

BLO/ 064/87

PATENTS ACT 1977

IN THE MATTER OF three applications
by Unique Expo Systems ApS for a
Declaration of non-infringement of
patent No. 1530455 in the name of
T R Zeigler.

DECISION

The applicants have applied to the Comptroller under Section 71 of the Patents Act 1977 for three declarations of non-infringement of Patent No. 1530455 a patent which was granted under the Patents Act 1949. The patent is dated 4 November 1975, i.e. before 1 June 1978 which was the day appointed for the coming into operation of the 1977 Act, and, therefore, is a new existing patent under paragraph 3(1)(b) of Schedule 1 of the 1977 Act. There is no suggestion of any infringing act having been performed before the appointed day and, accordingly, by virtue of paragraph 3(2) of Schedule 4 of the 1977 Act, and not Schedule 3(ii) referred to in paragraph 2 of the Statement, these applications are properly made under Section 71. In order to avoid triplication of evidence, the three applications were consolidated prior to the evidence stages at the request of both parties.

At the hearing before me on 8 October 1986, Mr G Burkill, instructed by Messrs Gill, Jennings and Every, appeared as Counsel for the patentees and Dr M F Ford of Messrs Mewburn Ellis and Co appeared as agent for the applicants.

In accordance with Section 71(1)(a), the applicants wrote on 9 March 1984 to the agents, E N Lewis and Taylor, recorded at that time on the Official Register as the address for service, for a declaration of non-infringement in respect of each of three display stands and the letter was accompanied by a written description and drawings of the three stands, a copy of which is included in Item 1 accompanying the applicants' Statement. This

letter and its enclosures were passed to the now-authorized agents, Gill Jennings and Every, via the patentee's solicitor. In addition, the patentee's agents were allowed to inspect samples of the first and third form of the stand. At that stage, there was no allegation from the patentees that they had been supplied with inadequate or insufficient description of the stands. The patentees refused to give the requested acknowledgement in respect of the three stands for which declarations were sought and this has resulted in the present applications under Section 71 made to the Comptroller on 31 August 1984.

From the above, it is clear that, prior to the initiation of these proceedings, the applicants had applied in writing to the patentee "for a written acknowledgement to the effect of the declaration(s) or declarator(s) claimed" and had furnished him "with full particulars in writing of the act(s) in question". For his part, the patentee had "refused or failed to give any such acknowledgement". Thus, the prerequisite conditions set out in Sections 71(1)(a) and (b) have been met.

However, on 13 June 1985, the patentee's agents informed the applicants that the patentee was prepared to give the requested declaration in respect of the third form of stand. On 20 March 1986, the applicants wrote to the Patent Office stating that this declaration had been given but that they would be asking for the award of costs since the acknowledgement could have been given before the commencement of the present proceedings. Therefore, the question of costs is the only point which I need to consider in respect of the third form of the stand.

Subsequent to the normal rounds of evidence, further evidence was filed by the applicants on 25 September 1986. At the hearing, in the absence of any formal objection from either side, I admitted this further evidence.

Patent No. 1530455 relates to a collapsible self-supporting structure which may have a fabric covering although the

self-supporting relation does not rely on such covering, page 1, lines 71-73.

Claim 1, the only independent claim other than the omnibus claims, reads as follows:

"A collapsible self-supporting structure comprising a network of struts pivotally interconnected to form a plurality of polygonally shaped assemblies; and wherein each assembly comprises a first set of struts lying substantially in a common plane and radiating from an inner central apical point at which their inner ends are pivotally interconnected, to respective outer surrounding apical points located at corners of said assembly; and a second set of struts whose inner ends are pivotally interconnected at an outer central apical point which is spaced from said inner central apical point in a direction outwardly of the structure and from which said second set of struts radiate in crossing relation to corresponding struts of said first set to respective inner surrounding apical points located at corners of said assembly, each of said inner surrounding apical points being spaced from a corresponding one of said outer surrounding apical points in a direction inwardly of said structure; and wherein at least some of the pairs of crossed struts of said first and second sets are pivotally interconnected at their crossing points."

