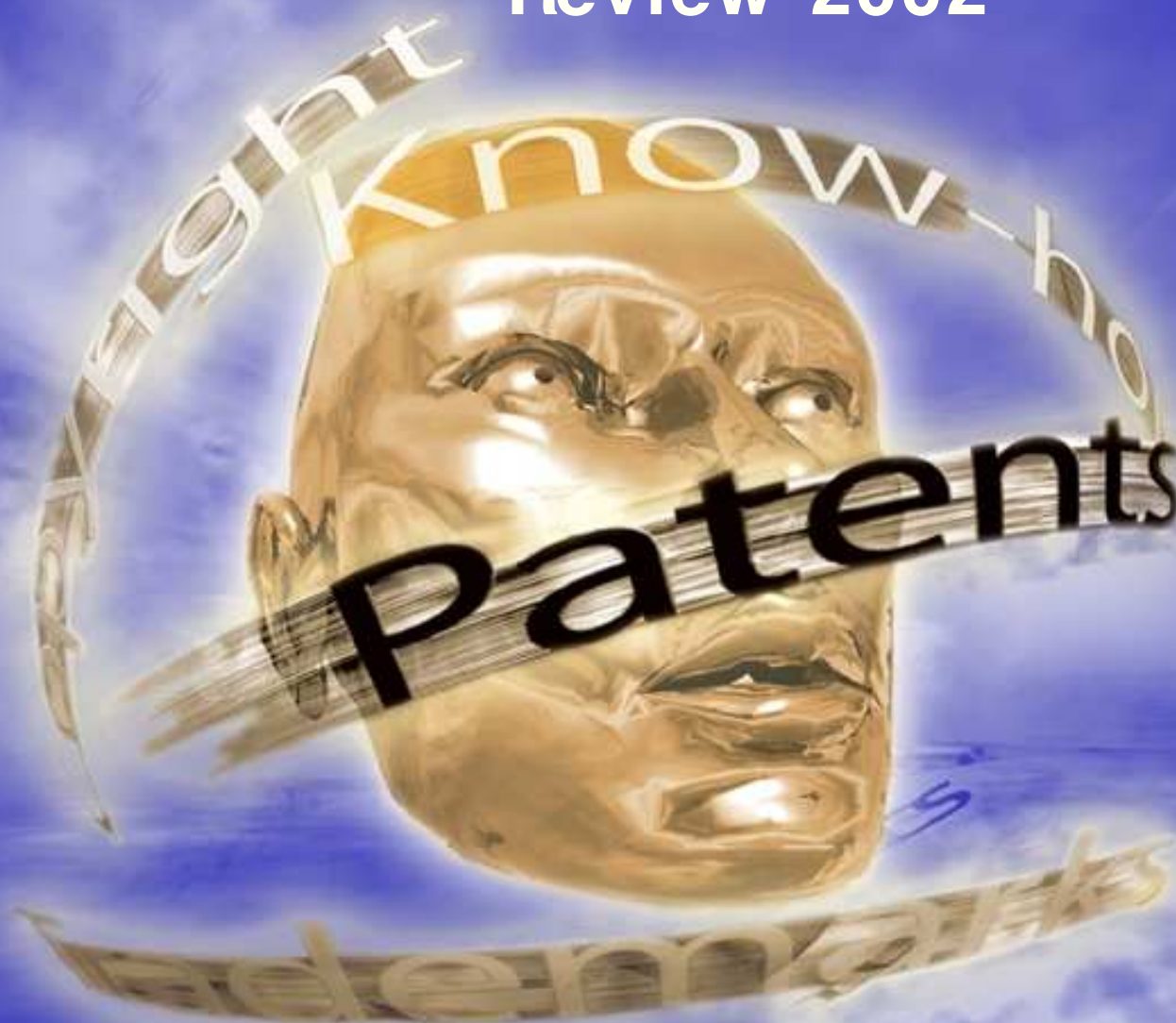


UK Patents Review 2002



Post patent-expiry
injunction granted

Caution required in
use of experiments

Difficulties in
application of
Protocol Questions

Windsurfing
approach useful
but not essential

Case analysis

How Counsel
compared?

