

IN THE MATTER OF a reference under section 37(1) by Aline Rosemary Holmes in respect of Patent No.2280345 in the name of Gordon Lee Baldwin

## **DECISION**

### **Introduction and History**

1. On 19 November 1996 Mrs Aline Rosemary Holmes ("the referrer") filed a reference under section 37(1) of the Patents Act 1977, together with a statement in which she claimed that she was the true inventor and hence rightful owner of a non-slip mat for use under saddles in horse riding, the mat being one of two embodiments claimed in UK patent No. 2280345. She asked the Comptroller to make an order to this effect. Her statement was accompanied by (a) a signed but unwitnessed statement which supported her, dated 6 November 1996 and made by Sidney Arnold ("Arnold") who was named as applicant and inventor when the application for the patent in suit was originally filed, and (b) a copy of a Consent Order dated 22 June 1995, which terminated case No.1993L No.750 in the High Court involving both the referrer and Arnold.

2. The referrer's claim was disputed in a counterstatement filed on behalf of Gordon George Baldwin ("GGB"), to whom the patent was granted on 3 April 1996 following the patent application having been assigned to him by Arnold on 10 April 1993, and his son Gordon Lee Baldwin ("GLB"), the present proprietor, to whom GGB further assigned the patent on 18 October 1996. The counterstatement was accompanied by eight annexes, which included, *inter alia*, documents associated with the High Court case and a statutory declaration by the same Arnold dated 10 July 1996, but this time supporting the proprietor.

3. Patent No. 2280345 was granted from UK application 9416195.7, which itself followed from a conversion into the national phase of a PCT application, published as No WO 93/15998 and filed 12 February 1993. Both the UK application and the PCT application named Arnold as both

applicant and inventor. The PCT application itself claimed priority from a yet earlier UK application No 9202980.0 which was filed on 13 February 1992 and named The Custom House Trust Corporation Limited ("Custom House") as applicant. The priority application was terminated on 14 April 1993.

4. In addition to the section 37 action which has been raised before the Patent Office, there has been a history of litigation in respect of the saddle mat embodiment of the invention of the patent in issue. The High Court case (to which reference has been made above) and an additional case No. 9301841 in the Exeter County Court were both concerned with this non-slip saddle mat.

5. Arnold and the referrer, who owns a stud farm for horses, were associated before and around the time of filing the original priority application in early 1992 and a company called Limpet Safety Products Limited ("Limpet") was set up around that time to market the non-slip saddle mat under the name of the "Limpet numnah" (a saddle mat being also known as a "numnah", an Indian word for a blanket placed beneath a saddle to protect the horse's back from an ill-fitting saddle). In the High Court case Arnold and Limpet made claims against the referrer, and *vice versa*, and at the termination of the case, the Consent Order of 22 June 1995, *inter alia*, gave the referrer an ostensible irrevocable licence to develop, market, sell or otherwise exploit the product known as the Limpet numnah. In the Exeter County Court case the referrer failed in an injunction against Arnold, Limpet and a certain Charles Hunt ("Hunt"), who was both Arnold's solicitor and a director of Limpet, to restrain them from excluding her from a trade fair, called the Beta Trade Fair, commencing on 28 February 1993, at which she had booked a stall on behalf of Limpet.

6. In addition, GGB and Arnold have themselves long been associated with each other and with the equine industry and their relationship apparently dates back to the early 1970s, it being undisputed that Arnold and GGB owned shares in the same racehorses in the late 1970s and early 1980s. As previously indicated, the referrer also has a background in horses for many years and owns a stud farm.

7. I have issued two previous preliminary decisions in connection with the patent in suit. The first was dated 21 October 1997 and was issued following a preliminary hearing held on 25 September 1997 before the evidence rounds took place. The proprietor had drawn my attention to section 37(8) and at the preliminary hearing I sought the advice of the parties with regard its provisions. In the event, however, I decided not to exercise the comptroller's discretion to decline to deal with this action under section 37(1). The second preliminary decision was dated 15 March 1999 and was issued after a further preliminary hearing had been held on 10 March 1999, after the normal evidence rounds had taken place. The second hearing was concerned with two-way discovery of documents connected with the two previous court cases and documents connected with the filing and prosecution of the patent in suit and its priority application. Some of the documents connected with the court cases had been filed as annexes to the counterstatement but were feint and unreadable. I ordered two-way discovery and held that all the documents filed as a result of discovery and any witness statements filed in the submission round should be treated as primary evidence.

8. The matter finally came before me at a substantive hearing on 1 & 2 June 1999. Mr Brown of patent agents Alpha and Omega represented the referrer, Mr Timothy Penny instructed by Mr Sean Callaghan of Twitchen, Musters and Kelly appearing as counsel for the proprietor.

### **Background**

9. The subject matter of patent No. 2280345 relates to a plastics mat having the special property of gripping to animal skin. The first embodiment, a saddle cloth, is claimed in claims 1 - 10, and the second embodiment, a shin pad, is claimed in claims 11-15. Claims 1, 8 and 11 are the only independent claims and read as follows:

Claim 1. " A mat for use as a saddle-cloth characterised in that the mat comprises a layer of foamed polyvinyl chloride, at least one face of said layer having a smooth surface, the arrangement being such that in use the mat is interposed between an animal's back and a saddle, with the smooth surface in frictional engagement with the animal's back to prevent substantial slipping of the saddle on the animal's back. "

Claim 8. " A mat for interposition between an animal and an item of saddlery or an accessory for that animal, characterised in that the mat comprises a layer of foamed polyvinyl chloride defining a first and a second face, at least one side of the layer having a smooth surface, the arrangement being such that in use the mat is interposed between the animal and the item of saddlery or accessory with the smooth surface in frictional engagement with the animal and the second face in frictional engagement with the item of saddlery or accessory to prevent any substantial slipping of the saddlery or accessory with respect to the animal."

Claim 11. " A mat for interposition between a shin pad and a leg characterised in that the mat comprises a layer of foamed polyvinyl chloride, at least one face of the layer having a smooth surface, the arrangement being such that in use the mat is interposed between the leg and the shin pad with the smooth surface in frictional engagement with the leg to prevent substantial slipping of the shin pad on the leg. "

10. Appendant claims 2 - 7, 9, 10 and 12 - 15 are concerned with optional features such as the smooth surface being plate finished, the layer having a thickness of between 4 and 12 mm, the polyvinyl chloride foam having a density of between 130 and 160 kg/ cubic m., and the mat, when a saddle cloth, having a central portion and side flaps

11. Unfortunately, the priority application has been destroyed within the Patent Office, in line with the current practice of destroying files a set number of years after they have been terminated, and the proprietor has been unable to supply a copy, but it seems, from inspection of the draft of an equivalent US application supplied by the proprietor that the priority application had been directed only towards the saddle mat embodiment, the shin pad embodiment being added later when the PCT application was filed. Patent Office computer records of the priority application show the applicant as Custom House and the title as "mat", but do not show an entry under "inventor" .

12. Following grant of the patent GGB firstly entered into two exclusive licence agreements dated 16 October 1996 with (a) Impakt Products & Marketing (UK) Ltd ("Impakt") for the invention of claims 1-10 of the patent (*ie* the saddle cloth embodiment) and with (b) Ruple Mouldings Ltd for the invention of claims 11-15 of the patent (*ie* the shin pad embodiment).

