Howmet Research Corporation's Application* [2006] RPC 27, [2006] EWHC 725 (PAT)

³ *ITT Industries Inc.'s Application* [1984] RPC 23

- 14 The submissions cover several alternative arguments, but the main contention is that, for several reasons, the comptroller can take the established approach of rescinding grant of the 2008 application under rule 107. This would mean that the 2009 application could be treated as having been filed prior to the grant of the 2008 application, and so accorded divisional status. There is one alternative argument to the effect that rescission of the 2008 application may not be necessary, which I shall turn to later.

Rescinding grant of the 2008 application – the approach to take

- 15 Counsel referred me to *Howmet*, which concerned the exercise of discretion under the forerunner to rule 107 (rule 100 of the Patents Rules 1995) in the circumstances where a possible divisional application had been foreshadowed but the parent application had nevertheless been granted. Counsel drew my attention particularly to paragraphs 13 and 15 of that judgment. At paragraph 13, Pumfrey J said that:

a straightforward approach to the exercise of a discretion in a case of this description, once it is accepted that there has been a relevant error, default or omission on the part of the Office, is to ask whether, had the Office done what it should have done, the applicant would have taken the step closed to him.

And he continued at paragraph 15 to say that, if it is shown that the applicant would have taken that step, there can be few reasons why the comptroller's discretion should be exercised against the applicant.

- 16 However, Counsel also pointed out that, in the circumstances where a divisional application is filed out-of-time (but the parent application is not yet granted), discretion can be exercised under rule 108(1) to extend the time period for filing the divisional application. In these circumstances the established test for discretion to be exercised favourably is that the applicant must show that the circumstances are exceptional and that he has been properly diligent – and Counsel referred to *ITT Industries* as an example. Her view was that this test could provide an appropriate basis on which to exercise discretion under rule 107. As she put it at the hearing:

How do you exercise that discretion? Is it as automatic as Mr. Justice Pumfrey suggested, or is there something else you need to look at? If you are going to look at the surrounding circumstances, it would not seem unreasonable, since the effect of rescinding the parent application is to give an extension of time for the divisional, that you might look at the same issues when you are exercising discretion under rule 108.

- 17 I do not think Pumfrey J was going quite as far as suggesting that favourable exercise of discretion would be “automatic”. But I do think that, where rule 107 and rescission of grant is at issue, I am bound to follow the approach of the court in *Howmet*, rather than adopt an alternative test based on exceptional circumstances and diligence – which is a well-established test for the rather different set of circumstances where a late divisional application is filed in respect of a parent application which has not yet been granted.

- 18 This also deals with a point which was not raised at the hearing, but which was contained in the attorneys' submissions of 19 June. They said:

we do not accept that it is necessary to have an omission on behalf of the Intellectual Property Office....to enable the Intellectual Property Office to exercise discretion in the present circumstances

They also questioned why an Office error would be considered to be "exceptional circumstances" when an attorney error would not, and they argued:

It is not fair on the applicant, who has acted diligently in both cases, to be treated differently depending on who made the error and in particular for the IPO to only use discretion in relation to their own errors.

- 19 As I have noted, the test of looking at exceptional circumstances and diligence is one which is applied when exercising discretion under rule 108(1) to extend the period for filing a divisional application under rule 19, when the parent application remains pending. Those are not the circumstances of this case. Instead, it is a matter of whether, under rule 107, discretion should be exercised to rescind grant.
- 20 And in that respect, *Howmet* tells me that I must look at whether the Office made an error, default or omission which, if not made, would have resulted in the filing of the 2009 application before the grant of the 2008 application. If I conclude on the balance of probabilities that it would have so resulted, I must then decide whether there are any reasons why I should not exercise discretion under rule 107 in the applicant's favour. I am therefore not persuaded that it is unnecessary to find an Office error in order to rescind grant. Neither do I think it follows that this means an Office error is necessarily considered to be "exceptional circumstances" and an applicant or attorney error is not.
- 21 At this point it is helpful to turn to Counsel's submissions in respect of *M's Application*. She pointed me to Oliver LJ's assumption that:

it is possible to bring within the description of an 'error or default or omission' a neglect of some well-established and generally well-known practice on which it is known or may be assumed that all those dealing with the Patent Office can be said to rely – even though it may not be backed up with any statutory or regulatory backing.