The two stands for which declarations are sought are similar to one another, in construction. The first form of stand, hereinafter referred to as stand No. 1, comprises a number of units, e.g. twelve, each as shown in Figs. 1, 2, and 3, (Item 1 accompanying the Statement and reproduced below), e.g. assembled in a four-by-three way, shown in Fig. 4 (not reproduced) and also in a copy of a brochure published by the applicants and additionally included in Item 1.

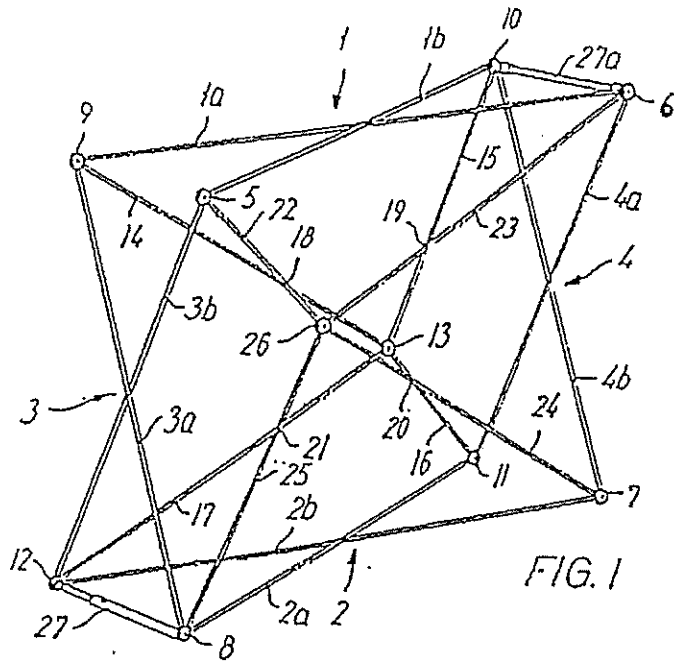


FIG. 1

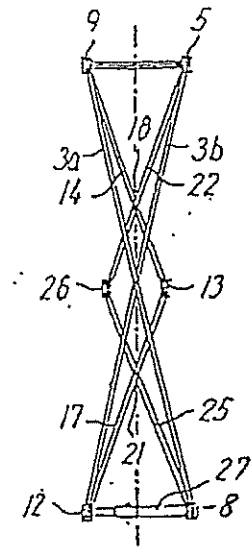


FIG. 2

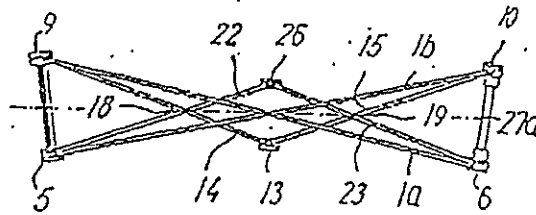


FIG. 3

Each unit comprises a box-like frame comprising side faces 1, 2, 3, 4 each defined by a crossing pair of rods 1a, 1b, ... 4a, 4b, the rods of each pair being pivotally connected together at their mid-points. These rods are connected pivotally to corner joints 5, ... 8 and 9, ... 12 from which rods 22, ... 25 and 14, ... 17, respectively, extend to central joints 26 and 13, respectively. The rods 14 and 22, 15 and 23, 16 and 24, 17 and 25 cross each other and are pivoted at their intersecting points 18, ... 21.

Adjacent units have corner joints, e.g. 5, . . . 12 and side rods, e.g. 1a, 1b, . . . , 4a, 4b, in common. The unit is held erect by a least one releasable locking device, e.g. 27 or 27a, Fig. 1, or as shown in Figs. 8 and 9, see also Exhibit WJB2. The second form of stand, herein-after referred to as stand No. 2, is

identical to the first but with the locking devices omitted.