## **The Witnesses and the Evidence**

13. The evidence filed in this case is extensive and comprises:

### Referrer's evidence in chief

- ! Statutory declaration by Susan Millington (“Millington”) and one exhibit
- ! Statutory declaration of the referrer and three exhibits
- ! Statutory declaration of Arnold (dated 9 February 1995) and three exhibits
- ! Second statutory declaration by Arnold (dated 9 February 1998)

### Opponents' (Baldwins') evidence in chief

- ! Statutory declarations by GGB, GLB, Keith Powell (“Powell”), Kenneth Pegley (“Pegley”), John Terry (“Terry”), Robert Williams (“Williams”), M Salaman (“Salaman”), Paul Bland, Anthony Green, Paul Drywood, and Jeremy Lindop
- ! Affidavit by Brian Axford (“Axford”) and three exhibits
- ! Statutory declaration by Alan Johnson (“Johnson”) and two exhibits

### Referrer's evidence in reply

- ! Second statutory declaration of the referrer
- ! Statutory declaration by John Ryder (“Ryder”)

### Other evidence

- ! Documents concerned with the filing and processing of the patent application
- ! Documents concerned with the High Court and the Exeter County Court actions
- ! Documents handed up at the hearing itself

15. Five people who had filed affidavits or statutory declarations as part of the evidence were cross-examined at the hearing, these five being the referrer herself; Arnold; Millington, a contact of the referrer; and Ryder, a friend of the referrer; and, for the other side GGB himself. I was given to understand that Hunt was no longer in the UK and so unavailable for cross-examination. The evidence of the various witnesses is contradictory and the reliability or otherwise of the individual witnesses must therefore be an important factor in my decision.

16. The impressions that the various witnesses made on me under cross-examination were mixed. The referrer I found to be forthright in manner and clearly knowledgeable in her answers when it came to equine matters but less so when it came to the properties of polymer materials and to the niceties of patent law, and some of her answers were confused, particularly with regard to dates or unsupported by evidence. Arnold's testimony, frankly, I found to be unconvincing, evasive and unreliable. On the other hand, Millington and Ryder gave the impression of attempting to answer honestly within their limited knowledge of events, and I was particularly impressed by the former's confident answers regarding horse matters. For the other side, GGB was not taxed unduly by the questions put to him, but within the limits of what he was asked, he struck me as being reliable and reasonably truthful, although like the referrer he perhaps had a partisan view of the supposed threats which both parties alleged the other to have made at a meeting near Andover to which reference is made later.

17. I should make the point here that, perhaps, Mr Brown did not make best use of his opportunity to re-examine his witnesses because he unfortunately experienced some difficulty in wording his questions in such a way to avoid leading them.

#### **Cross-examination of the Referrer and Millington**

18. The referrer was the first to be cross-examined. At the start of his extensive cross-examination, Mr Penny asked her to look at a number of statutory declarations or affidavits filed on behalf of the proprietor. These were by (a) Axford, GGB's Accountant, to the effect that he had been introduced in 1977 by GGB to Arnold, that resulting from a shared interest in horse racing GGB had first purchased a horse jointly with Arnold in 1979, and that in 1986 GGB had mentioned an idea for a non-slip saddle blanket for horses; (b) Powell, a salesman employee of Arnold from January 1989 until July 1991, to the effect that in 1989 he was aware that confidential trials of a saddle pad were being organised and that Arnold had told him that the non-slip concept had come about from a conversation some years earlier with GGB; (c) Pegley, who claimed to have been involved in the Rubber & Plastics Industry since 1969 and who said that he was present in late 1983 when GGB and Arnold had a discussion about various applications of certain polyvinyl chloride foams and GGB had expressed a thought regarding whether it would stick a saddle to a horse; (d) Salaman in which he stated that in about August 1984 he tested in

secret on behalf of Arnold a prototype product of a non-slip saddle pad, the pad being made of brown foam material, smooth and shiny on one side and  $\frac{3}{8}$ " -  $\frac{1}{2}$ " thick, that he recalled using it on a horse called Canford Lad which suffered from a bad back which was helped by the saddle pad, and that the saddle pad he tested appeared to be the same as the Impakt saddle pad except for it being brown rather than black; (e) Terry to the effect that he was present at a meeting between Arnold and Salaman around August 1984 where he was asked to keep confidential his knowledge that Salaman was testing a prototype, non-slip saddle pad and that he saw a brown sheet of foam material which had a shine on one side passed to Salaman, and that once again this saddle-pad appeared to be the same as the Impakt saddle pad except for the colour; and, (f) Williams, a jockey, to the effect that he had tried out a special pad of brown foam rubber-like material for Salaman on Canford Lad and it helped the horse and did not slip.

19. The referrer replied with respect to each individual one that she could not dispute that the conversations or activities referred to regarding non-slip saddle pads had taken place because she had not been there and that most of the persons involved were unknown to her. She accepted that the idea of a non-slip saddle pad could well have been talked about at that time, and also accepted that Salaman had tested out a foam material with a shiny surface, but disputed that it was truly non-slip, based on her knowledge of the industry and her conviction that the "anti-slip" saddle pad did not come into usage until 1992. When asked to confirm that Salaman's statement had indicated that the material being tested was polyvinyl chloride, the referrer said that obviously the jockey Williams had not known that because he said in his statement that the pad was of brown foam rubber. The referrer suggested to Mr Penny that the type of material used in the trials in the eighties was not the material claimed in the patent but a piece of scrim which was totally unbreathable and was an entirely different material (although ostensibly similar in that it had a shiny side and a mat side), and that had an effective non-slip pad been produced at that time the effect would have been so stunning that it would have been produced onto the market in 1985. The referrer confirmed that she knew of no other non-slip saddle pad in existence than the one claimed in the patent in suit.

20. Mr Penny asked the referrer why she had not asked to cross-examine Pegley, Powell, Salaman, Terry and Williams and she explained that she thought that what she had to say to the court would challenge their statements and would be proved to be the truth because of the length of time it took her to establish a material that actually worked.

21. When it came to her explanation of the genesis of the invention itself, the referrer told Mr Penny that for some time prior to the filing of the priority application she was the sole proprietor of a business called Happy Horse Products and Arnold was providing her with material for a wall mattress, which was one of several horse products she had invented and was used to protect horse's hocks. In 1991 she and Arnold held a discussion about the desirability but difficulty of providing a mat which would prevent a horse's saddle from slipping. She said that the conversation had arisen because Arnold had lost a considerable sum of money, a saddle having slipped on a horse that he had put money on. The referrer explained that she would not have thought any more about the topic, but for noticing, when taking a drink with a friend, Jean Byers, in a yacht in Torquay harbour, that a piece of foamed material on the table prevented her drink from moving with the wave movement and she thought the material might be useful for a non-slip saddle mat. Mr Penny drew the referrer's attention to the fact that the yacht incident had not been mentioned in any written evidence and the referrer said she thought this was wrong, that she had referred to it in the Exeter County Court and that she had made the story well known in the horse world newspapers and periodicals.