- 22 I agree with Counsel's submission that this has been followed as a matter of fact rather than on assumption in subsequent cases, and so rule 107 may be invoked where an Office error, default or omission has occurred in established non-statutory procedures on which the applicant may have been expecting to rely.
- 23 With that in mind, what I must now do is consider the various Office errors which the applicant contends were made in respect of this case.

Alleged error 1: No acknowledgment of request for extension to period for reply

- 24 The examiner issued an examination report on 22 December 2008, with a latest date for reply of 23 February 2009. In that report, he raised an objection to plurality of invention, which arose because the applicant had amended the claims on 24 November 2008 to include new independent claims 10 and 11.

- 25 The attorneys replied to this examination report on 25 February 2009. They explained that the reply was in response to the examination report and that a new set of claims was enclosed. They also pointed out that the reply was 2 days late, and requested a 2 month extension to the period for reply. The letter concluded with a statement that the applicant believed that the application “is now in condition for allowance”.
- 26 Counsel argued that the Office made an error in not confirming (or otherwise) the allowability of the extension.
- 27 Extensions to specified periods are governed by section 117B and rule 109, and a first extension is available as-of-right. That extension is available for a fixed period of 2 months (unless it is cut short by the compliance period, which does not apply here).
- 28 Since this extension is available as-of-right, and is for a standard period, the Office’s practice is not to acknowledge a request for such an extension (unless the request is made via the dedicated email address provided for this purpose – in which case a standard, automated acknowledgment is sent).
- 29 It follows that I cannot see how, in the present case, the Office’s lack of an acknowledgment of the invoking by the applicant of the as-of-right extension was “a neglect of some well-established and generally well-known practice” which amounted to an error, default or omission. The Office followed its standard practice by accepting the reply to the examination report in the extended period, and processing it without acknowledgment. Just to be clear, the question of whether the Office’s standard practice in this respect is the most appropriate one is not the matter I must decide. What I must decide is whether an error, default or omission in respect of established practice occurred, and I find that it did not.

Alleged error 2: Grant of the 2008 application before expiry of extended period

- 30 Counsel also argued that, if the extension was in fact allowed, the Office was wrong to grant the 2008 application before expiry of the extended period for reply. She contended that the intention had been to request the extension of time partly to ensure that the reply to the examination report was timely, and partly in order to ensure there was time to file a divisional application.
- 31 The evidence shows that the American attorneys wrote to the British attorneys on 20 February 2009, instructing them to file amended claims on the 2008 application and to file a divisional application with claims that had been provided. The British attorneys entered a diary entry on their records system, which would remind them within one month to create and send the desired divisional application to the Office.
- 32 At the hearing, the attorney Mr Lawrence explained:

When that letter [the 25 February reply] was framed, it was intended to sit on it until we had the divisional ready and then we may well have needed more of the two month period of time.... That is why it was worded in that way. We wanted to file a divisional and we knew we would not be able to formulate a divisional in a matter of a few days. It was an accident that [the 25 February] letter was sent out early...

33 This is consistent with the approach that the attorneys had taken when dividing the 2008 application out from the 2007 application. The witness statements also show that the text of the 2009 application was prepared at the same time as the 25 February reply, but needed further work and that (in the words of the attorneys' submission of 19 June):

the attorney supervising the filing of the divisional was unexpectedly under a great deal of pressure of work...and the filing of the divisional just inexplicably did not happen.

34 If the intention was to hold the 25 February reply back until the 2009 application was ready to be filed with it, then at first sight I cannot see how it can be argued that one purpose of the extension of time request contained in that reply was to secure time to file the 2009 application. If things had gone to plan, the 2009 application would have been filed at the same time that the reply was sent. If so, the extension would have been necessary simply to make the reply to the examination report a timely one.

35 As noted earlier, the Office's practice is to accept without comment a late reply to an examination report which is combined with a request for an as-of-right extension of time. Generally, if the examiner then considers that the reply is a complete one, he will not defer considering the reply in order simply to let the extended period run its course. The examiner will re-examine the application in light of the reply, and will either send the application for grant or will issue another examination report.

36 In this case, the examiner was firmly of the view that the reply was a complete reply to his report – not least because of the statement that the applicant considered the 2008 application now to be in order for grant. However, Counsel argued in some detail that the circumstances surrounding the processing of the 2008 application as a whole amounted to a foreshadowing of a divisional application, or at least to doubt about the applicant's intentions in this respect.

