Mrs Wilson
1R32

PATENTS ACT 1977

IN THE MATTER OF a reference under Section 12(1)
by Cinpres Limited and Tamworth Mouldings Limited
in respect of International Patent Application
No PCT/US 89/02815 in the name of Michael Ladney

DECISION

International Patent Application No PCT/US89/02815 entitled "Process for injection molding and hollow plastic article produced thereby" was filed on 26 June 1989 in the United States of America, and was published as WO90/00466 on 25 January 1990. The applicant was Michael Ladney, and the sole named inventor was James Watson Hendry. There were designations under the European Patent Convention of the United Kingdom, Belgium, Germany, France, Italy and Sweden, and other designations to Brazil, Denmark, Japan and Norway. The EPC designations have given rise to a European Patent Application No EP0424435, on which examination in the European Patent Office has been requested but suspended under Rule 13 of the Implementing Regulations of the European Patent Convention pending the outcome of the present proceedings.

A reference to the Comptroller under section 12(1)(a) was made by Cinpres Limited ("Cinpres") on 23 January 1991 on Form 2/77 accompanied by a statement of case, requesting the Comptroller to direct that Matthew Sayer should be named as inventor in relation to any claims that cover the use of a spill cavity directly or indirectly, and that the application containing such claims should proceed in the name of Cinpres. The reference covered the whole scope of the international application, not, for example, being limited to the European application. A counterstatement was filed on 10 July 1991 jointly on behalf of Mr Ladney and Mr Hendry, to whom for convenience I shall refer jointly as "the opponents".

The statement of case named Tamworth Mouldings Limited ("TML") as joint referrers with Cinpres, although they were not included on Form 2/77. When this was pointed out to them

Cinpres applied to correct Form 2/77 to add TML, but the opponents objected and it was agreed that I should determine the issue as a preliminary point at the substantive hearing. In the event, no arguments were raised before me at the hearing, and, it being apparent that the omission of TML was a simple error, I allowed the correction to be made. For convenience I will refer to Cinpres and TML jointly as "the referrers".

In the statement of case reference was made to a document known as the "Cinpres Manual". This document, the significance of which will be discussed later, was alleged to contain material which the referrers were anxious not to reveal to the public, including Mr Ladney, who is a competitor of the referrers. It was therefore agreed that the document should be subject to an order under Rule 94(1) whereby the document was treated as confidential. A masked version of one page of the Manual was therefore all that was placed on the open file, and a direction under Rule 94(1) was issued on 24 May 1991. Prolonged debate followed as to the status of the Manual in these proceedings, but shortly before the substantive hearing agreement was reached between the parties.

The terms of the agreement were: to allow reference to the First Edition of the Cinpres Manual with Mr Ladney present during and for the purpose of these proceedings only; to withdraw the request for confidentiality in respect of the whole of Page 40 of the First Edition of the Cinpres Manual; for exhibits JWH2 (a draft version of the Cinpres Manual) and JWH3 (page 40 of the First Edition) to be put on the open Patent Office file of these proceedings, and any appeal proceedings; and to withdraw the request for a preliminary hearing appointed for 26 January 1996. I am satisfied that the terms of this agreement meet all requirements and I therefore direct that the confidentiality order under Rule 94(1) made on 24 May 1991 in respect of the exhibited versions of and extracts from Cinpres Manual be cancelled.

The presentation of evidence in this case has been unusually complex. The referrers presented their evidence-in-chief in November 1991 after a short extension of the two month period. It comprised statutory declarations by Stephen Andrew Jordan, Cinpres' Managing Director and also a Director of TML, Matthew Emmett Sayer, Design and Development Manager of

Cinpres, and John Vernon Grundy, Process Engineer at Tamworth Plastics Limited, a sister company of TML.

The opponents faced a problem owing to the serious illness of Mr Hendry. After further extensions an affidavit by Mr Ladney was filed on behalf of the opponents in May 1992, albeit in unsworn form, the final form of his affidavit not being filed until October 1992. Mr Hendry remained at this time unfit to make a statement of substance, and arrangements were made for him to make a deposition, though no leave was sought from the Comptroller to file evidence in this form. Mr Hendry's deposition was eventually presented in an acceptable form in April 1993, as a transcript of an examination of Mr Hendry by a United States Attorney, Mr Mark Cantor, exhibited to Mr Cantor's affidavit.

In July 1993 a first tranche of evidence in reply in the form of a second statutory declaration by Mr Jordan was filed for the referrers, and at the same time arrangements were made for Mr Hendry to be cross-examined in the United States. The opponents agreed to this on the condition that similar cross-examination be carried out with the three main witnesses for the referrers, Messrs Jordan, Sayer and Grundy, despite the fact that there was no suggestion that these three witnesses would be unavailable for cross-examination before me. Again, no leave was sought from the Comptroller for this most irregular course of action.

In October 1993 extensive cross-examinations of Messrs Jordan, Sayer and Grundy apparently took place in the offices of Boult, Wade and Tennant, patent agents for the opponents, conducted principally by Mr Cantor, and Mr Hendry was similarly cross-examined in the United States by Mr Geoffrey Bayliss of Boult, Wade and Tennant. All of these cross-examinations appear to have taken place under oath, and in the presence of representatives of both sides. They were not, of course, in my presence, so I was at that time given no opportunity to ask questions myself or to direct or note the conduct of the examinations. The transcripts of all these examinations were filed at the Patent Office some months later, but not before the referrers had sought to file further evidence in January 1994 in the form of a third statutory declaration by Mr Jordan and a second by Mr Sayer, effectively responding to their own cross-examinations. The following month they sought to file yet further evidence, this

time in the form of statutory declarations by Brian Lawrence Brookshaw, Cinpres' Technical Director, and Richard Edward Sutherland-Harris a Technical Assistant of Boult, Wade and Tennant, and two months later a fourth statutory declaration by Mr Jordan was submitted.

This unleashed over the succeeding months a veritable flood of evidence from both sides, including for the referrers two statutory declarations from a new witness, Terence Colwyn Pearson, who up to July 1990 worked on the sales teams of Cinpres and TML and their predecessor companies, ultimately as Cinpres' Sales Director, and one from Geoffrey David Gahan, who in 1982 was a Director of Peerless Foam Moulding Company Limited ("PFM"), the former name of TML. Further statutory declarations also came in from Mr Jordan (eventually reaching a total of seven from him) and from Mr Sayer. The opponents almost kept pace with this, with more evidence from Mr Hendry (taking his total to five affidavits) and from Mr Ladney.

At the hearing which eventually came before me on 5-12 February 1996, and at which Mr Roger Wyand and Miss Denise McFarland appeared as counsel respectively for the referrers and for the opponents, I considered the admissibility of this undisciplined mass of evidence, reluctantly reaching the view that I should admit the whole of it except for the cross-examination transcripts. I was influenced in this exclusion by the fact that Mr Hendry was now happily well enough to attend the hearing for cross-examination before me, and that Messrs Jordan, Sayer and Grundy were also available for cross-examination. In the event all four were cross-examined in court, and I also heard cross-examination of Messrs Gahan, Brookshaw, Pearson and Ladney. The cross-examination depositions were, in fact, referred to on a number of occasions during this live examination.