22. I should mention at this point that I have been unable to find any reference to the yacht incident in any written evidence on file. An affidavit by Jean Byers dated 5 March 1993 was filed in the course of the High Court proceedings and in it she stated that she and the referrer discussed the fabric for use under a saddle on 13 January 1992, but the affidavit made no mention of the yacht incident.

23. The referrer told Mr Penny that it did not prove possible to obtain from the makers the foam material from which the yacht table cloth was made but she told Arnold what she wanted, namely a material which was washable, breathable, could absorb concussion, did not tear or stretch and would be non-slip in use, and he provided her in return with a piece of 'poly-foam'. The referrer



said that she sent this piece of material to Millington, an experienced horsewoman who looked after her show horses, for testing out on these horses, since one would not dare use it on anyone else's horse because of the danger of ill-effects. She claimed that previous to this she had never seen anything except "racing scrim" near a horse's body, racing scrim having been available since the 1970s and having a shiny side and a mat side but not being breathable or non-slip. When the first piece of poly-foam, which was similarly black and shiny on one side and matt on the other, did not work the referrer said that she suggested to Arnold that the density should be higher and this resulted in Arnold supplying a second piece of material (which also did not work) and then a third piece of material which did work. She explained that she did not have a scientific background and did not know the qualities of polyvinyl chloride except for understanding about its density, which she admitted she would have imparted to Arnold in terms of it being more or less "stretchy".

24. The referrer told Mr Penny that at that time she had believed that Arnold created the foamed material himself only later finding out that he bought the material in from elsewhere. Also, the referrer maintained from the witness box that Arnold had not mentioned to her that he had been involved in any earlier testing of a prototype of the non-slip numnah.

25. Although the referrer stated in her statutory declaration that Millington had carried out the testing in Summer 1991, under cross-examination the referrer was uncertain as to the year involved. She explained that she had had a serious riding accident in 1998 and it had caused her memory to be difficult to find, stress 'getting to her'.

26. The referrer's version of testing the materials was later confirmed by Millington who, under cross-examination by Mr Penny, stated that the testing of the materials took place in summer 1991, being able to identify the timing from her horse-show dates. Although in the affidavit exhibited to her statutory declaration she stated that she tested out two different types of material, she indicated in the declaration itself and confirmed under cross-examination that she probably tested more than two. She said that the original batch or two batches of material came in rolls from the referrer and she cut it to shape, but later the material came ready shaped. One of the materials was unsuitable because it caused the horses to sweat profusely, and another tore very

easily. When questioned by Mr Penny about what input she had made to the material being tested Millington told him that she informed the referrer about the problems with the materials and would have suggested using thicker materials to the referrer. Millington said that the material which was successful kept the saddle in place and did not cause friction, and the horses, which were part-bred Arabs with well sprung ribs, felt happier. She was, however, unable to confirm that the successful material was a polyvinyl chloride, merely saying that it was a black piece of foam material.

27. Mr Penny next turned his questioning of the referrer to the formation of the company Limpet. The referrer explained that, because her mother had been terminally ill from Christmas 1991, she had been unable at the time to pack and dispatch (and hence fulfill her plans to market the numnahs herself) and despite being convinced of her ownership of the invention, she had invited Arnold to take a 50/50 share in a newly formed company (Limpet) and that Arnold has subsequently introduced Hunt, as company secretary in return for a £5000 input. The referrer said that she had asked Arnold to procure the incorporation of the company but that she had not done anything to confirm the 50/50 agreement. Companies House records show that the company Limpet was incorporated on 10 April 1992, that the referrer was not registered as a director until 22 October 1992, but that Hunt was a director from the date of incorporation, another person being the secretary.

28. There is no dispute that on 16 October 1992 a meeting was held at White's Hotel, Lancaster Gate, which was attended by the referrer and Hunt, and that various matters concerning Limpet and Moonraker Marketing Limited ("Moonraker"), a company appointed in May 1992 to be sole distributor of the non-slip saddle mat, were discussed. There had been some unhappiness about the performance of Moonraker and notes of the meeting show that the activities of Moonraker was put on stop until their account was brought up to date. The referrer told Mr Penny that she agreed with the notes except for the final point 6' which stated that "*It was agreed that 16% of the shares of the company be allotted to each of Holmes and Hunt as fully paid in consideration of their services to date*". Instead the referrer claimed that it was agreed that Hunt would receive 16% but that the rest would be equally divided between herself and Arnold. Mr Penny asked the referrer to comment on a letter she had written on Limpet stationery, which had "*Patent Applied*

*for No. 9202980.0*" printed at the bottom of the front sheet, and was dated 21 October 1992, in which she stated that she agreed point 6'. She claimed that she now disagreed with point 6' and that subsequent to the letter of 21 October 1992, within about a week, she had phoned Hunt, rather than writing as she was so short of time due to her mother's illness, because she realised she had made a mistake. She had asked Hunt to issue share certificates, but they never had been issued. When challenged as to why a written response dated 3 November 1992 by Hunt to her letter of 21 October 1992 had referred to the latter but not to the alleged intervening telephone conversation, the referrer had no clear answer. She maintained that the latter had taken place, however, although never put into writing. The referrer admitted that she had been reprimanded by her legal advisors for not having put the disagreement over shares in writing. She said that she subsequently concluded that Hunt and Arnold had conspired to defraud her out of her interest in the company. She agreed that she had known at this time that a patent had been applied for and said that Arnold had told her that he and she had applied for the patent using Hunt and his £5000. Mr Penny put it to the referrer that her story about the shares conflicted with particulars that had been provided on her behalf on 10 November 1994 by her solicitors Every and Phillips for the High Court case. In these particulars it was stated that at the White's Hotel meeting it had been agreed that the stock of the company Limpet would be divided in the proportions : 1 share for Hunt, 3 shares for Arnold and 1 share for her because of her equine experience. The referrer maintained that, although she had presumably agreed the particulars at the time, the information was untrue, and what had been agreed was 16% to Hunt with the rest being equally divided between herself and Arnold.

29. It was shortly after this White's Hotel meeting that the referrer, Hunt and Arnold started falling out. Hunt claims in his affidavit of 26 February 1993, filed in connection with the Exeter County Court case, that Arnold had advised him in December 1992 that the referrer had approached him and suggested that she should resign as a director of Limpet, that her existing business, Happy Horse Products, should become Limpet's distributor, and that a written agreement would be provided, although it never was. The referrer agreed that this was one of the suggestions made at the time. She drew up an agreement to this end on 25 January 1993 in which it was stated that she would relinquish any shares in Limpet and Happy Horse Products should be the sole distributor of the Limpet Numnahs both in the UK and any foreign country.

Documents filed in connection with the Exeter County Court case show that she wrote letters to Hunt and Arnold in November 1992. In one letter, written to Arnold on 6 November 1992, she wrote of becoming aware of another use for the foam products, which under cross-examination she said were "boot mates", an adjunct to boots used by horses, and she offered Arnold "£5000, together with all her expertise and knowledge of the new product against, say, three shares in Limpet". The referrer told Mr Penny that she was becoming seriously worried in late 1992 and wanted a majority share holding in Limpet because Arnold was not doing what she and he had agreed he would do. She said that these extra three shares would make 45 in all, not 19 shares as put to her by Mr Penny.