37 Therefore, it was argued, even if the Office would usually consider such a reply to be a complete one, and would not defer consideration of it until the end of the extended period, in these particular circumstances the examiner should not have sent the 2008 application for grant until the extended period had expired or he had queried what the applicant intended to do in the remainder of the extended period.

38 The question of whether the Office was right, in this particular case, to grant the 2008 application prior to the expiry of the extended reply period cannot therefore be resolved without first considering in more detail the arguments that were made in respect of any foreshadowing of a divisional application.

Alleged error 3: Failure to respond to foreshadowing of divisional application

39 Counsel's contention was that the applicant's actions had foreshadowed the likelihood of a divisional application during the processing of the 2008 application, and that the Office had made an error in not dealing correctly with this foreshadowing.

- 40 In particular, she argued that the examiner should have issued a warning letter, known as an EL26, when he considered the contents of the 25 February reply. Counsel took me to paragraph 15.46 of the *Manual of Patent Practice*. It is a lengthy paragraph, but the relevant parts are:

If a divisional application has been foreshadowed in the most recent letter but not yet filed, and the application is in order for grant, an "in order" marking on the parent application should also be deferred...

If a divisional filing is "foreshadowed" in circumstances where division appears unlikely, the applicant should be asked for further details of his intentions). EL26 should be issued to inform the applicant that re-examination of the application will be deferred and if found to be in order after two weeks will be granted....

When an application is found to be in order and a divisional has been foreshadowed in an earlier letter partway through the examination process, eliciting a response from the examiner as outlined above, no further reminders will be issued and the application may proceed to grant. If no such responses have been made, EL26 should issue. The application can be sent for grant earlier if the applicant or agent requests this in writing.

- 41 Counsel argued that the applicant had foreshadowed a divisional application by their action, rather than by doing so in writing. First, as noted above, she argued that the request for the as-of-right extension in the 25 February reply was effectively asking grant to be deferred and was a request for time to file the divisional application, and so it amounted to a foreshadowing of that application.
- 42 However, it was also put to me that other actions by the applicant added weight to this "foreshadowing by act". In particular, the claims which formed the basis of the 2009 application were added to the 2008 application in November 2008, and were removed in the amendments which accompanied the 25 February reply. Counsel argued that:

they wanted those claims enough to put them in, so they were not simply going to cross them out again two months later. Clearly, there was likely to be an intention to put them into a divisional instead.

- 43 It was also argued that the applicant had a tendency to file divisional applications, and that the 2008 application was itself divided from the 2007 application.
- 44 Having carefully considered all of these points, I find that I am not persuaded. I think there is a difference between, on the one hand, the applicant foreshadowing a divisional application – that is to say, indicating clearly that a divisional application is likely to be filed in the future – and, on the other, the Office or an examiner being expected to assess the probability of a particular applicant filing a divisional application based on that applicant's prosecution of the application, their tendency to file divisional applications, or other actions they may have taken. I certainly do not think that the fact that an applicant tends generally to make use of the availability of divisional applications, or that the application in suit is a divisional application itself, in any way can be said to amount to the foreshadowing of a divisional application.

45 In the same vein, I do not think that adding and deleting claims – albeit over a short period of time – can amount to a foreshadowing of a divisional application either. There are no doubt many commercial, strategic, financial and other reasons why independent claims get added and deleted during the prosecution of an application. So to argue that the Office should have concluded from this particular addition and deletion of the claims, in response to an objection of plurality, that a divisional application was being foreshadowed is not one that I can accept. I think to do so would be to impute to the Office a far greater ability to see inside the mind of the applicant and his patenting strategy than can be possible in practice.

46 A further argument in this respect was put to me that, under the Office's practice at the time of *Howmet*, the deletion of independent claims following an objection of plurality was considered to be foreshadowing of a divisional application, in response to which an EL26 was sent. Although the Office's practice had changed after *Howmet*, it was argued that the change in practice did not amount to a change in what the Office regarded as "foreshadowing". Neither, said the attorneys, did the judge in *Howmet* suggest that there should be such a change. Therefore, deletion of independent claims should still be regarded as foreshadowing of a divisional application. In support of this, the attorneys referred to paragraph 15.46 of the *Manual of Patent Practice* as it stood at the time of *Howmet*. It said, at the relevant point:

Whenever an applicant has indicated the possibility of filing a divisional application, or when an application is found to be in order following amendment to meet an objection under s.14(5)(d), EL26 should be issued provided that at least one month of the r.24(1) period allowed for filing divisionals remains.