How the Judges
compared?

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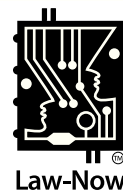
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2002



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Construction

Fuzzy areas at the edge of a claim

In the case of *Micromatic v Dispense Systems* the Court adopted a commercial approach to construction. The Court concluded that on its true construction, when one took into account the specification “and commercial common sense” claim 1 of the patent in suit extended to single piece valves as well as two piece valves for use in securing pressurised containers such as beer kegs. The claim also required that there be “a sufficiently large opening for the pressure in the container to be relieved”. Whilst no numerical limits were

which on the facts of the case would have been possible but somewhat arbitrary. The alternative course, as taken by the Claimant, was to phrase the claim in quantitative terms (that is, to refer to a “sufficiently large” opening). In doing so it was clear that the valve was intended to function in a keg where the pressure was between 1 and 2.5 bar, and little doubt that it was also intended to function if the pressure was between 2.5 and 4 bar. There was, however, plainly room for argument once the pressure got above 4 bar and the Judge did not need to decide at what point above 4 bar there could be sufficient uncer-

mented that mathematical precision was not required. The patent in suit was concerned with gas burners “which work” and neither of the experts called to give evidence appeared to have any difficulty in identifying a “good flame” for these purposes. There was nothing in the claims or the specification which indicated that the inventor was trying to achieve either perfect mixing, which might be the acontextual meaning of “complete mixing”, or even any numerically defined degree of mixing. The claims rather meant no more than such mixing as will give rise to a good flame in use. Similarly, in *Dyson v Hoover* the term “frustro-conical” was not to be given a precise mathematical definition. It was to be construed purposively to encompass a shape, generally frustro-conical, which achieved the desired concentration and separation of fine particles – i.e. “which worked”.

“As with virtually any product claim, one is concerned with an alleged invention in the practical, commercial world. Almost inevitably, unless the claim gives quantitative guidance, there will be “fuzzy edges” or “puzzles” which are “at the edge of the claim”. In such case if an alleged infringement is only within the fuzzy area, it will not infringe.”

(Neuberger J, Micromatic v Dispense Systems)

included, the specification made clear that such containers would always be at a pressure of at least 2.5 bar, and very commonly above 4 bar. Neuberger J noted that, as with virtually any product claim, one is concerned with an alleged invention in the practical, commercial world and that, almost inevitably, unless the claim gives quantitative guidance, there will be “fuzzy edges” or “puzzles” which are “at the edge of the claim”. In such a case, the patentee has two alternatives. The first is to incorporate quantitative requirements,

tainty to be within the “puzzle” or “fuzzy” area of the claim. In such a case, if an alleged infringement was only within the fuzzy area, it would not infringe. On the facts, however, the Defendant’s valve did infringe the patent in suit.

Mathematical precision not required

Consistent with this decision, in construing the term “complete mixing” of gas and air as used in burners for gas hobs, the Court in *Sabaf v MFI* com-

Limits to these fuzzy areas – “Large does not mean small”

The limits of these fuzzy boundaries were considered further in *Arjo v Liko*. The case, involving a patent for hoists for lifting disabled persons, involved construction of the wording “a generally arcuate path which arc has an effective radius comparable to the length of the thigh bones of the patient”. The patentee argued that the key requirement of the patent was to get the patient into a standing position and that anything which achieved this effect fell within the scope of the claim – “anything which works is comparable”. Laddie J, however, felt that this construction deprived many of the important words in the claim of any meaning since if any path which “worked” was to be treated as comparable, then more

“Because there is no clear distinction between large, medium and small, a reference in a claim to “large” could be read to include things which are “small” if Mr Waugh’s argument were correct.”
(Laddie J, Inhale v Quadrant)

or less any path would do. The Court did not accept that the invention consisted simply of getting the patient from the sitting to the standing position. The patent explained that it was the use of a lifting ratio which was substantially the same as the thigh length that achieved this effect. Whilst mathematical precision was not required in relation to these features, and the boundaries of the claim would inevitably be imprecise, the alleged infringement was obviously and substantially different from that claimed and there could be little doubt that the defendants’ products fell outside of the claims.