The relevant law in relation to references under Section 12(1)(a) is as follows:

> "12(1) At any time before a patent is granted for an invention in pursuance of an application made under the law of any country other than the United Kingdom or under any treaty or international convention (whether or not that application has been made) -

(a) any person may refer to the comptroller the question whether he is entitled to be granted (alone or with any other persons) any such patent for that invention or has or would have any right in or under any such patent or application for such a patent;

(b) . . .

and the comptroller shall determine the question so far as he is able to and may make such order as he thinks fit to give effect to the determination."

The application in suit was made under the Patent Cooperation Treaty and the European Patent Convention, and therefore falls within the ambit of this section. Section 12(3) states:

"(3) Subsection (1) above, in its application to a European patent and an application for any such patent, shall have effect subject to section 82 below."

Section 82 in turn includes the following provisions:

"82(1) The court shall not have jurisdiction to determine a question to which this section applies except in accordance with the following provisions of this section.

(2) Section 12 above shall not confer jurisdiction on the comptroller except in accordance with the following provisions of this section.

(3) This section applies to a question arising before the grant of a European patent whether a person has a right to be granted a European patent, or a share in any such patent, and in this section 'employer-employee question' means any such question between an employer and an employee, or their successors in title, arising out of an application for a European patent for an invention made by the employee.

(4) The court and the comptroller shall have jurisdiction to determine any question to which this section applies, other than an employer-employee question, if either of the following conditions is satisfied, that is to say -

(a) the applicant has his residence or principal place of business in the United Kingdom; or

(b) the other party claims that the patent should be granted to him and he has his residence or principal place of business in the United Kingdom and the applicant does not have his residence or principal place of business in any of the relevant contracting states;

and also if in either of those cases there is no written evidence that the parties have agreed to submit to the jurisdiction of the competent authority of a relevant contracting state other than the United Kingdom.

(5) The court and the comptroller shall have jurisdiction to determine an employer-employee question if either of the following conditiond is satisfied, that is to say -

(a) the employee is mainly employed in the United Kingdom; or

(b) the employee is not mainly employed anywhere or his place of main employment cannot be determined, but the employer has a place of business in the United Kingdom to which the employee is attached (whether or not he is also attached elsewhere);

and also in either of these cases there is no written evidence that the parties have agreed to submit to the jurisdiction of the competent authority of a relevant contracting state other than the United Kingdom or, where there is such evidence of such an agreement, if the proper law of the contract of employment does not recognise the validity of the agreement."

Since the question of jurisdiction and effectiveness of the Comptroller's findings under section 12 is often difficult to resolve I specifically sought assistance on it from both counsel. Dealing first with the designations via the European application, Miss McFarland put it to me that the referrers in their pleadings had referred only to section 12(1)(a), and that they should have pleaded sections 12(3) and 82 if they wished to rely upon them. Mr Wyand disagreed, arguing that such specific pleading was unnecessary since the effect of sections 12(3) and 82 is to define how section 12(1) applies to European applications. I agree with Mr Wyand on this point. Sections 12(3) and 82 are explanatory in the sense that, when section 12(1)(a) is pleaded, the combination of section 12(3) and 82 determines how the Act applies to European patent applications. I do not believe that the fact they have not been pleaded specifically is fatal to the reference.

Mr Wyand also stated in relation to the European designations, and it was not contested, that the circumstances of this case do not bring it within the section 82 definition of an "employer-employee question". This means that section 82(4) applies to define the extent of my jurisdiction as regards the European application. It was also not contested that the referrers have their principal place of business in the United Kingdom, that Mr Ladney, the applicant in the international application, who is based in the United States, does not have his residence or principal place of business in a contracting state of the EPC, and that there is no written evidence that the parties have agreed to submit to the jurisdiction of the authority of any other state. Section 82(4)(b) therefore gives me jurisdiction to deal with the question referred so far as it relates to the European application. I note in this respect that, since it is not disputed that the proceedings before the European Patent Office leading to grant of a European patent have been suspended pending resolution of the present dispute, the provision in section 12(1) that a patent was not granted before the reference to the Comptroller was made is satisfied as regards the European designations under the international application.

The advice I received on the question of jurisdiction as it applies to the non-European designations was less clear. Mr Wyand, in addressing this issue in response to my direct question, may perhaps have misled himself a little in that he appeared to believe that the definition of "patent" in section 130 as "a patent under this Act" applied to section 12, whereas

in fact section 12(7)(a) makes it clear that the terms "patent" and "patent application" as used in section 12 include protection and applications under foreign laws as well as treaties. Miss McFarland chose not to grapple directly with this issue, despite my equally direct question to her.

I have no information on whether any patents have been granted on the non-European designations of the international application, noting that the suspension of proceedings in the European Patent Office to which I have already referred applies only to the European application. I note that the CIPA Guide (fourth edition at paragraph 12.03) suggests that, as long as there is one pending application still afoot at the commencement of the entitlement proceedings under section 12, the Comptroller's decision could bind the ownership of any already-granted patent(s), having regard to the fact that the enquiry is focused as ownership of "that invention". In the absence of any contrary argument, I have no reason to differ from this interpretation, and the fact that the European application has not yet resulted in the grant of a patent means that there was at the commencement of these proceedings at least one pending application.

The same paragraph of the CIPA Guide also surmises that, for jurisdiction under section 12(1) to apply, it may be necessary for an application to be in existence in or for the United Kingdom. I do not need to decide whether this is a necessary qualification, since such an application, *viz* the European application designating the United Kingdom, did in fact exist at the time of the reference.

I thus have no doubt that I have jurisdiction under section 12 in relation to the full international scope of the application in suit, though this leaves unaddressed the more difficult (and, in relation to section 12, perennial) question of the potential effectiveness in foreign jurisdictions of any orders I may make to give effect to my findings.

Miss McFarland further argued that section 13 should have been pleaded to name Mr Sayer as inventor or joint inventor, though it was not clear to me whether she intended to imply that such a flaw in the pleadings could be fatal to the referrers' case. Mr Wyand did not respond

directly to this point. Section 13 is essentially concerned with the right of inventors to be **mentioned** in patents and published patent applications under the Act, and the failure of a party referring a question of entitlement to the Comptroller also to apply under section 13(3) for modification of the mention of inventorship on the patent or published application does not, in my view, preclude the issue of inventorship being addressed as part of the consideration of entitlement. In *Staeng Limited's Patents* [1996] RPC 183, also mentioned in CIPA Guide paragraph 12.03, I accepted a view that the issue of inventorship was a proper consideration as part of a section 12 reference relating to a European patent which did **not** designate the United Kingdom (there being in that case a parallel section 37 reference and section 13(3) application, in relation to a corresponding GB patent), since there was no other route open to the referrers to raise inventorship as part of the section 12 entitlement consideration.

