

PATENTS ACT 1977

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 ON COSTS

Background

1. In my substantive decision of 22 June 1999, I found that the referrer, Aline Rosemary Holmes, had failed to establish on the balance of probabilities that she made a contribution to the essential elements of the non-slip numnah (saddle mat) embodiment of the invention of patent no. 2280345.
2. At the two day substantive hearing Mr Timothy Penny, instructed by Sean Callaghan of Twitchen, Musters and Kelly (“TMK”), who appeared as counsel for the proprietor, put it to me that he would rather see my judgment before making a submission on costs, and I agreed to this. Mr Penny also said at the hearing that he would sort out as much as possible with the other side, who had also requested costs, and perhaps fix a short hearing before me to settle any open issues.
3. Mr Brown of Alpha & Omega represented the referrer at the substantive hearing and also at two earlier preliminary hearings, which were concerned with section 37(8) and two way discovery respectively. I issued preliminary decisions dated 21 October 1997 and 15 March 1999 following these hearings in which I stated that I had decided not to exercise the comptroller’s discretion to decline to deal with this action under section 37(1) and ordered two way discovery respectively.
4. During the period set for appeal against the substantive decision the Office received a letter from TMK on 9 July 1999 requesting a short hearing about costs and submitting that due to this being an exceptional case there should be an award of compensatory costs to the proprietor who had successfully resisted the referrer’s application. In this letter attention was drawn to Rizla Limited’s Application [1993] RPC 365 and Du Pont de Nemours Application [1996] RPC 740.

The facts and matters on which the proprietor would rely to support his submissions were also set out in the letter.

5. No appeal was lodged against the decision in the time period set and on 6 October 1999 the Office was informed that Anstey Sargent & Probert Solicitors (“ASP”) were now acting for Aline Holmes instead of Alpha & Omega. Written submissions on behalf of the referrer, in which ASP submitted that the case was not “exceptional” for compensatory costs and that part of the proprietor’s costs had been incurred unnecessarily, were received by the office on 28 October 1999 and attention was drawn additionally to Nimar Supplies Ltd Patent Application No. 2291019 [1999] (O/017/99)..

6. The matter of costs came before me at a hearing on 17 November 1999 at which Mr Penny, counsel, instructed by TMK, appeared for the proprietor and Mr Mackay of ASP appeared for the referrer.

The law

7. The comptroller’s authority to award costs is provided by section 107(1) which reads -

“The Comptroller may, in proceedings before him under this Act, by order award to any party such costs or, in Scotland, such expenses as he may consider reasonable and direct how and by what parties they are to be paid.”

8. It is the Comptroller’s normal practice to award a contribution towards costs only, using as a guide a scale which is periodically announced in the Patents and Designs Journal. This is a long-established practice, the reasoning behind it is to avoid a party, in particular a small company or individual, being deterred from pursuing or defending its rights before the Comptroller because of the fear of the costs it might have to pay should it lose. However, it has been suggested that this is a two-edged sword and that a party may be equally deterred from proceeding by the knowledge that even if they win, they would be unlikely to recover more than token costs and thus be heavily out of pocket even in victory.

9. The Comptroller certainly has the power to deviate from the published scale. In Rizla Limited's Application the hearing officer did decide to award compensatory costs, but he was overturned on appeal. However, the Deputy judge, despite overturning the case, stated at page 374

“As a matter of jurisdiction, I entertain no doubt that if the Comptroller were of the view that a case had been brought without any *bona fide* belief that it was soundly based or if in any other way he were satisfied that his jurisdiction was being used other than for the purpose of resolving genuine disputes, he has the power to order compensatory costs. It would be a strange result if the Comptroller were powerless to order more than a contribution from a party who had clearly abused the Comptroller's jurisdiction.”

However, he differed from the Hearing Officer's conclusions, saying at page 377 -

“Counsel was unable to refer me to any reported case where such a strong order for costs has been made to the Comptroller and therefore there is no established yardstick to measure what might be regarded as exceptional. I believe a case such as the present can only be regarded as exceptional if it can be shown that the losing party has abused the process of the Comptroller by commencing or maintaining a case without a genuine belief that there is an issue to be tried. In my view, this is not shown to be such a case. There are of course a large number of other circumstances such as deliberate delay, unnecessary adjournments etc where the Comptroller will be entitled to award compensatory costs, but it is unnecessary to attempt to define what is clearly a wide discretion.”