30. The referrer maintained that at this time, late 1992, she did not know that the patent application was in the name of Arnold as inventor and that it was only shortly after her mother's death in May 1993 that she rang Companies House and discovered that Limpet did not have a patent registered to them. According to her statement of case the referrer did not know at the time of the High Court Consent Order in June 1995 that Arnold had named himself as inventor as well as applicant or that he had already assigned the ownership of the patent application to GGB. She explained this to Mr Penny, saying that she was ignorant of the finer points of patent law and did not appreciate until later that there was a difference between naming oneself as the inventor and applying for a patent. Once again, under cross-examination the referrer seemed confused about dates and quite when she had become aware that the priority application had been filed in the name of Custom House or that Arnold was named as inventor. She claimed that she did not contact the patent agents Cleveland & Co who were seeing to the processing of the patent because she and her solicitors did not understand the necessity to do so. When questioned by Mr Penny, she also claimed that she could not see the inconsistency between obtaining a purported licence to exploit an intellectual property right, as she did under the terms of the High Court Consent Order, while at the same time claiming to be registered as proprietor.

31. There seems no dispute, however, that the referrer was first informed that GGB was the assignee of the patent application at a meeting near Andover in November 1993 with GGB, who was accompanied by a man called Paul Drywood, the referrer herself being accompanied by Ryder. When GGB told her he was the owner she did not believe him, and even when the

assignment was confirmed by a telephone call to a representative of Cleveland & Co, the patent agents dealing with the patent application, she said she still thought it was a put up job. She says that she informed her solicitors but she did not ask them to make enquiries about the assignment, her solicitors advising her rather than her telling them what to do. Both she and her solicitor had believed it to be a red herring. She also said that at about the time of the meeting with GGB she was receiving threatening phone calls from nameless gentlemen. The referrer explained to Mr Penny that, following the meeting at which GGB claimed he was the assignee of the patent, her solicitors had not checked out GGB's claim because they wrongly assumed that GGB was in league with Arnold.

32. Turning to Arnold's various statements, Mr Penny questioned the referrer about when and how the unwitnessed statement of 6 November 1996 had been prepared. She denied all knowledge of this and also fervently denied having forged Arnold's signature on this document or inviting him to make the statement. Mr Penny put it to the referrer that the true reason for Arnold producing this statement supporting her case might be found in the statutory declaration by Johnson, a solicitor of the supreme court, who attended a meeting with Arnold and GGB in December 1996. Arnold claimed at this later meeting that the referrer had offered him £50000 in cash if he helped her to get the patent transferred to her. The referrer refuted this, telling Mr Penny that there was absolutely no possibility that she would have been in a position financially to offer to do this.

33. Asked whether she knew where Arnold's statutory declarations, which supported her reference and were dated 4 March 1997 and 9 February 1998, had been produced and printed, she denied knowledge of this or that she asked him to produce them for her.

34. Finally, Mr Penny put it to the referrer that notwithstanding that she had not been authorised to do so or registered as a proprietor, she had been representing to third parties that she was indeed the proprietor. The referrer agreed that she had been doing that, because she was quite confident that she was the inventor and still maintained that she was. One example of this involved a company called Whinny Widgets with which the referrer had signed an agreement dated 30 July 1997. She had supplied products bearing labels with a patent number on them, but

she claimed that the patent number had been put on by another person without her observation and that she had felt obliged to accept the obligations that this person had created.

35. During re-examination of the referrer by Mr Brown, she explained that a non-slip numnah could protect a horse's back from damage because of its open breathable properties, allowing the sweat into it, the heat from the animal going up through it to cause the material to bond to the saddle itself so that the horse and saddle became one unit. She claimed that in 1991 she had won a major horse supreme championship with two of her young horses using the non-slip saddle pad and that she first advertised the Limpet numnah on 6 May 1992 in Horse and Hound. She also stated that the agreement she had drawn up on 25 January 1993, regarding her resignation from being a Limpet director and Happy Horse Products taking over distribution of the Limpet numnah, had not been accepted by Arnold and Hunt, and that by that time she was about to start litigation proceedings in the Exeter County Court. The referrer told Mr Brown that she believed that the Impakt saddle pad was first introduced two years after the Limpet numnah.

36. Before the referrer stepped down from the witness box I asked her whether she was claiming sole inventorship and not joint inventorship and whether she was claiming that she was herself the actual owner as opposed to a company with which she had been associated, *eg* Limpet, being the owner. She answered that she was claiming sole ownership herself.

### **Arnold**

37. I will now turn to Arnold, a crucial witness since his statutory declarations on file were self contradictory. In a similar manner to the questioning of the referrer, Mr Penny firstly asked about the statutory declarations by Pegley, Terry, Williams, Salaman and Axford. Arnold agreed that he and GGB had been close friends in the 1970s and 1980s but he claimed that Pegley's statutory declaration was a complete fabrication because Pegley had not been there as he claimed nor had GGB ever queried whether a certain polyvinyl chloride foam would stick a saddle to a horse, although he could remember that he himself had played around with a table mat sometime in 1983, cutting some up and taking them home. Arnold agreed that Terry was a friend of his and that he knew Salaman, who had trained a horse for Terry, although he had not seen him for many years. Arnold said that he had attended quite a few visits (his terminology rather than meetings),

on days out with Terry at Salaman's Lambourne stables but denied that he either had invited Salaman to test out a prototype non-slip saddle, saying that Salaman had told complete utter lies, or that he had asked Terry and Salaman to keep the testing confidential. Arnold agreed that he had given Salaman a piece of material, but not for testing purposes, it merely being a piece of grey polyethylene foam used all the time for saddle blankets. As far as Terry was concerned, Arnold claimed that he presently spoke to Terry and visited him every week and that Terry had phoned him about the statutory declaration saying that it had all been drawn up for him and it would help Arnold, so he (Terry) had signed it. Arnold denied all knowledge of Williams, and said that he could not assist with Axford's statement that GGB had told him that Arnold was doing research and testing of a prototype non-slip saddle blanket for horses. He confirmed, however, that he had not been involved in the testing of the shin pad embodiment in 1989.

38. Moreover, under cross-examination by Mr Penny, Arnold supported the referrer, saying that she rather than he was the inventor. He claimed that the referrer had asked him to supply her with various materials as she was trying to make a saddle mat which was non-slip, but that it was she rather than himself who had come up with the concept. Subsequently, he had supplied her with pieces of material and that she had tested them. Arnold explained that there were many different materials from polyethylene and closed-cell sponges which would give the effect of being non-slip but would eventually slip as soon as they became damp and wet with sweat off a horse, and that Holmes knew the (equine) rounds and the big companies, where to go and what not to do. Mr Penny asked Arnold to explain the properties of polyvinyl chloride and Arnold said that it could be used as a solid substance as well as a foam, that as it warmed up it became more flexible and stuck more, but various densities did not although he did not know why as he did not manufacture the material himself but had gone to the manufacturers for it. Further, whilst he knew that to make the surface shiny it had to be run between aluminium plates, he himself had not appreciated that it might aid the stickiness of the mat to the horse. Arnold said that the referrer had asked him to cut the material of the various samples (not all PVC) to saddle shape and that his employees had done the cutting. She had also asked him for samples of various densities and he believed at the start the density had been 20, but may have gone to 30s and then to the 50s. Arnold was asked by Mr Penny whether this material provision and testing had happened in 1990 but he said that he had not got a clue on dates.