Although in this case, of course, an application which may in due course give rise to a patent under the Act through the medium of the GB designation on the European application **does** exist within the section 12 reference, unlike the *Staeng* case, it seems to me that the worst penalty which the referrers might have to pay for failing to launch a section 13 application alongside this section 12 action would be that, should they succeed in the action, they will not, as of right, also be entitled to have their version of inventorship mentioned on any ultimately resultant United Kingdom patent. Mr Wyand accepted that, in the absence of a section 13 action, an order to that effect cannot emerge from these proceedings. That may perhaps be a relatively trivial matter for the referrers, firstly since they would presumably be entitled, on the strength of an inventorship finding within the section 12 action, to launch a subsequent application under section 13 which may perhaps not be resistible by the opponents, at least as to substance, as *res judicata*, but, more especially, since the referrers have made it clear throughout these proceedings that, should they succeed, they intend to abandon the patent application and, in Mr Wyand's words, to "dedicate it to the public". In any event, I am satisfied that it is proper in the context of this section 12 reference to address the question of who invented the invention in suit, and that the absence of a parallel section 13 application is in no way in itself fatal to the successful prosecution of this reference.

The invention which is the subject of the international application in suit lies in the field of gas assisted injection moulding of plastics. Gas assisted injection moulding consists of two stages in effect; first, fluid plastics material is injected into a mould cavity, and it is then given a further push by the application of gas under pressure. This process has been in existence for some time, and Mr Hendry has contributed to its development. The application in suit relates to the provision of a spill cavity, which as will become clear can be referred to in different terms, into which plastics material is pushed by the gas. The application includes several independent claims, but the referrers are making a claim only to claims 1 and 2 as originally filed, or claim 1 as amended.

Claims 1 and 2 as filed read as follows:

"1. A process for injection molding a hollow plastic article comprising the steps of:

injecting a quantity of fluent plastic into a mold cavity having a shape defining at least a portion of the article;

displacing a portion of the plastic from the mold cavity into a spill cavity flow coupled to the mold cavity by introduction of a charge of pressurised gas into the mold cavity;

permitting the injected plastic to solidify;

venting the gas from the mold cavity; and

removing the plastic article from the mold.

2. An injection molded hollow plastic article produced by a process comprising the steps of:

injecting a quantity of fluent plastic into a mold cavity having a shape defining at least a portion of the article;

displacing a portion of the plastic from the mold cavity into a spill cavity flow coupled to the mold cavity by introduction of a charge of pressurised gas into the mold cavity;

permitting the injected plastic to solidify;

venting the gas from the mold cavity; and

removing the plastic article from the mold."

In amended claims filed on 13 November 1989, claim 2 was deleted.

Certain basic facts are undisputed in this case. Mr Hendry was engaged as a consultant in 1982 to PFM. PFM and Peerless Cinpres Limited were wholly owned subsidiaries of Peerless PLC. In 1984, PFM assigned the relevant business to Peerless Cinpres. In 1987, Peerless Cinpres Limited changed its name to Cinpres Limited ("Cinpres"), and its sister company PFM changed its name to Tamworth Mouldings Limited ("TML"). Mr Hendry ceased to work for Cinpres in December 1985 and, at some later stage, worked in a consultancy capacity for Mr Ladney, with whom he had had commercial dealings over a great many years. During his association with Cinpres Mr Hendry was leader of a project to develop gas assisted injection moulding, and was assisted by Mr Sayer. Mr Sayer acknowledged that until Mr Hendry came along he knew nothing about gas assisted injection moulding.

The referrers case is essentially that, during the period of Mr Hendry's consultancy with Cinpres, a spill cavity was developed, primarily by Mr Sayer, in at least one project for Bell & Howell ("B&H"), in a way which reads on to the invention claimed in the application in suit, that Mr Hendry was aware of this at the time, and that he later revived the invention when he was working as a consultant for Mr Ladney.

The opponents deny that they had any knowledge of the B&H project, that any moulding manufactured by the referrers at the relevant time made use of the process of the application in suit, or that Mr Hendry ever worked with Mr Sayer on a development project as alleged by

the referrers. They assert that the subject matter of the application in suit was invented by Mr Hendry independently of his consultancy with the referrers.

Miss McFarland stated correctly that the onus lay with the referrers to prove their case on the evidence. She said that, to be successful overall, they must succeed on each of three elements. First, they must show that they invented the subject matter of the application in suit at Cinpres in 1985, the test as to whether they had done so being that of anticipation, *ie* would the B&H project infringe the claims of the application in suit if granted? Second, they must show that Mr Hendry knew of this while he was at Cinpres, whether by direct knowledge and involvement or by being told in sufficient detail to meet the requirement of knowledge. Third, they must show that Mr Hendry knowingly and deliberately took the invention and used it later in the patent application in suit. Mr Wyand, while arguing that there was a clear inference from the evidence that Mr Hendry **had** "knowingly and deliberately" taken the invention from Cinpres, took issue with Miss McFarland's assertion that he had to establish this condition. He argued that it would be sufficient for him to show that Mr Hendry had taken the invention "subconsciously".

Most of the evidence and of Mr Wyand's submissions went to the first two of these points, and he accepted that the onus lay on him to establish these matters on the balance of probabilities on the evidence. As to his response on Miss McFarland's third point, a large part of his case was directed to showing that Mr Hendry must have known what was being done at Cinpres, and to supporting his allegation that Mr Hendry was an unsatisfactory and unreliable witness as to his account of events. This, I take it, formed the basis of his argument that there was a clear inference that Mr Hendry had knowingly taken the invention, in that he was effectively implying that since Mr Hendry knew of the development of the invention while he was associated with Cinpres, he **must** have wittingly carried this knowledge with him to his later work for Mr Ladney.

Following a coherent and comprehensive path through the events to which I have been referred during these proceedings has been made very difficult by the extremely complex and poorly structured evidence with which I have been bombarded by both sides. Much of what I have

seen and heard in numerous statutory declarations, affidavits and depositions, and in many hours of cross-examination (and even, in some cases, of quite extensive oral examination in chief supplementing the already copious written evidence) has been, at most, of marginal relevance. In the review which follows I have attempted to deal only with matters of significance, but in reaching my findings I have tried to keep in view the complete picture, so far as I can discern it.

I have already noted that Mr Hendry began to work as a consultant for PFM in 1982. This appears to have followed from visits which PFM staff, including on occasions Mr Gahan, Mr Jordan and Mr Pearson, made to the Detroit premises of Mr Hendry's company at that time, KMMCO Structural Foam Inc ("KMMCO"). It appears that it was during these visits that the PFM team first became aware of the process of gas assisted injection moulding, recognised that it may offer possibilities for their own processes, and decided to engage Mr Hendry's services as consultant.

During his consultancy, Mr Hendry was in overall charge of development of the Cinpres process, which Mr Jordan characterised as being a way of controlling the entry of gas into the molten plastics in an injection moulding process by controlling the amount of gas, the time of its injection and the speed of its injection in relation to the molten plastics being injected. The Cinpres process did not in general involve the use of a spill cavity. Mr Hendry described in detail some of the projects with which he was associated.