As shown in Fig. 3, each unit has a substantially trapezoidal horizontal cross-section in the erected condition with a smaller horizontal distance between corner joints 5 and 6 at the front surface than at the other. In the display stand the individual units have the same orientation, with the consequence that the display stand is generally curved, as seen in horizontal section, but not in vertical section.

The applicants for the declarations contend that neither of the two stands infringes any claim of the patent in suit, or alternatively, if claim 1 is construed widely enough to include the stands within its scope, then the claim is invalid in that it is anticipated by US 3,710,806.

Validity is also contested in that it is alleged that claim 1 is not fairly based on the matter disclosed in the specification, Section 32(1)(i), 1949 Act, and that the specification is not self-consistent and does not sufficiently and fairly describe the invention.

After a general introduction, the opening passages of the specification distinguish a collapsible structure of the invention, firstly, from geodesic structures, i.e. structures comprising a network of struts and which are intended to remain in place once erected and, secondly, from known collapsible structures as exemplified by US 3, 185, 164, US 3,496,687 and US 3,710,806 in which, in order to achieve the extensible/foldable capability, various types of locking means are utilized. On page 1, lines 55-61, it is asserted that "none employs an arrangement wherein structural integrity results from a relationship amongst the elongate elements which is attained by the erected shape itself and which does not rely upon physical constraint of the pivotal connections among the elongate elements". The following paragraph emphasizes the distinction between the invention and the prior art by stating that the framework arrangement "derives self-

support by virtue of and in natural consequence of the shape which is assumed when erected into fully extended form. A fabric covering may be employed but the self-supporting relation does not rely upon such covering. The struts may remain freely pivotally interconnected at all times and whereas the extended structure may be rigidified by extraneous means it does not rely thereon for the basic self-supporting relation naturally attained."

For the applicants, Dr Ford contended that claim 1 should be construed in such a way that the collapsible and self-supporting requirements of line 1 must be achieved by the construction defined in line 2 onwards and that what this claim does not cover is something having the features of line 2 et seq but which does not support itself by means of these features. Dr Ford attempted to demonstrate that neither stand for which a declaration is sought is self-supporting without "extraneous means" and, for this purpose, he erected Exhibit WJB1, which is an example of stand no. 2, on a polished floor and showed that by "merely disturbing it by my own hand" it collapsed. He converted this stand to stand no. 1 by attaching locking means forming Exhibit WJB2 and established that "you can thump it quite hard and it will not go down" in contrast to the failure of stand no. 2 to stay erect.

It was accepted by Dr Ford that stand no. 2 might stay up by itself on some floors and, indeed, this was demonstrated by Mr Burkill utilizing stand no WJB1 on a carpeted floor. However, the demonstrations showed that stand no. 2 is not self-supporting on a polished floor. Dr Ford submitted that, when the stand does stay up on, for example, carpet tiles, these tiles are themselves extraneous means. The logical conclusion of this argument is that the carpet is providing something extra, i.e. friction between the stand and the carpet is helping to keep the stand erect.

Mr Burkill contended that in the construction of their stands the applicants have tried to get as near as they could without, they believe, still falling within the requirement that their stands

are self-supporting and he requested that I should take this into account in deciding whether or not to make a declaration in this case. He alleged that the applicants have obtained substantially all of the benefits of the invention, for example, ease of handling, only one person being required to erect the stand and a single locking device only being necessary to secure the stand in the erect position, and rigidity of the assembled structure. I have been unable to find any mention of such benefits, apart from the last, in the patent specification. It might well be that the applicants' stands have some advantages in common with the patentee's invention. But this is not what I have to decide. It is to the claims that I must look in order to decide whether or not the two stands in question infringe the patent. It is an unequivocal requirement of all of these claims that not only is the stand collapsible but, in addition, that it is self-supporting.