39. Arnold was next questioned about the exploitation of the product and the filing of the patent application. He said that the patent should have been in the name of Holmes, and that he had tried to steal the invention and that he 'believed' the solicitor filed it in another name. Arnold explained that his solicitor Hunt had had most of the dealings with patent agents Cleveland & Co who filed the patent applications, although on being shown letters written to him by Cleveland & Co in February 1993, at about the time the PCT application was made, he agreed that he had communicated directly with them and Hunt did not really have any involvement with the patent agents after 18 February 1993. On being pressed by Mr Penny that he had originally been named rightfully on the patent application since he was truly the inventor, Arnold continued to maintain that it was because he was trying to steal it.

40. On being questioned by Mr Penny about the company Limpet, which was incorporated on 10 April 1993 and in which he, Hunt and the referrer were involved, Arnold said that a conversation had taken place before the company was set up, he believed in Hunt's office, about forming a company to sell the saddle mats, and that the idea of the name Limpet, chosen because it was something that would 'stick', came from the referrer. Arnold was evasive about what he had agreed with the referrer and who had given instructions to Hunt to set up the company. I note that Hunt, in an affidavit filed in the Exeter County Court case, stated that the company was incorporated on the sole instructions of Arnold for the express purpose of marketing as licensee the patented product. Mr Penny questioned Arnold about Hunt's affidavit in which Hunt had also stated that "at all material times it has been my belief that the first defendant (Arnold) is the inventor of the numnah", Arnold answering that he had given Hunt the information and that Hunt was fully aware of the referrer's involvement, although he was again evasive when asked directly whether Hunt had lied. He said that it could possibly be correct that it had been agreed before Limpet was set up that the referrer would have a 15% share in the company but that he could not recall any other agreements about the share holding with the referrer. He agreed that after Limpet was set up Moonraker, with which he claimed to have no financial involvement, was appointed as distributor of the product. Arnold claimed that he did not recall whether he had been in attendance in the meeting at White's Hotel on 16 October 1992, but that he would have been quite content for 16% of the shares in the company which he owned to have been given away to each of Hunt and the referrer. In the former case, that was presumably in consideration for the



legal work that Hunt had done, but in the case of the referrer Hunt again claimed that he could not recall the reason. Arnold indicated to Mr Penny that he was not sure whether he or his son had been a director of Limpet. I can find no record on file to show that either of them were directors.

41. Arnold stated unflinchingly in the course of cross-examination by Mr Penny that he had lied to the court as to the inventorship position in both the High Court proceedings and in the Exeter County Court proceedings and that to terminate the High Court case he had purported to grant Holmes a license to exploit the product in June 1995 when in fact he had already assigned the patent to GGB in April 1993. He explained to Mr Penny that at that time he had drink and drugs problem. He also had cash flow problems at the end of 1992 as he told Mr Penny when cross-examined about the contents of the affidavit by Axford made on 8 April 1998. The affidavit states that he was lent £8000 by GLB, on behalf of his father GGB, in November 1992 and Arnold did not dispute this, confirming that he had cash flow problems in his businesses, although again he was uncertain as to the particular company involved.

42. Arnold also told Mr Penny that he had signed his statutory declaration dated 10 July 1996, which he claimed had been prepared by Paul Drywood, a close contact of GGB, without reading it, and that it falsely stated that he was the inventor with the concept coming from numerous discussions years earlier with GGB, and that at no time had the referrer been involved in inventing the non-slip mat. Arnold agreed that he had not informed Hunt or his solicitors who drew up the High Court Consent Order that he had assigned the patent to GGB.

43. When asked by Mr Penny to confirm that he himself had signed the unwitnessed statement dated 6 November 1996 and sent in with the statement of case, Arnold said that he had been a sick man at that time, that he could not categorically state either how the statement was prepared or that the signature was his, and further that he could not remember writing the annotation to the statement on 30 November 1996, which annotation said that the signature on the statement was not his and the contents of the statement were not true, although he did acknowledge that the handwriting looked like his own. In the unwitnessed statement, as well as stating that Holmes

was the inventor, Arnold claimed that he agreed to register the patent in the name of Limpet but instead registered it in the name of Custom House, another organisation with which he was involved, that GGB had not paid the £2000 to him stated in the assignment agreement, and that he had assigned the patent to GGB because of undue influence placed on him. All these statements were subsequently retracted in the manuscript annotation dated 30 November 1996. When asked about Custom House, Arnold claimed that he had asked Hunt to file the priority application in the name of Arnold himself and only much later did he find out that it had been filed instead in the name of Custom House.

44. As a result of this unwitnessed statement, as already indicated above a meeting took place on 19 December 1996 which was attended by Johnson, GGB and Arnold. Johnson stated in his statutory declaration dated 26 March 1998 that the purpose of the meeting from his perspective was to establish whether, and if so why, Arnold had signed the unwitnessed statement dated 6 November 1996, and that Arnold had claimed at this meeting that Holmes had offered him the sum of £50000 if he helped her to get the patent transferred to her and that he had confirmed that GGB had paid him £2000 for the assignment. Johnson also stated that while he found Arnold a likeable character who was co-operative in many respects, the interview was unsatisfactory because it was difficult to get Arnold to answer questions directly and his information about his dealings with the referrer over the years was extremely confused, particularly over dates. When Arnold was questioned by Mr Penny about this meeting, he said that he remembered the meeting, and remembered being drunk at the time, but that had the referrer offered him £50000 he would have taken it at the time and run. He claimed to Mr Penny that the referrer had not offered him a stake or some other share if she was successful in her reference.

45. At this stage Mr Penny produced a handwritten letter dated 18 October 1996 which the referrer had written to Arnold and he requested that this should be admitted as evidence. I agreed to it being admitted, since Mr Brown, after consulting with the referrer, said he had no objection. The letter was written about three weeks before Arnold signed his unwitnessed statement of 6 November 1996 and in it the referrer wrote " *I would appreciate your signing this before a solicitor, possibly not Mr Hunt, and returning it straight away to me, letting me have it early next week*". Arnold was asked by Mr Penny whether he accepted that the letter referred to the

statement which he signed on 6 November 1996 and gave no clear answer. Mr Penny also put it to Arnold that the referrer drew up the witness statement for him and he signed it, and Arnold skirted around the full question, merely answered that if his signature was on it, yes.

46. Arnold was then shown a copy of a further handwritten and witnessed statement of his dated 27 January 1997 in which he had denied that the content and signature of the witness statement of 6 November 1996 was valid. His response was that he had signed it as he would have signed anything put in front of him at that time.

47. When asked by Mr Penny to explain about his false statutory declarations and lying in the High Court and Exeter County Court cases and why he now had changed horses and was supporting the referrer, Arnold simply said that he had changed his ways and found religion. He explained this in more detail during re-examination by Mr Brown, saying that his wife was very ill and that he now had to spend lot of time looking after her, attending church quite regularly and doing church work as well as voluntary hospital work.