10. In Du Pont de Nemours & Co. (Rebouillat's) Applications I, the Hearing Officer, followed this statement by the Deputy Judge saying (page 748, line 20) -

“Thus the message is clear, the Comptroller can award compensatory costs, but only in exceptional circumstances such as a clear abuse of process.”

In the Du Pont case I also agreed with what had been pointed out in the Rizla case, namely that allegations of dishonesty are almost inevitable in an entitlement case, saying (at page 752, line 30) that the allegations made in the Du Pont case did not seem to me to make the case exceptional.

11. In Nimar Supplies Ltd the hearing officer stated at paragraph 12 -

“.....the opponents argument that the case warrants exceptional treatment because the referrer's claims

have not been substantiated by evidence is not sufficient. Indeed, if it were it would act as a deterrent to a party withdrawing as soon as they realised their case was not worth pursuing, and that would not be in anyone's interests. "

12. In none of these three cases was the substantive matter at issue maintained to a substantive hearing.

Submissions

13. In the letter from TMK of 9 July 1999 it was stated that the proprietor would rely on the following facts and matters to make out his case for compensatory costs -

“(a) Mrs Holmes forced Mr Baldwin (former proprietor and father of the present proprietor) into a position in which he took evidence from many witnesses, who were not even called for cross examination, thereby reflecting on the bona fides of the application, as the hearing officer decided that this alone was enough to score victory..

(b) Mr Baldwin had to defend his patent in the face of evidence from Mr Arnold (original applicant and inventor who assigned the patent application to Mr Baldwin), a self admitted perjurer and liar, upon whose evidence Mrs Holmes relied extremely heavily.

(c) Mrs Holmes persevered with her claim to be the sole inventor in circumstances in which, on the evidence, she was bound to fail given-

- I. the evidence against her
- ii. the inconsistencies in her case and the unreliable evidence of Mr Arnold.”

14. At the hearing Mr Penny commenced by taking me straight to Rizla which he said he accepted set out the basis of the jurisdiction . He put it to me it was significant that in Rizla, and in Du Pont also, discovery took place and then, the party clearly having considered all the relevant documents that it had on disclosure, a decision to withdraw was taken Mr Penny submitted to me that the present case was significantly different. Even if it had not been quite clear to the referrer at the time of making the reference that Mr Arnold's evidence was less than reliable, she and her adviser had three subsequent opportunities to realise that his evidence was unreliable, to

realise the hopelessness of her case and withdraw - (i) after she saw the counterstatement, when she was put on notice that Mr Arnold's evidence was going to be pretty unreliable, (ii) after the evidence stages had been completed, when she saw the large number of statutory declarations relating to pre-1991 which supported Mr Baldwin, and (iii) after she saw the discovery documents, which included *inter alia* the contrary and contradictory statements in Mr Arnold's affidavits filed in connection with earlier High Court and Exeter County Court cases, which were also concerned with the non-slip numnah. Instead, unlike Rizla, Du Pont, and Nimar, the referrer decided to bat on to the substantive hearing. The referrer was represented but she was clearly aware herself of the contents of the various affidavits and statutory declarations by Mr Arnold.

15. Mr Penny put it to me that in Rizla, Du Pont and Nimar it was held that if a referrer has a genuine belief that there is an issued to be tried then it is not an abuse of process and so compensatory costs are not applicable. However, he considered that, standing back, the test of abuse of process must be to a certain extent or entirely an objective test; it cannot be entirely subjective as suggested by the reported cases. None of these cases considered the question of what costs are appropriate in the case where a referrer has a 'genuine' belief but has held it unreasonably or improperly (for example by having a fixation that he created the invention) and so has abused the process. Mr Penny said that it cannot be right that if there is a genuine belief there can never be a sanction. The question of whether the genuine belief had been unreasonably or improperly used was not considered in the three cases and it is an important and necessary element of this present exception. It should not be the case that someone who holds a genuine belief but it is completely unreasonable or improper should be entitled to abuse the procedure by taking the Hearing officer all the way through to a full hearing, saying to the Hearing Officer "I have a genuine belief. I really do believe it" and then, when the case is rejected, just have to pay £1000 or so in normal scale costs.

16. Mr Penny then drew my attention to paragraph 72 of my substantive decision, ie

".. 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 unlikely to me that the third option is correct. 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 Winnie Widgets incident, if she knew she was not involved in inventing the non slip numnah.”.

and said that he read it to mean that I had accepted that the referrer had a genuine belief that she was the inventor. He put it to me that I should go on to consider whether she held this belief improperly and unreasonably.