As I understand it, Mr Burkill's argument is that since stand no. 1 can be erected in seconds by one person only, as illustrated in the Unique Expo Systems brochure filed with the statement, then it must be self-supporting in that it stands on its own whilst the erector is using two hands to fasten a "central securing lock". To my mind, this does not indicate that the stand is fully self-supporting but that it might be self-supporting in certain conditions. Dr Ford pointed out that the central securing lock is of the type forming part of Exhibit WJB2 and comprising two telescopic tubes securable together by a spring biased pin, the tubes being screwed one to each of a pair of inner and outer apical points (see page 3, line 24, to page 4 line 1 of the written description of the stands), and it would be possible for one person to secure this lock with both hands without releasing his grip on the structure. Thus, in the action of erection of this stand, it is immaterial whether or not the stand is self-supporting.

Mr Burkill submitted that I should look at the product in the context in which it is to be used and he tried to persuade me that

the normal, typical, indoor use is on carpet. However, there is no evidence as to the intended use of the stands and, therefore, I can only assume that there is no limitation in this respect and that the stand is intended to be used on any type of floor.

Dr Ford drew my attention to the case of Horville Engineering Company Limited v. Clares (Engineering) Limited, [1976] RPC 411 and Mr Burkill quoted at length from the judgment of Goff, L.J. in the Court of Appeal. In that case, it was held that in the body of the specification there was a promise that certain results would be achieved by a device constructed in accordance with the specification but that this promise was not met by an allegedly infringing device which fell within certain claims and these claims were invalid for inutility. Applied to the present case, it highlights the dilemma for the patentee that if the stands are not self-supporting but the claims are so construed as to cover the stands, then the claims are arguably invalid.

Dr Ford also made submissions as to the meaning of the reference on page 1, lines 73-75 of the patent specification, to the struts remaining freely pivotally interconnected at all times and to the kind of constraint with which the prior art is concerned. He further submitted that whereas the patent specification promised something which was free to pivot at all times, that promise was not fulfilled by stand no. 1 since the locking devices hold it rigid.

The statement on page 1, lines 75-78, that "the extended structure may be rigidified by extraneous means but it does not rely thereon for the basic self-supporting relation naturally attained" would seem to be more relevant to my considerations as to the meaning of "self-supporting" in the claims. Dr Ford placed particular emphasis on the word "rely" and, in my opinion, the clear deduction to be made from this passage is that the stand of the patentee's invention must be self-supporting when erected without the use of any extraneous means whatsoever.

On the question of interpretation of claims, I need look no further than the House of Lords decision in the case of Electrical and Musical Industries Limited and ors. v. Lissen Limited and anr., 56 RPC 23, and, in particular, to the judgment of Russell, L J on page 39

"The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification to change a claim which by its own language is a claim for one subject-matter into a claim for another and a different subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims".

Applying this to the present case, and reading the claims as a part of the entire document, and in particular with reference to the general description on page 1, I take the expression "self-supporting" in the claims to mean that the assembled structure must be self-supporting at all times and that this self-support is attained by the integrity of the struts and pivotal connections without any assistance from any other source whether this be some type of locking means or friction exerted by a carpet.

Therefore, I come to the conclusion that, since stand no. 1 is rendered stable in its erected condition by the use of extraneous locking means and stand no. 2 is not self-supporting in all circumstances, i.e. although it may stand up on a carpet, it will not stay put on a polished floor, then neither stand is self-supporting within the meaning of this term contemplated by the patent of issue.

I have arrived at this result without recourse to the evidence of Mr Blanchard for the applicants in view of Mr Burkill's allegation that Mr Blanchard is not a man skilled in the art. Whilst I neither accept nor reject this criticism, I appreciate Dr Ford's dilemma in that, in his own words, "there is no one skilled in the art, with the exception of Mr Zeigler, the inventor of the patent, and a few of his competitors".