Similarly, in *Inhale v Quadrant*, Laddie J refused to give a purposive construction to the term “dissolved” in the patent in suit, so as to embrace a “dispersion” of an assembly of molecules. Just because there is a continuum between a true molecular solution at one extreme and a true suspension at the other, it is not legitimate to ignore the patentee’s expressed desire to limit his claims to cases in which the stored material is “dissolved”. The same argument could be used where, say, a patentee refers to an ingredient being “large”. Because there is no clear distinction between large, medium, and small, a reference in a claim to “large” could be read to include things which are “small” if the patentee’s argument were correct.

Permissible to “airbrush” integer out of a claim where no sensible contribution made to claim?

In *McGhan v Nagor* (see below also) Mr Fysh QC, sitting at that time as a Deputy High Court Judge, noted that, in approaching construction, one cannot just “airbrush” an integer out of a claim - the assumption being that, however arcane the

integers significance, it is there for a purpose. The difficulty facing the Court, however, was that the adjective “interstitial”, appearing in claim 1, was found nowhere in the specification and its presence in the claim was “something of a mystery”. Since both parties’ experts also appeared to be as puzzled as to whether the limitation had technical significance at all, reluctantly the Court concluded that the integer made no sensible contribution to the claim and was therefore to be ignored.

Further, in *Spring Form v Worlds Apart*, the Court rejected the Defendant’s argument that the specification that material for the structures in question be “taut” required the material to be “drum-tight”. This was not a legitimate approach. “Taut” was an ordinary English word and meant “tight”, in the sense of “not slack”. Further than this it was not right to go.

The Court rejected the Defendant’s attempt to construe the claim in a way such that it was not merely supported by the disclosure of the patent, but was co-extensive with it. Whilst it is legitimate to resolve ambiguities and uncertainties in a claim in such a manner that the claim as construed is supported by the disclosure, it is another to manufacture questions like “is the claim limited to anticlastic diamond-shaped panels?” when the claim is silent on the shape of the panels and then answer the question by reference to the preferred embodiments.

Prosecution history may be used in construction of patent

In our UK Patents Review 2001, we reported the decision of *Rohm & Haas v Collag*. *Rohm and Haas* have now appealed

Neuberger J’s decision. The case concerned construction of the term “surfactant” and the Court of Appeal has confirmed Neuberger J’s narrow construction of the term to be limited to amphiphilic (water loving) substances. Of interest in the Court of Appeal’s decision, however, were their findings concerning the admissibility of technical material filed during the prosecution process in construction of the claim. In particular, the Court of Appeal were considering a letter to the EPO commenting on the specification. Rohm & Haas sought to rely on this letter. Although the Court in *Bristol Myers Squibb v Baker Norton* had given a useful summary of the problems associated with taking account of prosecution history, there was no clear English authority on the relevance of material filed during the prosecution of a patent on issues of construction. The Court of Appeal did, however, cite a Dutch case, *Ciba-Geigy v Ote Optics*, which it considered was persuasive guidance that such technical material, whilst not having the same status as published prior art identified in the specification, could be of assistance in resolving some puzzling features of a specification. Robert Walker LJ commented that “although the prosecution process may sometimes superficially resemble a process of negotiation between the applicant and its advisors and the officials who scrutinise the file, it is not the sort of commercial negotiation which is still rigidly excluded in the construction of a written contract”. Accordingly, had it been necessary for the Judge to take account of the letter to the EPO in order to resolve the issue of construction, then he would have been entitled to do so.



Infringement

The Protocol does not introduce the doctrine of infringement by equivalent effect into English law (yet)

The Court of Appeal has clarified in *Amersham v Amicon* that the Protocol has not introduced into our law a doctrine of infringement by equivalent effect by use of a different mechanism. It may, however, in the future. At present the Court is to construe the claim as part of the whole specification and it is established law that the requirements of the Protocol do not mean that an integer can be treated as struck out (*Step v Emson*).

that they produced the same result, but via a different mechanism. They thus showed different ways of producing an equivalent result. The fact that they produced an equivalent result, however, did not enable the first two Protocol Questions to be answered so as to conclude there was infringement. In any event even were the first two Protocol Questions answered in this way, the Court of Appeal considered that the Judge was right to conclude that, in answering the third Protocol Question, the skilled reader would have understood that the patentee intended to limit his monopoly to probes which moved in and out of the column.