17. Mr Penny then directed my attention to several points, namely -

i. The referrer had claimed at the substantive hearing under cross examination by him that the nub of the invention had come from a non-slip mat incident when she was having a drink on a yacht with a friend, but since there was not a single reference to this incident in any written evidence on file, even in the affidavit by Jean Byers, the friend on the yacht, the referrer had made unreasonable and improper use of the legal process by coming up with the incident during cross examination.

ii. The referrer had been blinkered in the way she pursued her reference to the hearing after she had seen all the discovery documents and witness statements, which included Mr Arnold’s many contradictory statements. It must have been absolutely clear to her that Mr Arnold’s evidence in her favour would never be accepted because it was inherently unreliable on the documents and he had admitted being a liar and perjurer.

iii. Mr Brown had commented at the substantive hearing that this was an unusual case and I had agreed with him in my substantive decision. The referrer relied on a self admitted liar and perjurer, whose best excuse for his change of heart to now telling the truth was that he had now found God. Pressing on to a very expensive two day hearing for which there was a substantial amount of preparation was unreasonable.

iv. In my substantive decision there had been criticism about the poor advice given to the referrer by her then adviser Mr Brown. But the referrer herself knew that there was not

to be cross examination of the people who had provided the pre-1991 evidence. She did not turn up to the hearing and say “what do you mean, we are not cross examining?” Instead, by way of explanation she gave her own side of the story. If she genuinely believed that she was the inventor, that belief was unreasonably and improperly held, objectively speaking. This case goes a little bit further than Rizla.

v. There was no genuine dispute once the decision had been taken not to challenge the pre-1991 evidence filed on behalf of Mr Baldwin. In the substantive decision I stated that failure to cross-examine the people providing the pre-1991 evidence meant that rejection of the reference would have occurred for this reason alone. Mr Baldwin need not have been called.

vi. Mr Arnold’s evidence which arose in connection with the earlier High Court and Exeter County Court cases was so strongly against the referrer that the proper way would have been for the referrer to no longer claim that she was the sole inventor. At the substantive hearing I had specifically asked the referrer if she was saying that she was the sole inventor and in my decision I said that had there been a different line of attack the decision might have been different. By choosing to continue with the action, but not to cross-examine the people who said that they witnessed the invention of the product in the mid-1980s, and by continuing to claim that she is was inventor and selling her non-slip numnahs through Winny Widgets, the referrer had gained another two years between the filing of the reference and the substantive hearing in which to sell her products. It was an interesting way to continue, which caused some suspicion.

18. Mr Penny presented me with a schedule of costs for his client, giving a grand total of £28,412.67, which he said did not include the costs of the final hearing about costs. He conceded that he was sure that I was not expecting him to claim for the two preliminary hearings, bearing in mind the proprietor lost the first preliminary hearing concerning section 37(8) and that the proprietor’s request for discovery, which had led to the second preliminary hearing, had been made out of time. He indicated that counsel’s fees for these two preliminary hearings were £2056.25 and solicitors’ fees £2,350, so that just under £4500, including VAT came off the schedule leaving some £24000.

19. Finally, Mr Penny put it to me that if I was convinced that the referrer was not necessarily acting unreasonably and improperly until after the discovery had taken place then I should take the view that the proprietor should be compensated outside the normal scales for the latter part of the claim, namely for the hearing and immediately before the hearing.

20. Turning now to the referrer's arguments, in their submissions sent with their letter of 28 October 1999, AST deny, on behalf of the referrer, each point made by TMK in their written submissions, saying -

a. Whilst the referrer's decision not to cross examine witnesses of the applicant had been criticised by myself, it is submitted that this could not amount to the exceptional circumstances as set out in the aforementioned cases. The decision to cross examine or not is a tactical decision that each party must consider. In evidence the referrer stated that the reason why witnesses were not cross examined was due to the fact that she thought the evidence submitted by herself was sufficient to challenge the applicant's allegations and that this would be sufficient evidence for the court to grant in her favour.

b. Mr Arnold admitted openly at the hearing that he had lied in the previous High Court proceedings and in the Exeter County Court but clearly stated that he was under pressure at that time both financially and through drink and drugs. Furthermore, he explained that since his wife's illness he had found comfort in religion and wished to rectify his previous deceptions. I had recognised in my judgement that Mr Arnold was a "crucial" witness and so it is submitted that the referrer can in no way be criticised for relying on such fundamental evidence. The fact that Mr Arnold was fundamentally involved in this matter is not disputed and the referrer should not be penalised for Mr Arnold's past discrepancies.