47 First, it seems to me that "indicating the possibility of filing a divisional application" is another way of referring to the "foreshadowing" of a divisional application. That being the case, it seems clear that what the relevant part of the *Manual* was saying was that an EL26 would be issued either where the applicant had indicated the possibility of filing a divisional application (i.e. had foreshadowed it) or where independent claims had been deleted following a plurality objection. In other words, these are two separate and distinct alternatives. The Office chose to respond to the foreshadowing of a divisional application by sending an EL26 but would also send an EL26 in response to the deletion of independent claims. The change in practice post-*Howmet* was to stop sending the EL26 in these latter circumstances – but to continue to send the EL26 when a divisional application had been foreshadowed.

48 This reinforces my conclusion that deletion of independent claims in response to a plurality objection has always been, and remains, something different from a foreshadowing of a divisional application – and that in this case the deletion of claims 10 and 11 did not amount to a foreshadowing of the 2009 application.

49 Neither do I think that the act of requesting the as-of-right extension in the 25 February reply amounted to a foreshadowing of a divisional application – either of itself or in combination with the other matters already discussed. As noted above, the intention had been to file the 2009 application with the reply to the examination report, so the purpose of the extension request cannot have been to secure time to file the 2009 application at a later point. I therefore think that it was reasonable to regard the request for an as-of-right extension of time to the reply date as one that was being sought solely for the purpose of making the reply a timely one – and not one that was also being sought for another, unstated purpose – namely, for securing time to file a divisional application.

50 I conclude, therefore, that the applicant's actions in respect of the 2008 application did not amount to a foreshadowing of a divisional application.

Alleged error 4: Failure to clarify doubt about applicant's intentions

51 At the hearing Counsel argued in the alternative that if foreshadowing had not occurred then at least the applicant's actions had given rise to some doubt about their intentions in respect of a divisional application – which the Office should have clarified. In this context, she pointed to the part of paragraph 15.46 of the *Manual* which states:

If a divisional filing is "foreshadowed" in circumstances where division appears unlikely, the applicant should be asked for further details of his intentions.

52 Counsel argued that this supported her view that:

where there is a doubt or a question mark of any kind over the intention to file a divisional, the EL26 should be issued.

53 Having given this point some careful thought, I do not think that it can be right to say that the Office should clarify any "doubt or a question mark of any kind" over the applicant's intentions in respect of divisional applications.

54 It seems to me that, until a divisional application is actually filed or the parent application is granted, there is almost always some doubt as to how an applicant may choose to proceed, or what their intentions are, in respect of possible divisional applications. To suggest that the Office should take it upon itself in all circumstances to clarify the doubt about how the applicant intends to proceed does not seem right to me.

55 In any case, that is not what the Office's current practice is. The practice is to clarify the doubt by issuing EL26, in (but only in) the circumstances where the applicant has indicated the possibility of filing a divisional application – in other words, where foreshadowing has taken place. If no foreshadowing has occurred, then the Office does not seek to clarify the doubt that exists. I think that the part of the *Manual* referred to above is consistent with this. It is restricted to the situation where foreshadowing has occurred – not to the general situation where no foreshadowing has occurred and the applicant's intentions remain unclear.

56 Therefore, it is not the case that it is the Office's current practice to clarify doubt – but that it failed to do so in this case. It follows that I do not agree that the Office, in failing to contact the applicant in these particular circumstances, committed an error, default or omission. In particular, there was no failure to follow a standard or well-established practice, on which the applicant could expect to rely.

Alleged errors 1 to 4: conclusions

57 I have found that there was no foreshadowing of the 2009 application, and so it follows that there was no error, default or omission on the part of the Office when it did not send an EL26 in response to the 25 February reply.

58 Given the absence of any foreshadowing, I have also found that it was not an error, default or omission for the Office not to contact the applicant to resolve any doubt about the applicant's intentions in respect of a further divisional application.