Caution required in the use of experiments to demonstrate infringement of immaterial variants

The case of *Deutsche Institute Fur Textil v Fibreguide* highlights that caution should be exercised in attempting to establish that variants in a Defendant's device do not materially affect the way the invention works and that this would be obvious to the skilled reader. The Claimant held a European patent for its invention in the field of machinery for processing textile yarns. The claimed device was one for imparting greater cohesion to a multi-filament yarn by passing it through a yarn channel in which it was subjected to a jet of air from a transverse nozzle – a process called "interlacing". Providing the claim with a purposive rather than a literal construction, in accordance with *Catnic* and the Protocol on interpretation of Article 69 of the European Patent Convention ("the

"I do not believe that the protocol introduced into our law a doctrine of infringement by equivalent effect by use of a different mechanism. That may be for the future."

(Aldous LJ, Amersham v Amicon)

The patent in suit concerned an apparatus and method for the charging and discharging of chromatography column beds without requiring the column to be disassembled. The unpacking of the matrix material involved use of a probe in the middle of the bottom of the column, which could be moved up and down by a handle. The Defendants' Isopak device, on the other hand, contained a stationary rod in the middle of the bottom of the column, with the column being opened by the upward or downward movement of the outside sleeve. The evidence did not establish that there was a material difference between the two systems in

“This variant is therefore not obviously immaterial. To hold the contrary would, it seems to me, impute to the skilled reader far too great a knowledge of the underlying theory...”
(Mr Foyd QC, Deutsche Institute Fur Textil v Fibreguide)

Protocol”), the use of the word “press” in the claim indicated that the patentee required something more than mere contact. The Defendant’s device did not ensure that the yarn would always be pressed against the yarn channel. This was thus a variant which, for the purpose of applying the first Protocol Question, the Court, assumed, without deciding, that the variant worked in the same way as the invention. The Court held, however, that it would not be obvious to the skilled reader that the two devices worked in the same way since no witness had suggested that this was in fact the case and from the fact that experiments had to be performed to see if the variant had a marked impact upon performance. This latter point suggested that it was not obvious that no difference would be seen. This was therefore a material variant and there was thus no infringement of the patent in suit.

The case is also of interest for the Court’s approach to construction of the rather complicated product by process claim. The claim was for a device “for interlacing multi-filament yarns” by which, under English case law, it merely needed to be “suitable for” interlacing multi-filament yarns – the claim not being limited by such purpose and there therefore being no requirement for a yarn for infringement. Notwithstanding this position, however, the patent proceeded to limit its claims by reference to the “length of the yarn channel” and such length varied dependant upon the type of yarn used – the yarn channel being a maximum of 40mm with untextured yarns and 30mm with textured yarns. The question arose as to whether the claim required a maximum length of 30mm or 40mm for

the yarn channel, since there was no need for use of a yarn at all. The Court held that the better construction was, where the device was suitable for both types of yarn, the claim was limited to a maximum channel length of 30mm since this would not cover a device suitable for textured yarn with a length greater than that prescribed by the claim for that type of yarn.

Festo appeal delays hearing

Laddie J has ruled that a preliminary issue to be decided in *Celltech v Medimmune* is to be heard after the Festo appeal to the US Supreme Court has been decided. Medimmune was the licensee of certain Celltech patents including a US patent. In deciding what royalties might be due to Celltech under such licence, the English Court would need to decide whether certain Medimmune products fell within the scope of the US patent. Medimmune argued that it could not possibly infringe and that this matter could be disposed of as a preliminary issue. This preliminary issue would be dependant upon the US “doctrine of equivalence” and “file wrapper estoppel”. In particular, Medimmune argued that the patent in suit, covering monoclonal antibodies, had been amended in the USPTO proceedings and that Celltech were prevented by file wrapper estoppel from claiming that the Medimmune product infringed since the particular embodiment in question had been surrendered during prosecution. On an application for directions, the Court held that US law would be clearer after the appeal decision in Festo, and that there were significant savings in costs and Court time if the preliminary issue was heard after this decision.