c. At no time did the referrer genuinely believe that she would lose this case. She called a number of witnesses who supported her allegations including Mr Arnold, Suzanne Millington and John Ryder. All three witnesses supported the allegations of the Respondent and indeed in my judgement, besides the passage quoted in paragraph 15 above, I stated in paragraph 16 of my earlier judgement that -

“Millington and Ryder gave the impression of attempting to answer honestly within their limited knowledge of events”.

d. In conclusion, it is submitted by ASP that there is no evidence to support TMK’s assertion that this case amounts to an “exceptional case” for the purposes of compensatory costs. There is no good evidence to support any allegation that the referrer acted in any way other than in good faith and with a genuine belief that she had a valid claim to the sole ownership of the patent and as such a claim for compensatory costs should be denied. It is accepted that the losing party is usually asked to pay a “very limited proportion of the other side’s costs”. It is however submitted that any such award should be at the lowest scale. Reasons for this are as follows because -

1. The referrer had acted at all times in good faith and under the belief that she was the sole owner of the Patent. This was supported in evidence by Susan Millington and Arnold;
2. The referrer was entitled to ignore the argument by the applicant that the patent had been assigned to him. This is supported by the fact that the assignment despite being reported to have been executed in 1993 was not filed in the Patent Office until November 1995;
3. The actions of the applicant both prior to and after the hearing have been inconsistent with his assertion of ownership. The matters put before the Court could have been resolved earlier if the applicant had filed the purported assignment immediately after the alleged date of execution;
4. Part of the applicant’s costs have been incurred unnecessarily. The first of the two preliminary hearings in respect of the case was to deal with a request by the applicant to the Patent Office asking the Patent Office to decline to hear the application and direct it instead to the court. It is submitted that this was not only unnecessary but was never likely to succeed. The Comptroller clearly had the jurisdiction to hear the case and as such the referrer should not have to contribute to these costs. The second hearing was in respect of a request by the applicant for further discovery. This application was made outside the time period originally set by the Patent Office.

21. I would, however, note with respect to paragraph (d) above, that in fact the Section 37(1) ownership reference was not filed until 1996, ie until after the assignment to Mr Baldwin was registered at the Patent Office, and that Mr Penny has conceded that he is not expecting costs to be awarded for the two preliminary hearings.

22. At the hearing Mr Mackay put it to me that during the Rizla case an objective view had not been taken although it could have been; only a subjective view had been taken. Mr A Watson Q.C. had said in Rizla that he believed that “a case such as the present can only be regarded as exceptional if it can be shown that the losing party has abused the process of the Comptroller by commencing or maintaining a case without a genuine belief that there is an issue to be tried.” Mr Mackay argued that the genuine belief in question is that of the referrer, not the belief of the objective person.

23. Mr Mackay submitted that certainly there was criticism of why the referrer did not cross examine Mr Baldwin’s witnesses but that this was a dispute that had gone on for many, many years, during which time she had always maintained this genuine belief that she was the rightful owner of the patent. She was not the sort of person who would carry on a case just to get two years of sales out of it.

24. Regarding the yacht incident, Mr Mackay pointed out to me that the yacht incident was not the only submission put forward by the referrer. The referrer’s friends Susan Millington and John Ryder as well as Mr Arnold had produced evidence. Mr Mackay said that he had no doubt that Mr Arnold could be criticised for his past and did not deny that I had criticised him and found his evidence suspect but that this did not mean that the referrer’s belief that the evidence hat Mr Arnold was putting forward was truthful was not genuine. Mr Arnold did not confirm the yacht incident but he did turn around and admit openly that it was the referrer who had come up with the invention and not him.

25. As far as Mr Penny’s submission about the referrer’s approach being blinkered, Mr Mackay told me that the referrer had thought that her own evidence and that provided by her supporters provided her with a strong enough case. She had legal representation and it was believed that the

evidence they were producing was sufficient to establish her case. The referrer should not be criticised for that. Mr Mackay submitted to me that there had been no abuse of process; the referrer had the strongest evidence she could possibly bring. She had the person who allegedly came up with the original idea now prepared to stand up and say that she was the inventor, not him.