So, when Mr Hendry began working with PFM in 1982, he was already a leading expert in the field of gas assisted injection moulding. Mr Sayer was a young draughtsman, who became assistant to Mr Hendry and credits him with teaching him all of what he knew about gas assisted injection moulding, although he had some experience of structural foam moulding and high pressure injection moulding before Mr Hendry arrived. In Mr Sayer's words, Mr Hendry was "in control" of him, but it appears that, perhaps at least partly because Mr Hendry was based in the United States and spent only a proportion of his time with PFM and Cinpres, Mr Sayer was, again in his own words, "looked to to do modifications, to do trials on components on new tools". Mr Sayer said that when Mr Hendry was absent he would report

to Mr Jordan, though he added that he would also always report to Mr Hendry on the latter's return. He said that Mr Hendry was always interested on his return in any trials or other work which had taken place while he had been away. While Mr Hendry was with PFM and Cinpres, he and Mr Sayer spent a lot of time together, both at work and outside work. For example, during 1982 and 1983 they shared both an office and lodgings, and the working relationship remained unchanged throughout 1984 and 1985, during which period it became clear that the Cinpres process could be operated commercially, Cinpres took over responsibility for it from PFM, and Mr Sayer transferred to Cinpres. I was given the impression of quite a close relationship over an extended period of time, with the senior man, away from his own home for extended periods, taking the younger man under his wing in the work situation and also, to an extent, outside it, and welcoming the opportunity to share companionship and to offer advice, both technical and personal. There is no significant difference between the parties as regards this broad picture. Coupled with Mr Hendry's very apparent, and no doubt justified, pride in his technical authority, it suggests to me an environment in which Mr Hendry routinely wanted and expected to be told about any significant developments related to gas assisted injection moulding which arose at PFM and Cinpres during his regular absences.

Early in 1985 the referrers' evidence is that PFM were asked by B&H to produce mouldings for an overhead projector plinth. Mr Sayer was not personally involved in discussions with B&H, but he appears to have been entrusted with development work on the project, and he described it in some detail. The plinth was a rectangular moulding rather like a picture frame with additional features such as bosses for the reception of screws. The original mould tool for the production of the plinth was used for a different moulding process called structural foam moulding, and it was provided to Cinpres in February 1985. In the original process, plastics was introduced into the mould from a central sprue or inlet, through two runners carrying the plastics to opposite points on the rectangular frame.

Mr Sayer said that, having received the mould tool from B&H, he was asked to create samples using gas assisted injection moulding to see whether a better surface finish could be obtained,

in which case the tool would be put into production. Mr Sayer described the process whereby he modified the tool for the application of gas assisted injection moulding.

It was a feature of Mr Sayer's description under cross-examination, both of the process of experimentation and trial which he undertook, for example in relation to amounts of plastics to be injected, and of his communication with Mr Hendry about the developments, that he almost invariably used the expression "I would have (done such-and-such)", rather than the more direct "I did (such-and-such)", and this raises the question of the extent to which he was directly recalling the development work on the B&H mould tool or merely presuming that he had gone through the sort of steps that he normally undertook when testing and developing a new tool. The fact that he was, for example, unable to recall with any certainty specific occasions on which he had kept Mr Hendry informed about his work on the B&H mould tool, and even, in his first statutory declaration, whether it was in fact himself or Mr Hendry who first thought of the various developments, tends to persuade me that Mr Sayer was, at least for the most part, relying upon the assumption that he had done things on the B&H tool much in the same way as his usual practice, rather than that he was remembering directly what he had done specifically on that tool. This, of course, qualifies the force of his testimony to a significant extent, though its impact in weakening the referrers' case might be mitigated if the referrers were able to provide corrobative evidence to reinforce Mr Sayer's somewhat tentative recollection. Miss McFarland suggested, in this connection, that Mr Sayer's evidence had "improved" over the course of the proceedings, and to the extent that at the hearing he seemed more confident than in his first statutory declaration that it was **he** rather than Mr Hendry who had originated the key developments, there is perhaps some truth in the suggestion. Having said that, however, I found Mr Sayer in general to be a conscientious and consistent witness, appearing for the most part to strive always to commit himself to particular actions and events only to extent that his personal recollection allowed, and otherwise employing the careful conditional form.

Mr Sayer said that he discovered that injecting the plastics and gas together from both sides through the two opposed runners resulted in two marks known as weld lines where the plastics flowing from opposite directions met. He therefore tried blocking one of the runners so that

the plastics flows met at only one point. This was done by filling the runner with a length of solid plastics material. In cross-examination he said that this was a practice that he would quite often do when working on a new tool, and which Mr Hendry had taught him to do.

Although the result was an improvement, the moulding still showed sink marks, where the plastics material collapses slightly on cooling. This suggested that the gas had not penetrated far enough to maintain pressure at the limits of the plastics flow. A further modification was therefore made, to unblock part of the blocked runner so that it could serve as an overflow for plastics pushed round the mould tool by the gas to the extremity of the tool furthest from the injection point, allowing gas to penetrate far enough to pass the points at which the sink marks had previously occurred. It was discovered that this eliminated the sink marks. This is the process which the referrers say constituted the invention which was later claimed in the patent application in suit.

The opponents have suggested that there is a lack of direct evidence in this case which could be explained by assuming that none of what Mr Sayer described happened. However, the evidence clearly establishes that certain relevant events and developments took place as indicated by the referrers. There are contemporaneous records of minutes of meetings which refer to a B&H project, albeit without spelling out the nature of that project. It has not, moreover, been suggested that these references relate to anything other than the project to mould the overhead projector plinth, and I have no reason to doubt that this is in fact the project to which they refer. There is, on the other hand, a marked absence of corroborative documentation as to the technical and chronological details of that project as described by Mr Sayer.

A sample of the B&H plinth was presented, somewhat late in the day, by Mr Pearson, as exhibit TCP5, which he asserts to be contemporaneous with the time when he was an agent and marketing consultant for the referrers. Miss McFarland appeared to imply, albeit not very directly, that TCP5 may not in fact be contemporaneous, but, although the exact date of manufacture of this exhibit is certainly not established, I have no reason to believe that Mr Pearson, who has not been associated with the referrers since 1990 (though he was, at the

time when he made his statutory declaration, negotiating a commercial relationship with them), would have made or acquired it more recently than he asserted. I have no reason not to accept, then, that TCP5 represents the plinth created by the referrers for B&H following the developments described by Mr Sayer.

While I am considering TCP5 it is convenient to deal with an issue which arose in connection with it. In his written evidence Mr Pearson suggested that the words "INC THIN" written on the sample in felt-tipped pen were in fact written by Mr Hendry, speculating that "INC" was a misspelling for "ink", and that the words described the thin coating of paint which I was told had been applied to the outer surface of the sample. Mr Pearson suggested that this was an error which only an American, and perhaps Mr Hendry in particular, might have made, both because the abbreviation "INC" has greater use in the United States than in this country, and because, he said (and Mr Hendry did not deny), spelling was a weakness of Mr Hendry. Mr Hendry denied that he wrote the words, and I share his view that Mr Pearson's theory seems, in the absence of any corroboration, rather fanciful. Whatever the inscription might mean, or who made it, remains unresolved as far as I am concerned, and certainly does not constitute proof that Mr Hendry handled the sample in the past, as Mr Pearson was implying.