Difficulties in application of the Protocol Questions lead to a “middle way”

In our UK Patents Review 2001, we reported the case of *Monsanto v Merck*, in which Monsanto’s patent claiming a class of organic compounds possessing anti-inflammatory and/or analgesic activity with “gastric sparing” qualities was held to be both invalid and to not be infringed by Merck’s anti-inflammatory product. (Merck’s product was the keto-tautomer of a 2-hydroxyfuran derivative listed in the claims of Monsanto’s patent.) This case proceeded to be heard by the Court of Appeal last year (under the name of *Pharmacia v Merck*) and, whilst the decision on validity was upheld (see below), Pumfrey J’s decision on infringement has been overturned.

Aldous LJ, in his leading Judgment, expressed the difficulty he had found in applying the Protocol Questions in a case where every term in the claim was unambiguous and devoid of any question of degree, but where the claim, since to a class of compounds, would nonetheless involve the presence of other compounds which were not specifically claimed. In such a case the Court has no alternative but to seek the “middle way” required by the Protocol by considering the effect upon the patentees and the public of construing the claim in a particular way (which on the facts involved a consideration as to whether the claim covered the keto form of the compound). In her supporting Judgment Arden LJ distinguished between the “Protocol Questions” (involving a consideration of reasonable certainty for third parties and fairness to patentees) and the “Improver Questions” (involving considerations of variance). In previous cases these two questions have been treated synonymously. Arden LJ, however, stated that “the Improver Questions are no more than guidelines: the final conclusion on interpretation must be found by asking the Protocol Questions”. It appears, therefore,

that the Protocol Questions will be relied upon in circumstances where the Improver Questions are less easy to apply.

On this basis, the Court preferred the approach of the patentees to the more literalist approach of Merck, and held that the keto form of the compound was included within the scope of the claim since in the human body the keto form of tautomer would inevitably be present. This construction gave fair protection to the patentee, since it was reasonable to take into account the existence of the compound in the body. Further it did not prevent there being a reasonable degree of certainty for third parties who would appreciate that whilst the keto form was not specifically mentioned that this did not necessarily mean that the claim was limited to the compounds listed. Otherwise all claims to chemical compounds would have to be construed using the literal interpretation outlawed by the Protocol. The Court also disagreed with Pumfrey J’s holding that constituents that were not mentioned expressly in the claim were excluded. This could not be right as a general rule. It would mean that the terms of a patent could never include an unspecified variant. Of interest were Aldous LJ’s comments that to restrict the claim to the enol tautomer would not appear to achieve any useful purpose so far as the patentees were concerned, which appear to be out of line with his comments in *American Home Products v Novartis*, also reported in our UK Patents Review 2001.

“...the Improver Questions are no more than guidelines: the final conclusion on interpretation must be found by asking the Protocol Questions.”
(Arden LJ, *Pharmacia v Merck*)



Validity

Commercial success can be powerful evidence but must be pleaded

In *Panduit v Band-it* the Patents County Court commented that a long-felt want for the benefits achieved by the invention coupled with commercial success can be powerful secondary evidence on the issue of obviousness. The snag is that it must be commercial success caused by the attributes of the invention. Not infrequently it turns out that commercial success was caused by collateral factors. Mr Prescott QC, sitting as Deputy Judge, also confirmed that long felt want/commercial success, if it is to be relied upon, must be pleaded. This decision is consistent with the view of the Patents Court expressed in *Dyson v Hoover* as reported in our UK Patents Review 2001.