### **Ryder**

48. A friend of the referrer, Ryder a retired banker, had attended the White's Hotel meeting and the Andover meetings with the referrer, and Mr Penny cross-examined him on his statutory declaration dated 31 July 1998. Ryder said that he could not recall that, at the Andover meeting GGB had said that he was the rights owner of the patent, the assignee of the patent but he did claim that he could recall that the referrer had spoken on the phone to a purported representative of the patent agents and that the referrer had told him about the contents of the phone conversation when they got back home. Ryder said that he was not involved with the business of the Happy Horse Products. Ryder told Mr Penny that his memory of the Andover meeting was that GGB issued threats to the referrer and said he was determined to put her out of business, saying that he and his friends had a method of dealing with Arnold and that being "on the square" was mentioned, which he understood to mean that GGB and his friends were Freemasons. Ryder claimed to Mr Penny that GGB was using threatening language to persuade her to have the distribution rights for the South West of England and for GGB to have the rights for the rest of the world which was unacceptable to the referrer.

49. Ryder went on to confirm that Arnold and Hunt had been present at the White's Hotel meeting in October 1992, saying that Arnold's son, Tony, had also been present, and that at the meeting Arnold and the referrer were discussing how they could produce and sell and distribute the product that was the Limpet numnah. Ryder also told Mr Penny that he had understood that Arnold, his son and the referrer were going to be the shareholders of a new company that was going to be set up. Under re-examination by Mr Brown, Ryder explained that he had merely been present as a listener both at the Andover meeting and at the earlier White's Hotel meeting, being there to ensure that the referrer was getting proper treatment. He recollected that at the White's Hotel meeting the shares were, he thought, 16% for the referrer, 16% for Arnold and 16% to Arnold's son, but it did not work out that way because the man who fired all the bullets and persuaded Arnold to do things was Hunt. He told Mr Brown that in his view, as a professional man himself, there were matters in Hunt's approach which were unprofessional.

### **Baldwin**

50. The last person to be cross-examined was GGB. When firstly called by Mr Penny, GGB gave direct oral evidence to the effect that he had paid for every cost involved with the patent applications and continued to pay for the continuation of the patent. Samples of the Impakt saddle pad, made under licence, and the Limpet numnah were handed over to me for inspection and the differences between them explained. Some were single skinned, some double, one even triple. The Impakt numnahs were black and bound around their peripheries while the Limpet numnahs were dark grey and unbound. Most of the numnahs had only one shiny side but both sides of the double and triple Impakt numnahs were shiny. The difference in colour between the black and the dark grey was not very noticeable. When cross-examined by Mr Brown, GGB explained that he had been making his own numnahs since towards the end of 1992, approximately early 1993. Prior to that he had been dropped a lot over by Arnold of the unbound single skin variety when the latter had off-loaded everything to him and signed the agreement across to him. He told Mr Brown that he did not currently make shin pads, the second embodiment of the patent, because they also involved outer plastics guards, inner guards and ingredients, *eg* glues and adhesives so that there was no migration. GGB said that he was working with a company called Staffordshire rubber and was getting close to putting one on the market.

51. When asked whether he had provided any of the information that Cleveland & Co needed to prepare the patent specification, GGB answered that he had provided none at all although he had assumed financial responsibility, as indicated in a letter from Arnold to Cleveland & Co, from 31 March 1993 because Arnold had not paid Cleveland & Co and they were giving him undue pressure. GGB was also asked whether he had any involvement in filing the priority application in February 1992 and he said he had not.

52. Mr Brown asked GGB about the Andover meeting in November 1993. GGB said that by this time it was coming out loud and clear that what started out as a marketing dispute, according to Arnold, was turning into a patent dispute and that the referrer was saying that she was the inventor of the product, and that the meeting came about because he had decided to meet the referrer personally. GGB claimed that he went along to the meeting with an open mind and at the end of the day asked her if she would be interested in a part of the marketing. When questioned about the assignment of the patent and the phone call to Cleveland & Co, GGB, he claimed that after the phone call the referrer's attitude changed from being quite a civil person and that she had said things like "it is a mistake". He claimed that the referrer had said that she had friends in high places and that he chose to leave, at no time threatening her in any way shape or form. He said that when he had left he had said to her that she could come back to him if she wanted after thinking it through, but she had not. GGB's version of the meeting was basically confirmed in a statutory declaration by Paul Drywood, who accompanied him.

53. Before he stepped down, I asked GGB about the shin pad embodiment. He said that the material was exactly the same principle and that the problem was that of needing a very good adhesive to stop migration between the inserts and the hard outside skin. Also, he said that the edge of the shin pad had to be bound to prevent water getting in. He confirmed that he had invented the concept of the shin pad himself in 1989. GGB explained to me that he and Arnold had been very close at one time, for years, but that Arnold had started lying to him and his family, betraying their trust, and that he had had enough of the man.

54. As far as the shin pad embodiment is concerned, the evidence includes statutory declarations by Paul Bland, a football club player, and Anthony Green, manager of his football club, and in

their declarations these people stated that during the 1989 - 90 football season confidential tests were carried out by them of a prototype anti-slip shin pad. The present proprietor GLB has also claimed, in a statutory declaration, that for the last few years he has been working with his father testing the products, *ie* the saddle pads and the shin pads, and that in conjunction with his father he has been instrumental in arranging for various organisations to test the products for viability, the tests being outstandingly successful. GLB also stated that the assignment of the patent from his father to him was in consideration of monies lent to his father and love and affection. None of these statutory declarations have been challenged and the referrer has made no claim in writing or in the witness box to the shin pad embodiment.

### **The Law**

55. This reference has been made under section 37(1) of the Patents Act 1977 which reads -

*37 - (1) After a patent has been granted for an invention any person having or claiming a proprietary interest in or under the patent may refer to the comptroller the question-*

*(a) who is or are the true proprietor or proprietors of the patent*

*(b) whether the patent should have been granted to the person or persons to whom it was granted, or*

*(c) whether any right in or under the patent should be transferred or granted to any other person or persons;*

*and the comptroller shall determine the question and make such order as he thinks fit to give effect to the determination.*

56. The right to apply for and be granted a patent is governed by section 7 of the Act. Subsections 2 to 4 of that section read-

*7 - (2) A patent for an invention may be granted -*

*(a) primarily to the inventor or joint inventors;*

*(b) in preference to the foregoing, to any person or persons who, by virtue of any enactment or rule of law, or any foreign law or treaty or international convention, or by virtue of an enforceable term of any agreement entered into with the inventor before the making of the patent, was or were at the time of the making of the invention entitled to the whole of the property in it ( other than equitable interests) in the United*

*Kingdom;*

*(c) in any event, to the successor or successors in title of any person or persons mentioned in paragraph (a) or (b) above or any person so mentioned and the successor or successors in title of another person so mentioned, and to no other person.*

*7 - (3) In this Act "inventor" in relation to an invention means the actual deviser of the invention and "joint inventor" shall be construed accordingly.*

*7 - (4) Except so far as the contrary is established, a person who makes an application for a patent shall be taken to be the person who is entitled under subsection (2) above to be granted a patent and two or more persons who make such an application jointly shall be taken to be the persons so entitled.*