While I am discussing sample B&H plinths, I will refer briefly to an item which Mr Wyand categorised as a red herring, and in relation to which I find myself agreeing with him. In cross-examination Mr Sayer mentioned that a half-plinth made "in the 1985 time frame" still existed at Cinpres' premises. Miss McFarland sought to make something of the fact that this had not been offered in evidence, but Mr Sayer made it clear at the outset that it was the half of the plinth through which the plastics and gas had been injected, rather than the opposite half adjacent the overflow, which might conceivably have been of interest and relevance to these proceedings. I am therefore satisfied that the addition of this half-plinth to the mass of evidence already accumulated in this case would not have assisted me in resolving the questions before me.

Two items of evidence, whilst not directly related to the B&H plinth project itself, also tend to counter the opponents' suggestion that Mr Sayer did not in fact do what he claimed to do.

The first is the extract from a document which was referred in the proceedings as the "Cinpres Manual". Much was said about the Manual, with argument about what it means and who wrote it. I shall be returning to the latter at a later stage. Mr Jordan explained that the Manual was intended to be issued to licensees to explain the Cinpres process, which is a process of gas assisted injection moulding. It was associated with a training course which Cinpres provided for licensees of the Cinpres process. According to Mr Jordan's evidence, the first edition was produced in December 1985. It appears that those attending the training were generally required to return the Manual to Cinpres. Records were apparently kept of who held copies, and whether they had been returned.

The extract of importance consists of a single sentence on page 40 of the Manual, which reads as follows: "Sometimes an over-flow runner or pocket will help to take gas into a thick section at the end of the material flow". It appears to be part of a section dealing, in similarly concise language, with such matters as the diameter and cross-section of the runners and sprue bushes, and other details of the technical specification. However, since I have not been shown any part of the completed Manual other than page 40, and in particular have not had the opportunity to see the remainder of the section in which this sentence appears, I am able to draw only incomplete conclusions as to its context. It does appear, however, that the modification to which the sentence referred was an optional extra, perhaps of use only if the mould tool in use included a "thick section at the end of the material flow". Nevertheless, in the context of a debate as to whether Mr Sayer's account of the process he undertook is to be accepted, the choice of words appears significant. I note particularly the use of the word "runner". In Mr Sayer's explanation of the steps in the process of modification of the B&H tool, he describes how he first blocked and then partially unblocked a runner. The runner in its normal sense comprises a passage through which plastics flows from the sprue into the mould. It would not perhaps seem natural to refer to an "overflow runner" unless a runner had been modified for that purpose. Thus, it seems that this isolated sentence in the Cinpres Manual relates, on the balance of probabilities, to the modifications which Mr Sayer described in relation to the B&H mould tool, and reinforces my view that, contrary to the opponents' position, Mr Sayer did in fact carry out these modifications involving the use of a runner as an overflow at the end of the material flow.

The second item of evidence consists of two pages of notes exhibited as MES5 to Mr Sayer's second statutory declaration. These apparently relate to a different project, namely a Mercedes air deflector panel. The referrers' evidence is that no overflow was used for this project, but that it was considered. The first of the two pages is dated 22 May 1985 and apparently initialed by Mr Grundy. It appears to contain nothing of direct relevance to these proceedings. The second sheet, although also stated by Mr Sayer to be "contemporaneous" (presumably with the first sheet) and to be also written by Mr Grundy, is in fact undated and unsigned, and not even self-evidently in the same hand as the first sheet. At the bottom of the second sheet are the words "overflow pockets at end". I note the word "pockets", the other word used in the sentence in the Manual. Although this is not in itself a very convincing item of evidence, Mr Grundy was not himself cross-examined as to its authenticity or significance, and I can conclude from it at least that it is consistent with Mr Sayer's account.

According to the referrers the overflow process developed by Mr Sayer for use in the B&H plinth was also used in certain other items, despite having been considered but then **not** used for the Mercedes deflector. Mr Jordan said it was used on projects he referred to as T.I.Creda and the Warwick Pump, and Mr Grundy described the former as a "microwave frame" and the latter as a "hot wash cover". Mr Grundy also recalled a shower head for Munster Simms, and mentioned something he called a "back handle". All of these both appear to have been later than the B&H project, though Mr Sayer thought that T.I.Creda was during 1985. Mr Jordan said that parts or moulds for the Warwick Pump component still existed at Tamworth, but that he was not sure about T.I.Creda. Mr Sayer thought that neither samples nor written records existed in relation to T.I.Creda. Items from none of these products were in fact put in evidence by the referrers, however, and I can draw no conclusions as to their relationship to the issues before me.

Thus, the evidence regarding Mr Sayer's development of the idea of an overflow to assist the penetration of gas into the mould tool is not very full or complete, and Mr Hendry, of course, denies any knowledge of these projects from his time with the referrers. It thus appears to me that the evidence, such as it is, paints a very sketchy picture of a development which was not apparently rated by the referrers as very significant commercially, and which certainly does

not seem to have been very used extensively or publicised energetically, and which is equally certainly very poorly documented. I consider nevertheless that the evidence is sufficiently persuasive that Mr Sayer did indeed develop the use of an overflow for me to proceed on that assumption, and to move on to further stages in my consideration.

The first main issue for me to resolve is whether the process which was developed, primarily by Mr Sayer, by the referrers in connection with the B&H plinth did in fact constitute the same invention as that which forms the subject of the application in suit.

I will dispose first of TCP5, Mr Pearson's sample of the B&H plinth, as it appears to relate to this question. In his fifth affidavit Mr Hendry referred to two X-ray photographs, allegedly taken of this sample. The X-rays were not in fact supplied to the Office with the affidavit, although they were ostensibly exhibited to it, but only appeared on the fifth day of the hearing, after Mr Hendry had been cross-examined, and then only in response to my repeated requests, and despite the fact that Mr Hendry stated in his affidavit that he would explain them at the hearing and would demonstrate how they showed that the invention of the application in suit was not used. The nearest I got to receiving such an explanation from Mr Hendry was a sheet of paper in the bundles provided by Mishcon de Reya, the opponents' solicitors, but not put formally in evidence, purportedly written by Mr Hendry and apparently explaining how gas can be seen to have penetrated the plinth, extending partway along the side of the plinth furthest from the apparent point of entry from both ends towards the middle. I find these X-rays most unsatisfactory, both from the point of view of the way they have been made available and explained to me, and in what conclusions Mr Hendry would wish me to draw from them. As to the latter, it may be significant that Mr Hendry did not, as he said he would, actually explain the X-rays to me at the hearing, and in particular he did not attempt to demonstrate that they showed that the invention had not been used.