59 It follows that I do not see why it would have been necessary or appropriate for the examiner to hold back the grant of the 2008 application until the expiry of the extended period for reply to the examination report. That reply had been received and was, on the face of it, a full and complete response to the examination report. No divisional application had been foreshadowed.

60 This leads me to conclude that the examiner was right to send the 2008 application for grant when he did so, given that there were no objections remaining. No error, default or omission occurred in this respect.

61 I have also already concluded that no error, default or omission occurred when the Office did not confirm (or otherwise) the as-of-right extension.

62 I therefore conclude that there are no grounds, on the basis of alleged errors 1 to 4, on which I should exercise my discretion under rule 107 to rescind the grant of the 2008 application.

Alleged error 5: Missing word in warning clause about divisional applications

63 Counsel argued that an error was committed in respect of the warning clause included in the examiner's report of 22 December 2008. This report raised a plurality objection, following the introduction of new independent claims 10 and 11. It included a clause, with the title "**Protection of other inventions**" in bold, which went on to say (emphasis as it appears in the report):

Note that there will be no automatic reminders on the subject of divisionals. If your application is found to be in order it will be granted whether or not a divisional has been filed. You will not be able to file a divisional on this application once it has been granted.

64 Counsel pointed out that the Office's post-*Howmet* Practice Notice of 1 November 2006 stated that, in the circumstances where an examiner initially objected to plurality of invention in an examination report, this warning clause would be included in the report but would be preceded by the word "**warning**" in bold. The absence of this word was an Office error, and she contended:

The applicant is entitled to expect to see that and it is a further jolt to remind them to get on and do something, which this applicant did not have the benefit of. Again, I would submit that is a failure to follow your own Practice Direction. It is quite a serious omission.

65 Because the required warning clause was included, and the most important point was underlined, I have some difficulty accepting that this omission amounts to a great deal. But on balance I am prepared to accept that the inclusion of the word "**warning**" in bold was, as Counsel argued, "sufficiently important that [the Office] have issued a Practice Direction saying that this should happen". And so its absence was an omission to follow a point of standard practice on which the applicant could be said to rely.

66 Thus I need to consider how to exercise my discretion under rule 107 in respect of that omission. Following *Howmet* I need to ask whether, had the word "**warning**" been included, the applicant would have taken a step that was in fact closed to him by that word's omission.

67 Having studied the evidence before me concerning the various circumstances at the attorneys' offices, I can see no basis for concluding that the presence of the word "**warning**" in bold would have materially changed the way in which the attorneys dealt with the examination report in February 2009, nor that it would have altered the problems that they faced in the filing of the 2009 application. No specific evidence was put to me on this point, and both Counsel and the attorney at the hearing admitted that it was a matter of speculation.

68 The conclusion that I come to is that, on the balance of probabilities, the circumstances would have played themselves out in the same way if the word "**warning**" had been included in bold in the examination report. Following *Howmet*, I therefore decline to exercise my discretion under rule 107 favourably, and so to rescind the grant of the 2008 application on this basis.

Correction of date of grant of 2008 application

69 As an alternative to the arguments in respect of rescission, Counsel suggested that a wholly different way to deal with the applicant's problem was to correct the date of grant of the 2008 application. She pointed out that under section 117 the comptroller has the power to:

correct any...clerical error or mistake in...any document filed in connection with a patent or such an application.

- 70 She argued that, since it was an error to grant the 2008 application during the extended period for reply to the examination report, the erroneous date of grant in the notice of grant sent to the applicant could be corrected by the comptroller using this provision.
- 71 I have already concluded that the Office did not make an error in granting the 2008 application when it did, so I do not think there is any basis on which I should correct the date of grant of the 2008 application under section 117. For that reason, it is not necessary for me to consider Counsel's submission that "any document filed" includes within its scope a document, such as the notification of grant, which is sent by the comptroller to the applicant.

Conclusion

- 72 I have concluded that I should not exercise my discretion under rule 107 to rescind grant of the 2008 application. I have also concluded that I should not correct the date of grant of the 2008 application under section 117.
- 73 That being so, it remains the case that the 2009 application was filed after the grant of the 2008 application. It follows that the 2009 application is not accorded divisional status under section 15(9) and must proceed with a filing date of 15 April 2009.

Appeal

- 74 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

Dr J E PORTER

Deputy Director acting for the Comptroller