57. The consequence of Section 7(4) is that the onus is on the referrer to establish her case.

58. Mr Penny drew my attention to a few reported cases which he considered to be relevant to the present reference, these being (a) Peckitt's Application [1999] RPC 337 in which the hearing officer Mr Dennehey reviewing a complex argument relating to evidence, referred to Norris's Patent [1988] RPC 159, in which Falkoner J said that:

*"I desire to say at this stage that this is pre-eminently a case in which there should have been ..... cross examination of the main declarants on each side. On the written evidence, much of which is not in a satisfactory form, there is an acute conflict of testimony - when that became apparent, the patent agents acting on both sides should have requested cross examination of the main declarants under rule 103(2) and (3)...",*

and concluded that Norris's Patent demonstrated that the cross-examination of main declarants on both sides can be crucial in cases where there is serious conflict of evidence; (b) Viziball's Application [ 1988] RPC 213 in which it was held that the burden of proof is on the referrer to establish on the balance of probabilities that she has made a contribution to the essential elements of the invention; and, (c) Alsop's Application SRIS 0/120/84 and Brockhouse's Patent (No. 2) SRIS 0/100/85 in which it was held that if there is conflict of evidence which cannot be resolved, the referrer must fail.

## **Closing submissions**

59. Mr Penny submitted to me that the reference must fail on two fronts. Firstly, it must fail on the basis of the unchallenged evidence, *ie* that between 1984 and 1990 Arnold was carrying out confidential testing of a material which appears to be the same or closely similar to the subject matter of the patent, and therefore it was not probable that the referrer's version of events was true. Mr Penny drew my attention to the fact that serious conflict of evidence had arisen in this reference and said that there could be hardly a set of circumstances which fell more squarely within what Falkoner J said in Norris's Application. He put it to me that if the referrer was seeking to challenge any of the evidence about the confidential testing of non-slip saddle pads in the 1980s she was obliged to apply for cross-examination of the many proprietor's witnesses who had given voluntary statements which corroborated each other, saying that confidential testing of a prototype of a non-slip saddle pad took place in the 1980s. On their written documents, the prototypes appear to be within the scope of the patent and are either the same or very closely similar to the samples supplied. Mr Penny put it to me that the referrer's claim that the tested materials were merely scrim should be rejected because there would be no reason to test material which had been around since the 1970s. She had not shown that the material tested in 1984 was a different material from the material specified in the patent and the onus to do so was on her.

60. Secondly, Mr Penny submitted to me that the referrer's version of events could not and should not be accepted since it was completely flawed. He put it to me that I should only accept the referrer's evidence where there was independent, credible evidence that what she said was the truth. Mr Penny strongly claimed that Arnold's evidence, in so far as it purported to support the referrer, should be rejected because he was a self admitted perjurer, a liar, a deceiver and an attempted thief. In addition, Mr Penny drew my attention to the fact that some of the written statements made by Arnold in support of the referrer contained clearly incorrect information, his unwitnessed statement of 6 November 1996 and his statutory declaration of 9 February both stating that the company Limpet was formed in September 1991, whereas Companies House records show that it was incorporated in April 1992. The hand-written letter sent by the referrer to Arnold just before the unwitnessed statement of 6 November 1996 indicated that it was likely that she had drawn up the statement for him. He drew attention to the many inconsistent statements Arnold had made to illustrate his unreliability and stressed the point that the most likely



true story was that given closest to the time the events occurred and before this action had been launched.

61. Mr Penny went on to claim that the evidence of the referrer herself as to the origin of the invention was uncorroborated and lacking in credibility. He pointed to her story of the yacht, which has only surfaced now, and to the fact that since the referrer showed little comprehension of the qualities of foam, having admitted that she did not know the difference between polyethylene and polyvinyl chloride, and since Arnold showed a little nugget of understanding of the qualities, this supported his contention that it was Arnold, who also had a knowledge of horses, who had developed the idea with the flat side and the shiny side. Mr Penny acknowledged that it may have been some testing was carried out using Millington and conjectured that Arnold was trying to test the numnahs amongst different types of horsey people but submitted that the referrer could only succeed in undermining the corroborated evidence if she could prove that on the balance of probabilities it was a put up job.

62. With regard to Limpet, Mr Penny submitted that there was some suggestion that some joint venture agreement was reached before incorporation had taken place but it seemed that the referrer had no share entitlement before the White's Hotel meeting and the inference must be that Arnold was the inventor and was sufficiently satisfied with the investment made by the referrer and Hunt to give them part of his company. By accepting that, the referrer had cast doubts upon her subsequent claim to be an inventor.

63. Mr Penny reminded me that this case was not about whether there was a valid assignment, it was about whether or not the referrer was the inventor. She was claiming to be the sole inventor and she might have put a different argument had she been arguing that she was a joint inventor. He put it to me that the referrer had decided sometime between December 1992 and February 1993 that she was going to say that she was the inventor. She had not made out her case that she was the sole inventor and the onus was on her to do so.

64. For the referrer, Mr Brown submitted that the referrer's statements about the testing of a satisfactory non-slip numnah in August/September 1991 were backed up by Millington, that

considerable evidence had shown that people had been trying, testing and looking for a good non-slip numnah and that the problem of the slipping of saddle mats had been thought about in 1980s, but that at the time in question in 1991 there was not a non-slip numnah on the market. A non-slip numnah, the Limpet numnah, first appeared on the market about three months after the priority application was filed in February 1992. Mr Brown said that GGB had told the court that his Impakt numnah was not put on the market until about 9 months later, and that he had no input into the original priority application. Thus, whatever trials had been carried out, whether into shin pads or anything else, they had not resulted into any input into the 1992 patent application. The input into the priority application came purely from Arnold and the referrer via Hunt to Cleveland & Co. and at the time of making the priority application the question of inventorship was not an issue although it became one later.

65. As far as Arnold's evidence was concerned, Mr Brown put it to me that at the time Arnold was in a mess and, by his own admission, telling lies. Johnson had stated in his statutory declaration that at the meeting in December 1996 he found it difficult to make any sense of Arnold. Mr Brown also put it to me that Arnold was now telling the truth, having turned to God in a terrible situation.

66. Mr Brown submitted that the referrer's evidence was the truth. She was an impetuous person and at times willing to sign things to get them out of the way and get on with something else, the Whinny Widgets thing being an example. She trusted her solicitor to find out whatever needed doing instead of realising or thinking that she should tell the solicitor what to do. But, this was not an uncommon situation for people to assume that their solicitor knew everything and an example of this had been that when GGB told her about the assignment of the patent to him she assumed there had not been one because her solicitors were not aware of it.

67. Mr Brown also submitted that the High Court proceedings between the referrer and Arnold had proceeded on the incorrect assumption that Arnold was still the proprietor and that by reaching some sort of agreement with Arnold at the end of the day the referrer would be left in peace to get on with what she wanted to do, the marketing of the Limpet numnah. It was an unusual story, almost an incredible story, but it was what had happened. Mr Brown asked me to

make a decision in favour of the referrer because she was the inventor and she should be entitled to the rights in the numnah, but not to the shin pad embodiment.