In addition, I have not taken into account the decision of the German Court in infringement proceedings on DE 2548817, which corresponds to the present patent, a copy of which was filed by the applicants as part of their evidence. As pointed out by Mr Burkill, the claim is not the same, the law in the Federal Republic of Germany is different and we do not know what construction of stand was involved. However, I note that the paragraph at the head of page 9 of the translation of the german judgment, Exhibit KR3, agrees with my findings that a self-supporting structure should be able to be used for its intended purpose in its erect position without any additional measures.

Turning now to the construction of the structure as set out in claim 1, line 2 onwards, the main area of dispute between the parties lies in the statement in lines 5-7 of this claim, i.e. page 6, lines 81-83, that each polygonally-shaped assembly "comprises a first set of struts lying substantially in a common plane and radiating from an inner central apical point". It is worth noting here that on page 4 lines 27 to 30 of the specification is stated: "it is these coplanar groups which

contribute strongly to the self-supporting feature of the framework".

It is the applicants' contention that, in the erected condition of stands nos. 1 and 2, it is not possible to find three or more struts lying substantially in a common plane and radiating from a single point. Dr Ford argued that, in contrast to the patentee's invention in which the specification is effectively teaching that there must be a clear and discernible outside and inside of the structure, the applicants' stands do not have any distinction between the inner and outer sets of struts which would necessarily be the case if one set was in a common plane.

Using the stand forming Exhibit WJB1 with a number of the struts painted previously in different colours, Dr Ford submitted that it is not possible to find three struts lying in a common plane. In fact, the point selected as an inner apical point for this purpose is not one of the central joints 13 or 26 of Fig. 1 of the drawings accompanying the written description of the stands for which declarations are sought but is one of the corner joints of this structure, for example, the joint 7. The two struts extending horizontally from this joint had been painted white and the two extending vertically had been painted black, as can be seen in the photographs forming Exhibit MFF3. In addition, the two struts extending vertically from what Dr Ford designated to be the outer apical point of the pair, for example, the corner joint 16 if the joint 7 is taken to be the inner apical point, had been coloured red. He asserted that there is very little difference in the angle between the black struts and the angle between the red struts whereas the claim requires a distinct difference between these two angles if the black and white struts are to lie substantially in a common plane and, in addition, the struts of one set are to cross the struts of the other set. This latter feature is a requirement of lines 15-19 of claim 1, i.e. page 6, lines 91-95, i.e. "from which (outer central apical point) said second set of struts radiate in crossing relation to corresponding struts of said first set to respective inner surrounding apical

points". I am satisfied that if this requirement, together with the requirement that the struts of the first set, i.e. all the black and white struts, lie in a common plane, is to be met then there must be a perceptible variance between the angle subtended between the black struts and that between the red struts. This was demonstrated to be so by Dr Ford on the erected stand forming Exhibit WJBl. I have ignored for the moment the term "substantially" but I will return to that later.

Mr Burkill conceded that there is no common plane that will cover all eight of the struts radiating from one inner apical point and that it was not possible to find an erected position in which the two white and two black struts, i.e. four struts, extending from this point lie in a common plane (or even a substantially common plane). He attempted to demonstrate that it would be possible to align the two white struts and then "to catch one of the black struts in a third common plane" which he alleged was a plane slightly out of the vertical. However, in trying to align the white struts, Mr Burkill was extending the stand to a position beyond the normal fully erect position, i.e. beyond the position of use in which, in stand no. 1, extraneous locking means is secured between at least one pair of inner and outer apical points. In the event, this demonstration did not satisfy me that these three struts could be made to lie in a common plane in a position of the stand in which it could be used in practice. In the drawings accompanying the written statement for which declarations are sought, and in particular in Figs. 5 and 6, the various angles of inclination between the various struts are shown quite clearly in the position of use of the stand. In these figures, I cannot find any three struts radiating from a single point and which lie in a common plane.