26. Mr Mackay told me that this was an extraordinary case and that he had no doubt that there was not really a winner. The referrer had every reason to believe her case was strong enough. He put it to me that even if I accepted that there was an objective element to this test, which is not supported by Rizla and Du Pont, I should still reach the same conclusion that compensatory costs should not be awarded.

27. Finally, Mr Mackay drew my attention back to paragraph 72 of my substantive decision in which I stated -

“ A third alternative is that the referrer is telling lies and knows that she was not involved in inventing the numnah and has somehow persuaded Arnold to support her untruthful reference. It seems unlikely to me that the third option is the correct one.”

Mr Mackay put it to me that, even with an objective element put in, I was holding that the third option did not seem to be correct.

He then continued to quote further from paragraph 72, which reads -

“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.”

Mr Mackay submitted that even if we look at it slightly from an objective point of view, there was no evidence to support the reference being anything other than a bona fide claim; Aline Holmes went to the substantive hearing with what she believed was strong evidence in her favour and she should not be penalized because it did not go in her favour. Mr Mackay said that he accepted that this case differed to a certain extent from Rizla and Du Pont but said that because the referrer came to a different decision after she had gathered all the evidence, and had maintained her reference, that did not amount to an abuse of process. After considering all the evidence and discovery documents the referrer and her adviser had thought it worth continuing. He put it to me that there was no evidence to support the case for compensatory costs.

28. Mr Penny then took the opportunity I offered to him to comment on Mr Mackay's submissions. He reiterated the views he had previously put to me, in particular saying that this was a very unusual case, adding that the referrer was an unusual lady, and that I should go beyond Rizla and incorporate some kind of objective test. He said that the evidence disclosed under discovery, including affidavits by Mr Hunt, a solicitor, and Mr Arnold which were consistent with Mr Arnold being the inventor and which were filed in connection with the earlier High Court and County Court cases, was known to the referrer before discovery took place. There must be some incentive for the referrer to consider all the evidence, and see if she was going to win. Mr Penny put it to me that his submission was based on common sense. He claimed that I would not be opening the flood gates if I acceded to his argument since it was a very unusual case.

29. In his final submission in reply Mr Mackay also reiterated the points he had made earlier, in particular that the referrer had made an informed decision about not cross examining the people providing the pre-1991 evidence because she thought she had sufficient evidence of her own. He said that nobody was disputing Mr Arnold's past but the inventorship dispute went right back; it was not a new matter. Mr Arnold had stood in the referrer's way in the past but was prepared to stand up and support her now. Mr Mackay submitted that, as in Rizla and Du Pont, the test to be applied was subjective. There was no clear evidence that she did not operate with a genuine belief; this case was not exceptional. The referrer made the reference because she held a genuine belief that she had a decent case.

30. Both Mr Penny and Mr Mackay confirmed to me that two newspaper articles from the July/August and September issues of the “Equestrian Business News” which had been sent to the Patent Office in connection with their written submissions about costs were not now at issue in connection with costs.

Findings

31. In paragraph 75 of my substantive decision I said -

“ 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 regard to joint ownership rather than sole ownership, my findings might have been different.”

I think this statement clearly indicates that I am not convinced that all the matters involved in this ownership and inventorship challenge have necessarily come to light.

32. At the substantive hearing, when asked by Mr Penny why she had not asked to cross examine the people who had provided statutory declarations giving pre-1991 evidence supporting the proprietor, the referrer 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. As I commented in paragraph 71 of my decision, “.... *there is widespread ignorance about patent matters and so it was not unexpected that Aline Holmes was ignorant about patent inventor and applicant requirements.*“ It seems likely that her claim to be the sole inventor rather than a joint inventor arose and was maintained because of her ignorance of patent law and because she was advised poorly. Indeed, I referred to the possibility of her not being wisely advised about going for sole inventorship in paragraph 73 of my substantive decision.

33. Moreover, in addition to there being widespread ignorance about patent matters, I would go further and say that there is widespread ignorance of many more general legal matters and so it is not unexpected that the referrer was also ignorant about the need to challenge by cross examination written evidence against her case. On this matter, too, perhaps she was poorly advised .

34. However, these sole inventorship and cross examination matters do not detract from the fact that I consider that the referrer had genuine belief that she was involved in inventing the non-slip numnah and accordingly had ownership rights.