## **Findings**

68. I would agree with Mr Brown that this is indeed an unusual case. One of the main witnesses, Arnold, the person named at the time of filing the patent application as the applicant and inventor, has provided very self-contradictory evidence and has admitted to lying under oath, a serious offence. He also purports to have attempted to steal the invention. His evidence is crucial to this case, as also is the uncontested written evidence of Terry, Powell, Williams and Salaman who claimed they tested out non-slip numnahs for him in the 1980s or knew about the testing, and Pegley who claims that he was present at the discussion between Arnold and GGB in late 1983 about polyvinyl chloride foams.

69. I will start by dealing with the first ground for refusing the reference that was put to me by Mr Penny, namely that in not contesting by cross-examination the statements by Terry, Williams, Salaman, Pegley and Powell all of which support the proprietor's case, the referrer has not been able to make out her case, an important aspect of which was that testing of non-slip numnahs meeting the broad requirements of claim 1 of the patent did not take place in the 1980s as claimed by the proprietor. I consider that cross-examination of these witnesses in this case, where there is serious conflict of evidence, would indeed have been of material assistance to me in reaching a just conclusion and failure to request such must be fatal to the referrer's case. It seems to me probable that testing did take place on Arnold's behalf in the 1980s. Although I would agree that there is some uncertainty over the type of material being tested in the 1980s, and as to why, if suitable non-slip saddle pads were developed in 1985, they did not appear on the market until 1992, I have not been provided with any evidence which shows that the material tested clearly was outside the terms of claim 1 of the patent. It is unfortunate that the referrer was not apparently advised, as far as I am aware, to ask for cross-examination of these witnesses as it seems to me likely that they would have been able to throw some light on the type of material which was tested. Thus, I would agree with Mr Penny that the referrer has not been able to show that she was the first to invent a non-slip numnah. For this reason, alone, I would refuse the

reference.

70. Even disregarding this, the second ground put to me by Mr Penny for refusing the reference, namely that the referrer's version of events should not be accepted because it was flawed, would equally seem to me to be valid. Millington has supported the referrer's statements about confidentially testing the numnahs in 1991 and coming up with a successful non-slip numnah, and I have been persuaded that Millington did test numnahs at the request of the referrer in 1991 to find a non-slip numnah. But the crux of the referrer's evidence about her being the inventor rather than Arnold is only supported by Arnold and I cannot regard his evidence as reliable because he is a self admitted liar who, in this case at least, has given not once but on a number of occasions contradictory statements, and in the two earlier two court actions has maintained that he was the inventor. Even the referrer's story about the origins of the invention does not find clear support in Arnold's evidence under cross-examination because he maintained that the original idea had been hers whilst she maintains it was due to him that she took notice of the incident of the yacht table-cloth.

71. I have been presented with much confusing and conflicting evidence about the company Limpet, who set it up, its purpose, its intended involvement in the patent, and who held what directorships and shares, particularly the latter. I find it difficult to decide what probably did take place with regard to Limpet. Cross-examination of Hunt, who was a director of Limpet from its incorporation, had it been possible, might have provided some answers. Also, I am aware that there is widespread ignorance amongst the general public about patent matters and so I do not consider it unexpected that the referrer should have been ignorant about patent inventor and applicant requirements. Unfortunately some solicitors are also not well informed about patent matters. As for the inconsistencies over dates, it seems to me that many of these are honest misrecollections due to the long time that has elapsed since the events took place.

72. Arnold says that he is now telling the truth, having taken on religion, but his web of lies stretching over many years is so complex that the truth is not easy to ascertain and, indeed, he may no longer be able to distinguish truth from fiction. At many times he was evasive. It would perhaps have been helpful to the referrer's case had Arnold's new life story been supported, for example by a statement from his church. It seems to me that Arnold has intentionally misled many people that he has dealt with, usually for money reasons. That being so, either he may have

intentionally misled the referrer into thinking that she had invented the non-slip numnah when he himself had already invented it, perhaps because he wanted to involve the referrer's knowledge, ideas, money, and experience in perfecting and selling the non-slip numnah which he had already basically invented, or he may be now telling the truth and the referrer did invent the non-slip numnah, in which case he misled GGB. A third alternative is that the referrer is telling lies and knows that she was not involved in inventing the non-slip numnah and has somehow persuaded Arnold to support her untruthful reference. It seems to me unlikely that the third option is the correct one. The referrer may be impetuous and may have unwisely signed documents put before her, I would agree with Mr Brown on that, but I cannot see that she would go to the lengths of making a reference to the Patent Office unless she genuinely believed that she was the inventor. Also, I find it difficult to believe that she would have indulged in such unwise and dishonest behaviour as purporting to be the proprietor of the patent, as in the Whinny Widgets incident, if she knew she was not involved in inventing the non-slip numnah.

73. As far as the referrer being the sole inventor is concerned, even if I were persuaded that the referrer had been involved in inventing the non-slip numnah, it seems to me that her story indicates that she should not be regarded as the only person who devised the actual invention. I accept that she introduced some ideas about what materials to use in the testing, but it seems to me that Susan Millington, in feeding back to the referrer results of the tests and making suggestions about changes to the materials previously supplied and unsuccessful, also contributed to devising the nonslip numnah. Again it seems to me that the referrer was perhaps not wisely advised about going for sole ownership.

74. In consequence, if I had not found against the referrer on the first ground, then I would have found against her on the second.

## **Conclusions**

75. This is a case in which there is much conflict of evidence which has not been fully resolved. I find that the referrer has not made out her case and has failed to establish on the balance of probabilities that she made a contribution to the essential elements of the non-slip numnah embodiment of the invention. I would add that had there been cross-examination of the various

people who provided statutory declarations supporting the proprietor and had the referrer's reference been with respect to joint inventorship rather than sole ownership, my findings might have been different.

76. During the hearing there was a hint that, if successful, the proprietor may proceed to take other action against the referrer. That, of course, is his right. However, I would ask that due notice be taken of the fact that as recently as June 1995 the referrer was awarded the High Court Consent Order ostensibly giving her a free licence to manufacture numnahs under the patent, and that Arnold has admitted that he misled, not only her, but his solicitors and GGB as to his right to make such a order. Further, whilst much has been made of the referrer's inaction following the Andover meeting where GGB informed her that he was the rightful owner, it must be remembered that at this time she was in litigation with Arnold and her contention that she thought Baldwin and Arnold to be in league has a plausible ring to it. She may have been remiss in not following up the meeting by further enquiries, but equally I can find no clear evidence that Mr Baldwin took any action either, *eg* to contact Arnold or to instruct Cleveland & Co to write to the referrer, and indeed he suggested as much under cross-examination.

### **Costs**

77. Both sides have requested costs but Mr Penny put it to me at the hearing that he would rather see my judgment before making submissions on costs. He said that he could then sort out as much as possible with the other side and perhaps fix a short hearing before me to settle any open issues. I agreed to this.

### **Appeal**

78. This being a decision on a substantive matter, the period of appeal is six weeks.

Dated this 22<sup>nd</sup> Day of June 1999

**G M BRIDGES**

**Divisional Director, acting for the Comptroller**

**THE PATENT OFFICE**