Frankly I do not see how I can draw that conclusion from them. They do, apparently on Mr Hendry's admission, show that gas assisted injection was used, and I could see for myself that the dark lines which apparently showed the hollow regions where gas had penetrated extended beyond the boss areas on the plinth where I had been told there were sinkage

problems, and beyond which it was desirable to cause the gas to pass. As far as I can determine, in the absence of fuller explanation from either side, this appears to be not inconsistent both with the sample having been made in the way described by Mr Sayer, and with its having been made by the process of the invention in suit, though equally it does not in itself provide any conclusive proof of either of those propositions. Thus, while it does not prove that the inventive process **was** used in TCP5, it certainly does not do what Mr Hendry, in his fifth affidavit, says that it does, namely prove the contrary. I am left in these circumstances to speculate as to why Mr Hendry did not attempt at the hearing to give me the promised explanation.

Two other issues arose in relation to Mr Pearson's sample B&H plinth, the first being whether certain marks were present or absent on its surface, and whether this was of any significance in relation to whether the sample had been made by the process of the invention in suit. Mr Pearson himself identified a mark on the inner surface of the sample as a weld line, the significance of which I have already mentioned. Mr Sayer, however, was less sure, saying that it could be a "hesitation mark", *viz* a minor flaw showing that the plastics flowing into the mould had slowed or stopped and then been pushed forward again. I found Mr Hendry's view of the nature and significance of the mark on TCP5 difficult to be sure of, not least because he was handling this sample at the same time as a number of other, definitely non-contemporaneous, samples submitted in evidence by Mr Sayer, and was trying to draw attention to a number of different features which may or may not have been significant. Mr Wyand observed that, in any case, there was no evidence as to whether hesitation marks **had** to be present to establish whether the invention in suit had been performed, and I agree with him.

The other issue concerning TCP5 arose from Messrs Sayer's and Hendry's differing views as to whether there were any sink marks visible on its surface. Mr Sayer took what he perceived as the absence of sinkage as evidence that the invention in suit had been used, and Mr Hendry sought to persuade me that there was in fact "very, very, very slight sinkage" present (though I note that his own X-ray appeared to show that gas had in fact penetrated the sample beyond the point at which he thought he detected sinkage, which should, if I have correctly understood

how gas assisted injection moulding works, have countered any tendency to sinkage at that point). In any event, I am satisfied that inspection of this item in the light of the contrasting comments of the various witnesses does not in itself enable me to determine with any certainty either whether the process described by Mr Sayer had been used in its manufacture (though the circumstantial evidence of Mr Pearson would seem to indicate that this is probably so), or, that being so, whether the process of the invention in suit had been used.

To assist me in determining whether the process carried out by Mr Sayer amounted to the invention in suit it is necessary to turn to the patent specification itself.

In relation to the test of whether the process carried out by Mr Sayer would anticipate the claims of the application in suit, Miss McFarland took me through the specification, drawing my attention to a number of factors. The specification refers to a process for injection moulding a **hollow** plastics article, and the drawings show an arrangement in which, at least in the manner in which they are represented in the drawings, the walls of the article are relatively thin, with one or more large spaces within the body of the article. The specification cites among the advantages of such a system weight and material savings, as well as the overcoming of surface defects, and Mr Hendry confirmed these benefits. He made it clear that the use of overspill presented difficulties which meant that it was only likely to be useful in situations where its benefits were of most value, and he indicated that its main use would be for larger items for which weight saving was a major requirement. Moulded plastics door and instrument panels for a car were particular examples, and Mr Hendry referred to his attempts to reduce the weight of a car door to particular level during his development of the invention in suit. Examples of such mouldings were presented in evidence, and although I was not shown cross-sections through such articles made in accordance with the invention, it was easy to see that the word "hollow" had a meaning in such cases which was likely to be consistent with the relatively thin walled open structure illustrated in the patent specification.

The evidence as to how closely the B&H plinth moulding resembles this in terms of the relative thickness of the walls as compared with the space within it is not strong, but Miss McFarland did not take issue on this point, and Mr Hendry's X-rays do appear to show

that hollow spaces do in fact extend around within most of the perimeter of the frame of Mr Pearson's sample plinth. The more recently produced transparent samples produced in evidence by Mr Sayer are consistent with this, showing hollows extending around the frame, albeit much more irregularly distributed than seems to be implied by the schematic representation of the drawings of the patent specification. As regards these samples, however, I have to agree with Miss McFarland when she suggested that they have no real validity as evidence in these proceedings other than as teaching aids. Mr Sayer talked about cutting through samples of objects made using his technique to check on the extent of gas penetration, but I was shown no examples of such cross-sections, whether made contemporaneously with the development of the method in the mid-eighties or more recently.

There was much discussion at the hearing as to the extent to which the mould tool was filled with plastics material before the gas injection took place, and the degree of hollowness would no doubt be determined to a degree by the amount of plastics material injected into the mould relative to the size of the mould. The evidence touching on this was, however, as unhelpful as in many other respects in these proceedings. It was put to me for the opponents that what Mr Sayer did was to fill the mould cavity with plastics, with the result that gas could not penetrate at all, in which case the resulting article could not be described a hollow. On the other hand, Mr Jordan used the phrase "kissing the fill" to describe the way that Mr Sayer at most almost filled the mould cavity before introducing the gas. Contemporaneous notes, or even cross-sectioned examples produced at the time of Mr Sayer's development work, might have settled this question, but no such evidence was forthcoming, and I was given to understand that it did not exist.

I am left, then, with very little to assist me in deciding whether the mouldings produced by the method developed by Mr Sayer for the referrers can sensibly be described as "hollow". On a purposive construction of the claims of the patent application, recognising the weight and material saving benefits ascribed to the invention, I am inclined to conclude that the limited evidence available to me hardly suggests that, for example, the B&H plinth was truly hollow in the sense intended in the claims. Nevertheless the opponents own evidence, in the form of Mr Hendry's X-rays of Mr Pearson's sample TCP5, does seem to indicate that a hollow

channel extends through most of the body of the plinth, and to that extent it is arguable that I should regard the plinth as hollow. Without reaching a definitive view on this point I will, then, proceed on the hypothesis that the referrers' method results in a hollow structure. My reasons for adopting this approach, which is effectively to give the referrers the benefit of the doubt in this regard, will emerge later.

As regards the other features of claim 1, the B&H plinth project involved injecting a quantity of fluent plastics into the mould cavity, and displacing a portion of the plastics into an overflow. The term used in claim 1 is "spill cavity". I can see no difference in practice between spilling and overflowing, and consider that the terms "overflow runner or pocket" and "spill cavity" are co-terminous. There is no debate about the remainder of the claim, so, to the extent that I am prepared to accept that the resulting object is hollow, I am prepared to proceed on the basis that the process developed in 1985 by Mr Sayer, initially on the B&H plinth, effectively anticipated the invention later claimed in claims 1 and 2 (as filed) of the application in suit.

The next issue for me is whether Mr Hendry was aware of the B&H process and the use of overflows while he was with the referrers, either as a contributor to its development or by hearing about it from Mr Sayer or others.