No interest required to apply for revocation

The Court has clarified that a party need not have any interest in a patent's invalidation to apply to revoke it under Section 72 of the Patents Act 1977 ("the Patents Act"). In *Cairnstores v Aktiebolaget Hassle* the Claimant applied to revoke the Defendant's patents for drugs used in the treatment of duodenal ulcers. The Defendant applied to strike out the Claimant's application for revocation on the basis that the Claimant had no commercial interest in the pharmaceutical industry and was alleged to be standing in front of a party with a true commercial interest, that was alleged to be financing the proceedings. In finding for the Claimant, Pumfrey J rejected the Defendant's arguments that the arrangement was an abuse of process and that it would prevent the Court from

exercising its case management powers consistently with the overriding objective in the Civil Procedure Rules. The Court noted that Section 72 of the Patents Act reflected Article 99(1) of the European Patents Convention, which permitted "any person" to apply to revoke a patent. There was no requirement for the opponent to any patent to have any interest in its invalidation. The use by a third party of a "straw man" was, save in exceptional circumstances, of no importance. The Court also rejected the Defendant's argument that the third party was not subject to the doctrine of res judicata and would thus be able to re-litigate the same issues. The Court considered that the third party was "privy" to the proceedings and thus bound by them.

Obscure prior art causes difficulties in assessing obviousness; Windsurfing approach useful but not essential

The Windsurfing approach to assessing obviousness may not be appropriate where it is not possible to identify a clear disclosure from the relevant prior art which can be used as the basis of the assessment of the step represented by the invention. In *Hewlett Packard v Waters* the question was rather whether the ambiguities and obscurities of the disclosure in the prior art document would be resolved by the skilled man in such a way that he came up with something falling within the claim without the exercise of inventive ingenuity. The Court acknowledged that it is its task to determine what the prior art document clearly and distinctly taught the skilled person at the priority date, not what

"It is the task of the Court to determine what [the prior art document] clearly and distinctly taught the skilled person at the priority date, not what can be read out of [it] by... squeezing a document to extract every last drop of meaning."

(Pumfrey J, Hewlett Packard v Waters)

can be read out of the prior art document by the application of “hermeneutical stress” – a phrase describing “the process of squeezing a document to extract every last drop of meaning”. The objection based on the prior art document was an objection of the kind often called “anticipation or nothing”. There was insufficient general teaching in the document to find a convincing argument of obviousness and the objection thus failed.

Indeed, the Windsurfing approach need not always be required. In *Instance v Denny Bros.*, the Court of Appeal upheld the decision of the Judge at first instance and refused to accept the patentee’s submission that the Judge erred in principle in failing to adopt the structured approach to deciding obviousness advocated by Oliver LJ in *Windsurfing*. Whilst the structured approach of *Windsurfing* is useful, it is not essential. The Court has to decide whether an invention is obvious and a Judge cannot be faulted from going straight to that question, provided that he adopts the mantle of the skilled person and asks himself the correct question. It was not

of. The Judge rejected the patentee’s argument, that in the context of a notional skilled person with expertise in different fields (i.e. the notional skilled “team”), the common general knowledge was only that which was common to persons in all such fields. This “smallest common denominator approach” was misconceived since otherwise the broader the scope of the claims, and therefore the number of areas of application or expertise covered, the narrower the area of common general knowledge. The Judge considered that this approach was not unfair to a patentee, but simply a reflection of the fact that the scope of protection sought was wide.

Of further interest in *Inhale v Quadrant* were the Judge’s comments that a notional skilled person does not consider all prior art to be equally “interesting”. The more distant the prior art document is from the field of technology covered by the patent, the greater the chance that the skilled addressee would fail to make the jump to the solution found by the patentee. Such comments have now been affirmed by the Court of Appeal in *Amersham v Amicon*. Such considerations were also raised in

realities cannot necessarily be divorced from the kinds of practical outcome which might occur to the law’s skilled addressee as potentially worthwhile...commercial mindset will have played a part in setting the notional skilled addressee’s mental horizon, making a true inventor of the individual who was able to lift his eyes above the horizon and see a bag-free machine”. Whilst agreeing with her fellow Lord Justices, Arden LJ sought to stem the likely tide of evidence in future cases on such commercial factors in stating that whilst commercial motivation or lack of it and “mindset” in some circumstances may have some indirect relevance, that the fact that it was not foreseen an invention would be a commercial success was neither a necessary nor sufficient requirement for refuting a claim of obviousness, just as the subsequent commercial success of an invention would not prove the presence of an inventive step.