Returning to the word "substantially", Dr Ford submitted that there is very little guidance in the specification as to how far the word "substantially" permitted one to deviate from a straight line. In reply, Mr Burkill contended that "substantially" tells us that there is a relaxation from the strict requirement of

coplanarity and he referred to the House of Lords' decision in Catnic Components Limited and anr. v. Hill and Smith Limited, [1982] RPC 183, in which the word "vertically" was construed as covering something which was 7 degrees off the vertical. He pointed out that the claim in that case did not even say "substantially vertically". However, I think that the passage which has the most relevance to the present situation appears in the judgment of Lord Diplock on page 243:

"A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked.

The question, of course, does not arise where the variant would in fact have a material effect upon the way the invention worked. Nor does it arise unless at the date of publication of the specification it would be obvious to the informed reader that this was so. Where it is not obvious, in the light of then-existing knowledge, the reader is entitled to assume that the patentee thought at the time of the specification that he had good reason for limiting his monopoly so strictly and had intended to do so, even though subsequent work by him or others in the field of the invention

might show the limitation to have been unnecessary. It is to be answered in the negative only when it would be apparent to any reader skilled in the art that a particular descriptive word or phrase used in a claim cannot have been intended by a patentee, who was also skilled in the art, to exclude minor variants which, to the knowledge of both him and the readers to whom the patent was addressed, could have no material effect upon the way in which the invention worked."

In the present case, neither side has offered any evidence as to how a skilled worker in the field would view the wording "substantially in a common plane". I do not know the patentee's intentions as to the strictness of interpretation of this phrase in the working of the invention. In my view, the fact that in Catnic 7 degrees from the vertical was considered as included in "vertical" is irrelevant to my present deliberations. The question is what is meant in the present context and, in view of the lack of expert evidence on the point of what would be obvious to the skilled man, the question cannot be answered. Accordingly, I construe the phrase "substantially in a common plane" as meaning, to all intents and purposes, in a common plane, the only deviation therefrom being that which might result unintentionally during the manufacture of the structure by a skilled operative who, in attempting to locate the struts precisely in a single plane, departed slightly therefrom within practical limitations. I believe that this view is justified since there is no hint or suggestion anywhere in the specification that the patentees contemplated the struts of the first set lying in anything other than a common plane.

As stated above, Mr Burkill failed to convince me that it is possible to find three struts radiating from an (inner) apical point and which lie in a common plane. Nevertheless, I must give some consideration as to the significance of the word "set" in the phrase "a first set of struts lying substantially in a common plane and radiating from an inner central apical point." Dr Ford

argued that claim 1 requires the whole set of struts radiating from an inner apical point to be coplanar and not just some of the set. In support of this contention, he drew my attention to the passage commencing on the last line of page 2: "It is further characteristic of the invention that each set of struts associated with and radiating from each inner apical point and extending therefrom to adjacent outer apical points lies in a common plane." Furthermore, in his second declaration, Dr Ford referred to the passage on page 3, lines 70-73, which refers to struts 140 and 144 forming two elements of a set radiating essentially in a common plane. In my opinion, both of these passages imply that the total number of struts radiating from an inner apical point are intended to be regarded as a set and that it was never contemplated to designate an arbitrary selection of these struts as a set. I find, therefore, that the word "set" in claim 1 should be construed as covering all of the struts radiating from an apical point and that this term does not cover the three struts, i.e. two white and one black, as submitted by Mr Burkill.

In addition, claim 1 requires that the first set of struts radiate from an inner central apical point to respective outer surrounding apical points. I am persuaded by Dr Ford's further argument that, if two white colinear struts and one black strut are considered as a set, since the polygon to which these rods extend is a triangle with the inner apical point lying on one line of the triangle, then the three outer apical points to which the struts extend do not surround the inner apical point on the grounds, as he put it, that "if I had someone to the north, to the south and to the west of me and no-one to the east of me, then I would not regard myself as surrounded". Thus, if I were to regard the three struts as constituting a set, although I have decided above that I do not, I cannot accept that the respective three outer apical points to which these struts extend satisfy the requirement that they surround the inner apical point.