Mr Hendry has consistently and vehemently denied that he had any knowledge of the moulding process adopted for the B&H plinth in particular and the use of overflows in general, whether in the form of runners or pockets or of anything serving to receive displaced plastics material. The referrers' case, on the other hand, is that, despite the fact that Mr Sayer has no specific recollection of having told Mr Hendry of his work on the B&H plinth, and no other member of the Cinpres/TML team can categorically state that Mr Hendry knew of it, it is in effect inconceivable that he would not have known, given his position within the organisation and his relationship with Mr Sayer. In addition the referrers have two specific arguments, one in relation to the Cinpres Manual, and the other concerning a Press Launch for the Cinpres process, which they used to try to persuade me that Mr Hendry must have known about the use of overflows. For Mr Hendry, of course, the problem in principle is the inevitably very

difficult one of proving a negative, made even more daunting by the fact that what has to be proved is something as intangible as his state of knowledge more than a decade ago. However, the onus to establish Mr Hendry's knowledge of the process lies with the referrers, so Mr Hendry is not in reality confronted with such an impossible task, and it is for the referrers to draw from the evidence the conclusion that, on the balance of probabilities, he must have known.

It is in this connection that Mr Sayer's almost invariable practice during his cross- examination of using the conditional form leaves his evidence at its weakest. What he effectively seemed to be saying to me as regards his relationship with Mr Hendry was that, in lieu of any specific record or recollection of having discussed overflows with Mr Sayer in connection with the B&H moulding, it was his general practice to discuss all developments with him, either immediately if Mr Hendry was in the country, or subsequently on his return if he was away at the time when something worth discussing took place. There was nothing in Mr Sayer's evidence to suggest that at the time when the B&H project was live, from February 1985 onwards, this would not still have been his approach. Therefore, he would have me conclude, it must have happened.

It would certainly not seem surprising if it had happened. After all, the B&H mould tool had evidently been received by 1 February 1985, according to a minute of a "tooling review" exhibited by Mr Jordan as SAJ30, where the words "Tool in. Requires minor modifications for fitting to press" were set against the heading "Bell & Howell" as one item in a 22-item list. It is not apparent who wrote the minute, but it was apparently copied *inter alia* to Messrs Jordan, Sayer and Pearson, but **not** to Mr Hendry. Mr Hendry was, however, in the country by 7 February, when he was recorded as being present at a Cinpres meeting, along with *inter alia* Messrs Pearson, Grundy and Sayer. The B&H tool is not, however, mentioned in the minutes of this meeting.

But set against Mr Sayer's rather vague assurance that it was his practice always to disclose developments to Mr Hendry, supported as a general proposition by Mr Hendry's own recollection, is Mr Hendry's confident and consistent assertion that it did **not** happen in

relation to the B&H tool. Mr Hendry does not attempt to explain **why** it might not have happened in this case, but he does not need to. In fact in seeking a possible explanation it may not be necessary to look any further than the fact that the referrers do not appear at any stage to have regarded the use of overflows as a major step forward technically, to the extent that they now say that if I find in their favour in these proceedings they will abandon the application. The plausibility of that possible explanation must, however, be qualified to some extent by the fact that the B&H project appears to have been quite enthusiastically pursued by Mr Sayer, who appears also to be the person who would normally have been expected to brief Mr Hendry.

I find Mr Sayer's evidence generally unpersuasive in this regard. A less conscientious witness might simply have persuaded himself that, since it was his normal practice to confide in Mr Hendry, he must have done so this time, and then he might have gone on under oath to assert that he **did** tell Mr Hendry. In that case I would have been faced by a straightforward conflict of evidence. But Mr Sayer was consistent under cross-examination in his position effectively that he **presumed** that he had told Mr Hendry, because that is what he always did. If the referrers are to establish that Mr Hendry did gain knowledge of the overflow process used for B&H while he was working as a consultant for the referrers, then they need more specific and focused evidence to that effect.

In April 1985, the company held a Press Launch of the Cinpres process. Much has been made of a document Mr Pearson produced identified as TCP4, also exhibited by Mr Jordan as SAJ17, which consists of a memo from Mr Pearson to Mr Sayer suggesting various samples for display at the Press Launch, including the B&H projector base, which it is accepted is the same item as the plinth. This memo, dated 25 March 1985, copied *inter alia* to Mr Jordan, was not copied to Mr Hendry. However, Mr Hendry was at the Press Launch.

In cross-examination Mr Pearson said that he recalled the Press Launch, but was unable to say with certainty that the B&H plinth was in fact present. The best he could manage, in a manner strongly reminiscent of Mr Sayer's conditional form of response to so many questions requiring him to recall specific events, was that it was his belief that Cinpres "would have

presented that moulding as an example of the technology as developed at that stage". He went on to say that "I see no reason why (the B&H moulding) should not have been included and shown at that Press Launch" and "I think it most unlikely that we did not use that moulding at that Press Launch because it was available .... I see no reason why it was not there". No other of the referrers' witnesses offered a confirmation or otherwise of whether the B&H moulding was present at the Press Launch, but an exhibit by Mr Jordan labelled SAJ10 includes a check list dated 10 April 1985 detailing the structure of the Press Launch closer to the date. It lists mouldings to be on show, including some of those on Mr Pearson's list and others not suggested by him, but it makes no mention of the B&H projector base.

When asked whether the B&H projector base was at the Press Launch, Mr Hendry said that it was not there to the best of his knowledge, and its exclusion from the check list exhibited by Mr Jordan, a document apparently put together closer to the date of the Launch than Mr Pearson's list of suggestions, suggests to me that in all probability it was not used on that occasion. The referrers' evidence relating to the Press Launch therefore does not, in my view, succeed in establishing even that Mr Hendry must have been aware of the B&H project.

While I am dealing with the items shown at the Press Launch, it is interesting to note that they included the Warwick pump housing, and I note also that in cross-examination Mr Hendry acknowledged that he knew of the work done on the Warwick pump. Indeed, he described it as "a definite breakthrough", though he did not volunteer, and was not pressed, on what there was about it which constituted a breakthrough. I have already noted that both Mr Jordan and Mr Grundy said that the overflow process developed by Mr Sayer for the B&H plinth was used *inter alia* on the Warwick pump, and that Mr Jordan said that parts or moulds of this item still existed at Tamworth. It might appear that this offered the referrers an opportunity to have filed evidence which linked Mr Hendry during his time with Cinpres with a project on which, allegedly, the overflow process was used, thereby strengthening their argument that he must have known of the process. But, for whatever reason, the referrers neither chose to put the Warwick item in evidence, nor provided corroboration for Mr Jordan's and Mr Grundy's recollection that the process in issue was used on that item. I must therefore conclude that the

little that I have been told about this item does not lend any support to the referrers' claim that Mr Hendry knew about the overflow process.