35. Some interesting arguments have been put to me. I would agree with Mr Penny that a case could arise where such ‘genuine belief’ alone might, in certain circumstances, not be sufficient to prevent compensatory costs being awarded, if that genuine belief were used improperly in some way and the process abused. I also agree that the Rizla, Du Pont and Nimar cases are all ostensibly different from the present case in that in none of them was the reference maintained to a substantive hearing, although I do not consider that the Deputy Judge’s comments in Rizla, ie “...by commencing or maintaining a case without genuine belief...” to be limited to such cases. If I were to go along merely with the findings in these three cases it would seem that I would have to find that this case is not exceptional and that compensatory costs should not be awarded because the referrer maintained the case with a genuine belief that she was involved in inventing the non-slip numnah and that there was an issue to be tried.

36. However, since I agree with Mr Penny that genuine belief is not necessarily enough to deny compensatory costs, I must firstly consider whether with regard to the present case I have to go beyond Rizla and decide whether the referrer, who as I have already determined held a genuine belief, used that belief improperly and abused the process. Only if I decide such applies will I then have to decide what compensatory costs it is correct to award in this case.

37. Firstly in this regard and contrary to Mr Penny’s arguments, I accept that the referrer was bound to rely at least in part on Mr Arnold’s evidence since he was a crucial witness and I would agree with Mr Mackay that although Mr Arnold was, by self admission, a perjurer and liar in the past, the referrer held a genuine belief that his evidence in this case on her behalf was correct. Moreover, the referrer did not only rely on Mr Arnold, she also relied on other witnesses, Susan Millington and John Ryder in particular, who supported her allegations, and, as I stated in paragraph 16 of my substantive decision, as drawn to my attention by Mr Mackay, Susan Millington and John Ryder gave the impression of attempting to answer honestly within their limited knowledge of events.

38. Secondly, Mr Mackay implied to me that it was a joint decision of the referrer and her adviser, Mr Brown, to continue with the reference to the substantive hearing and without cross examination of the people who had provided the pre-1991 evidence. In a legal adviser and client situation, when good advice is given by the adviser and the client is sensible, a legal case can proceed properly with both the adviser and the client together taking the decisions. As I have indicated above, I do not find it surprising that the referrer herself was ignorant about the necessity of cross examining these people and thought that her own evidence when taken together with that of Mr Arnold, Susan Millington and John Ryder would suffice to prove her case but her adviser Mr Brown should not have been dismissive of the need to cross examine these people. Perhaps he was not, but failed to persuade the referrer.

39. However, it would be most surprising, and I feel that it would indicate some lack of common sense, if the referrer expected Mr Arnold's evidence alone, true although she thought it to be in her eyes, to be viewed as reliable. But I am willing to accept that she thought Mr Arnold's evidence when taken with her own evidence and the other evidence given on her behalf would win the day for her. Perhaps she could have been advised more strongly about the need to cross examine more people and perhaps she should have shown better sense about relying so heavily on Mr Arnold's evidence, but I do not consider that there was a clear abuse of process because the view was taken to maintain the reference after discovery and take it to a substantive hearing. I consider, on the contrary, there was a genuine dispute to be resolved.

40. It is true Mr Baldwin had the expense of taking evidence from many witnesses, but it was necessary for him, in making out his case, to have these plurality of witness statements which corroborated each other and explained about the testing at various times in the period 1984 - 1990. I note that these witness statements were all brief.

41. Thirdly, with regard to the yacht incident, I do not consider this incident and the way in which it only came to light at the substantive hearing to be of any great significance to the matter of costs.

42. Thus in conclusion, I find that this is not an exceptional case and the referrer held a genuine belief that she was involved in the invention of the non-slip numnah and I have not been persuaded that she used that belief improperly and abused the process of the Comptroller in maintaining the reference to the substantive hearing. Accordingly, I decline to award compensatory costs for any part of the proceedings and will rely on the standard scale of costs.

Costs

43. In view of my findings I order the referrer (Aline Rosemary Holmes) to pay the proprietor (Gordon Lee Baldwin) £1485 (one thousand, four hundred and eighty-five pounds) as a contribution towards his costs. This relates to the two day substantive hearing itself, but the award makes no allowance for the two preliminary hearings or for the final hearing about costs but does include an element for the two day attendance of Mr Baldwin at the substantive hearing.

Appeal

44. As this matter does not relate to a matter of procedure, under the rules of the Supreme Court any appeal must be lodged within six weeks.

Dated this 3rd day of December 1999

G M BRIDGES

Divisional Director, acting for the Comptroller

THE PATENT OFFICE