I have some doubts as to the precise meaning of the expression "polygonally shaped assemblies" in the present context since I

have some difficulty in identifying each individual polygonal assembly in the structure described in the specification. Nevertheless, this point was not argued at the hearing and I do not pursue it now.

At the hearing, Mr Burkill submitted that, if I decide to make a declaration of non-infringement, then I should do so on the basis of Exhibit WJB1 with or without the coupling rods included. If such a declaration is made on the basis of the written description, then he thought that the applicants would be able to make modifications in accordance with the description and "little differences physically can make such enormous differences in performance".

Dr Ford pointed out that Section 71 requires details in writing and he drew my attention to paragraph 1 of the counterstatement which acknowledges the patentee's acceptance of paragraphs 1 to 6 of the applicants' statement. In particular, paragraph 6 states that there had never been any suggestion of inadequacy of the information supplied.

Section 71(1)(a) provides that

"a declaration . . . that an act does not . . . constitute an infringement of a patent may be made by . . . the comptroller in proceedings between the person doing . . . the act and the proprietor of the patent, . . . if it is shown that that person has applied in writing to the proprietor for a written acknowledgment to the effect of the declaration . . . claimed, and has furnished him with full particulars in writing of the act in question".

The relevant wording of this section is similar to that of Section 66(1)(a) of the 1949 Act and I think that it would be pertinent to quote from the judgment of Mr D W Falconer Q.C., as he then was,

sitting as Deputy High Court Judge, in the case of Plasticisers Ltd and ors. v. Pixdane Ltd and ors., [1979] RPC at page 328.

"Looking at the matter myself, . . . , it seems to me that the paragraph in the section is quite clear, and it simply requires that there should have been furnished to the person who has become the defendant full particulars in writing of the process or article in question. No doubt it may be convenient in some cases to provide an article or give inspection of the proposed process or, indeed, to use a description with reference to the actual article, but the section it seems to me does not require such."

Applying this to the present case, a written description was supplied and there were no allegations until the hearing that the description in any way fell short of what is required and, in addition, there was no suggestion by the patentee that the exhibited stands do not fall within this description. Thus, it seems to me that any declaration should be made on the written description and accompanying drawings filed by the applicants with the statement and not on the particular forms of the stand exhibited.

At the hearing, Mr Burkill submitted that the onus is on the applicants to establish non-infringement rather than on the proprietor to establish infringement. Dr Ford agreed basically but added that, in his opinion, once the applicants have made out a prima facie case, it is up to the patentee to displace the burden of proof back from where it came, if he can do so. The principle that the onus is on the applicant to prove his case was stated by Scarman, L. J. in Mallory Metallurgical Products Limited v. Black Sivalls and Bryson Incorporated, [1977] RPC 321, an action for a declaration of non-infringement under Section 66 of the 1949 Act, the wording of that Section being similar, but not identical, to the wording of Section 71 of the 1977 Act. I

quote from the judgment on page 345, lines 28-30:

"The burden of proving the absence of infringement rests, in my judgment, upon the plaintiff. If there is a lack or clarity of precision, the court is not in a position to grant the declaration sought."

In the present case, as stated above, there was no suggestion prior to the hearing that the written description of the two stands was inadequate or insufficient in any respect whatsoever and I cannot, therefore, at this stage entertain any argument that the description lacks clarity or precision. I am satisfied that the applicants have made out a prima facie case establishing non-infringement and that the patentee has not displaced that case and proved that the stands do infringe his patent.