The Cinpres Manual, which included the sentence I quoted above, was prepared in draft by Mr Hendry for training purposes. Work was begun following a meeting in March 1984, and in February 1985 it was reported that it had been prepared. At this time, however, it is clear that neither the sentence referred to, nor anything appearing to correspond to it, was in the draft, which is exhibited by Mr Hendry as JWH2. According to Mr Brookshaw, when he joined Cinpres as Development Manager in August 1985 the Manual was still in draft form, as prepared by Mr Hendry. It was one of Mr Brookshaw's first tasks to review it and get it into suitable format for use on the training courses, and he and Mr Sayer spent a lot of time between September and November 1985 rewriting sections. Other sections were added by other people. Although Mr Brookshaw did not mention this, it was apparently also edited and revised by a Mr Storrs, though whether this was before or after Mr Brookshaw's and Mr Sayer's contributions is not clear. Mr Hendry was proud of his draft, and was plainly deeply unhappy with the changes, which he appeared to ascribe primarily to Mr Storrs. He stated in cross-examination that he was "pulverised" at "what they had done".

It is an odd feature of the evidence regarding the Cinpres Manual that no-one appears to recall having written the key sentence upon which so much now turns. All but Mr Sayer have denied having written it, and even he, consistent with his general lack of clear recollection of so much concerning the issues of significance to this case, could only say that it was possible that he had written it. It was, he said, the type of terminology he used, but he could remember neither specifically writing it nor being asked to do so. When he was asked by Miss McFarland whether the sentence described the B&H project he said that it described a process taken from the experience of that project. He also said that he remembered talking about overflow runners as part of the training course.

It was an issue at the hearing whether Mr Hendry had received a copy of the final form of the Manual, including the sentence in question. Mr Brookshaw's evidence states that the first

edition of the Manual was ready for the first training course for licensees, which he believes was held in November 1985.

In their counterstatement the opponents make the unequivocal claim "Mr Hendry admits that he received a copy of the document entitled 'Cinpres Manual'". When it was put to him in cross-examination, Mr Hendry stated that he did not receive the Manual, and that the passage was hearsay. He added that he did not see the counterstatement before it was filed. That may perhaps appear not unlikely in view of the fact that he was at the time in dispute with Mr Ladney, although I note that the counterstatement was ostensibly filed jointly on behalf of Mr Ladney and Mr Hendry, on my understanding therefore making Mr Hendry a party in the action, contrary to what Miss McFarland, the opponents' own counsel, appeared to believe. If an explanation of the apparent discrepancy between the counterstatement and Mr Hendry's own evidence is needed it may be no more than that Mr Hendry **did**, by all accounts, have a copy of his early draft of the Manual, which may have prompted the "admission" in the counterstatement.

In his statutory declaration Mr Brookshaw stated that Mr Hendry had contacted him by telephone to ask for a copy of the Manual, and he believed that this had occurred in December 1985 prior to Mr Hendry's last time at Tamworth. Mr Hendry, however, poured scorn on this suggestion. Miss McFarland did not herself take the opportunity during her cross-examination of Mr Brookshaw to challenge him as to his account of Mr Hendry's telephoned request, so I am faced with a stark conflict of evidence as to whether the request was made.

Mr Jordan and Mr Brookshaw each exhibited a document entitled "Cinpres Process Manual Register", which appeared to show those who had received copies of the Manual, with dates and comments, for example, on whether they had been returned, presumably following the training course. Mr Hendry's was the first name on the list but, unlike most names on the list, there was no date against it. Mr Brookshaw also exhibited a copy of a handwritten list which he said he prepared in 1986 listing the persons who had then been given copies of the Manual. Mr Hendry's name was also the first on this list, with a mark against it which Mr Brookshaw

said was a tick showing that Mr Hendry had received his copy. I note that the Register is dated 14.03.90, apparently some years after the events actually recorded, and that the handwritten list contains no date. Again, Mr Brookshaw was not cross-examined in relation to the Register or the handwritten list, and neither was Mr Jordan, but I have to conclude that neither of the two documents provide contemporaneous confirmation of the referrers' claim to have sent the Manual to Mr Hendry, and I regard that claim as unproved by the evidence submitted.

Furthermore, even if it had been established that the Manual, including the single sentence referring to the use of an overflow runner or pocket on page 40 of a document whose overall length was not disclosed but which certainly comprises more than 40 pages, had been sent to Mr Hendry, in the absence of any persuasive evidence that he had also learned of Mr Sayer's work on the B&H mould tool earlier in the course of his normal contact with Mr Sayer, I would remain to be convinced that this of itself could be claimed to have alerted Mr Hendry to the possibility of using overflows in the way adopted in the B&H project sufficiently for it to be said that he effectively took the invention with him from Cinpres to Mr Ladney.

In December 1985 Mr Hendry left Cinpres following some disputes. The following month Mr Jordan issued a memo to staff asking that there should be no more exchange of technical information with Mr Hendry. The issue for me, then, is whether, prior to that time, on the balance of probabilities based on the evidence before me, Mr Hendry had become aware of the use of overflow runners to facilitate the penetration of gas into the mould, as used for example on the B&H mould tool by Mr Sayer. I am not satisfied that the referrers have succeeded in establishing this as a matter of fact, and I therefore conclude that they have failed to make this essential element in their case.

It was not argued for the referrers that it would have been in any way extraordinary for Mr Hendry to have independently come up with the idea of using a spill cavity to facilitate the manufacture of hollow articles in gas assisted injection moulding, and I am satisfied that such an argument would not have been sustainable. Mr Hendry's knowledge and experience in the field of gas assisted injection moulding is acknowledged, and his explanation of how he

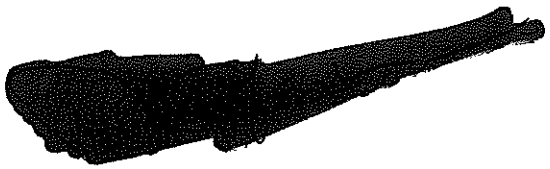
devised the method to enable large mouldings such as car doors and instrument panels to be made to stringent weight and quality requirements is, in my view, entirely credible.

Therefore, having found that the referrers did during 1985 develop the use of overflow runners or pockets to facilitate the penetration of gas around the mould tool in gas assisted injected moulding, and having proceeded on the premise that this process did effectively anticipate the claims of the patent application in suit, I have found that they have failed to establish their case that Mr Hendry learned of this process while he was working with them as a consultant and that he took the knowledge of it with him when he left them at the end of 1985, recalling it later while working with Mr Ladney. The outcome, therefore, is that I find that the reference under section 12 fails, and I consequently make no order in relation to International Patent Application No PCT/US89/02815.

The opponents have sought an award of costs. Consistent with the Comptroller's practice, approved by the Patents Court in *Rizla's Application* [1993] RPC 365, of making awards based not upon full costs, which in this case I was told were very high (Mr Ladney suggested that his side may have incurred expenditure of $4-500,000), but upon a scale published from time to time in the Official Journal (Patents), I award the opponents the sum of £2500 as a contribution to their costs in these proceedings and order that this sum be paid to them by the referrers. In making this award I have taken account of the unusual extent of evidence filed and the unusual length of the hearing.

Any appeal from this decision must be lodged within six weeks from the date of the decision.

Dated this 22 day of May 1996



Dr P FERDINANDO

Superintending Examiner, acting for the Comptroller

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