To sum up, I have come to the conclusion;

firstly, that neither of the stands is self-supporting in all circumstances:

secondly, although it is not entirely clear what are the polygonally shaped assemblies, on a proper construction, the wording in claim 1 "a first set of struts lying substantially in a common plane and radiating from an inner central apical point" must mean all of the struts radiating from that point and it is not possible to find such a set of struts in either of the stands which satisfies this condition.

thirdly, if I am wrong on this construction and the set can comprise just three of the struts radiating from an apical point, in the normal fully erect position of the stands it is not possible to find any three struts radiating from a single point which lie substantially in a common plane;

fourthly, if Mr Burkill is right and two white struts and one black strut can be considered to meet the requirement of a first set of struts lying substantially in a common plane, nevertheless the three outer apical points to which these struts extend do not surround the inner apical point.

Taking all these considerations into account, I find that the stands 1 and 2 do not infringe any claim of patent no. 1530455.

I find, therefore, that the applicants are entitled to the requested declarations of non-infringement in respect of the two stands which have been designated, in these proceedings, as stands nos. 1 and 2, the said stands being defined as set out in the written description and drawings included in Item 1 accompanying the statement under rule 74.

The other point that I need to consider is validity. As I understand it, the applicants' allegations that the patent is invalid are made as "fall-back" objections, that is, if I were to find that the stands under consideration read onto (infringe) claim 1 of the patent, then the attack by the applicants is against the validity of the patent in suit.

The relevance of validity to Section 71 proceedings in respect of an "existing patent" has already been decided. In both Martinez's Patent, [1983] RPC 307 and Reckitt and Colman Products Limited v. Biorex Laboratories Incorporated, [1985] FSR 94, it was held that, in Section 71 proceedings, it was possible to put at issue the validity of the patent and that a declaration of non-infringement should not be made in respect of an invalid patent. However, in the present proceedings, I need do no more than deal with the question very briefly. Dr Ford's contention is that, if claim 1 is construed broadly enough to cover the two stands, then it also covers, i.e. is anticipated by, US 3,710,806. Since I have found above that stands nos. 1 and 2 do not infringe claim 1, there is

no necessity for me to deal in detail with the US patent. Suffice it to say that I cannot find, in the disclosure of the US patent specification, a set of struts or rods satisfying the requirement that they lie substantially in a common plane and radiate from an inner central apical point.

In the statement, it is also alleged that the patent in suit is invalid on the grounds that it is not fairly based on the matter disclosed in the specification and that the specification is not self-consistent and does not sufficiently or fairly describe the invention. These issues were not pursued at the hearing and I am satisfied that they do not require further consideration now.

In addition to a declaration of non-infringement in respect of each of the two stands, the applicants have requested such other relief as the Comptroller may allow. Whilst, if I find that the claim is invalid, I can decline to give a declaration of non-infringement, I cannot, in these proceedings, order the revocation of the patent on the grounds of invalidity. The only relief that can be given is to make a negative declaration, cf. the words of Graham J in the proceedings under Section 66 of the 1949 Act in the case of Mallory Metallurgical Products Limited v. Black Sivalls and Bryson Incorporated [1977] RPC at page 337:

"This section of the Patents Act is not one which is used very frequently. This is not altogether surprising, because, as indeed seems clear also in the present case, the proceedings are liable to be somewhat unrealistic. In the present case, for example, the court can only do one thing; that is, to make a negative declaration that the process or article in question does not infringe the patent. It can give no other relief and is under no obligation to come to any theoretical conclusion as to the nature of any process or the form of any article which it would conclude infringes the patent."

Accordingly, my decision is restricted only to the declaration of non-infringement as set out above.

Having regard to all the circumstances of the case, I award the applicants, Unique Expo Systems ApS, the sum of seven hundred and fifty pounds (£750) as a contribution towards their costs and direct that this sum be paid to them by the patentee, Mr T R Zeigler.

Dated this 9th day of April 1987

J SHARROCK

Superintending Examiner, acting for the Comptroller