Laddie J also backtracked in *Inhale v Quadrant* from his decision in *Evans Medical Limited’s Patent*. In that case, Laddie J had held that if someone trying to prove anticipation could demonstrate that an experiment “well within the general teaching of the prior art” would produce something within the scope of the claim under attack, that this proved anticipation. This was wrong. Not only must it be an inevitable result of the experiment that something is produced that falls within the scope of the claims, further the experiment itself must have actually been performed and not merely be “well within the general teaching of the prior art”.

No reason required for collocation of known parts to render a patent obvious

In *Sabat v MFI* Laddie J held that the pre-1977 law of collocation of two known or obvious integers continues to apply under the Patents Act. The two important features of the Claimant’s gas burners which were said to constitute an invention were both known in the prior art and there was nothing in the specification to suggest that the two features interacted with each

“The structured approach of Windsurfing is useful, but there is nothing to say that it is essential”
(Aldous LJ, *Instance v Denny Bros.*)

surprising that the Judge did not mention *Windsurfing* as neither Counsel referred to the case during argument.

Common general knowledge is not the “smallest common denominator” of the notional skilled team; all prior art is not equally “interesting”; patents are not anticipated by matter “well within the general teaching of the prior art”.

In *Inhale v Quadrant*, Laddie J gave consideration to the mantle of the skilled addressee and to the scope of the common general knowledge that he would be aware

Dyson v Hoover. The Court of Appeal in that case stated that the mantle of the skilled person was that of an “actual skilled person” and would include all attitudes and perceptions of such person. Accepting that commercial considerations can, in appropriate circumstances, be important to a determination of the issue of obviousness, Sedley LJ stated “it remains the case that the perceived limits of technical practicability are a matter of mindset, and that mindset is characteristically affected by awareness of need, of which commercial potential is both a function and an index...if then the intellection horizon for practical research and innovation is in part set by the economic milieu, commercial

other. The Judge rejected the Claimant's contention that before a collocation of known or obvious integers can be invalid it must be obvious to put the parts together - "this would turn the law of collocation on its head". Since the devices did not relate to each other and did not effect each other's function there was little technical incentive for the worker in the field to put them together. According to the Claimant's approach the lack of inter-relationship would render the collocation non-obvious and virtually all collocations would become patentable. The Court, rejecting this approach, held that if there was no inventive step in using either of the known devices separately, there was also no inventive step in using them together. The patent was thus found to be invalid for obviousness. Where the devices or features interact, however, different considerations may apply.

Patents need not have both "classic" and "Biogen" sufficiency to be valid

It is now well established that there are two bases upon which a patent may be rendered insufficient. A patent may be "classically" insufficient where it does not disclose enough information to enable a person skilled in the art to perform the invention without inventive effort. Alternatively, following *Biogen v Medeva* a patent may also be insufficient where the breadth of the claim is not commensurate with the technical contribution of the patent to the art. Thus, where a patent discloses a general principle, it can have correspondingly broad claims and it may be enough for the patent to disclose one example; if, however, the patent discloses a number of discrete methods or products, then the patent must enable the skilled addressee to carry out or produce each of these. It has generally been assumed that either ground may be sufficient to invalidate a patent. The case of *Kirin Amgen v Roche and Transkaryotic Therapies* last year, however, shows this to have been an incorrect assumption.

The patent in question, relating to the production of erythropoietin ("epo"), was

found to be classically insufficient since the teaching was confined to the production of epo in specific types of eukaryotic cells and did not adequately teach expression of epo in human cells as claimed. On the other hand, Neuberger J found the patent to be Biogen sufficient since it disclosed a principle that was capable of general application. His finding of Biogen sufficiency saved the patent from the attack on validity. The defendant's further assertion of insufficiency, on the grounds that the skilled person in the art would not have been able to determine whether particular variants worked, also failed. In so finding, the Judge distinguished the case of

activity". However, the Court rejected the test suggested by Pumfrey J at first instance, adopted from *Olin Mathieson v Biorex*, which stated that the applicable principle was that the claim must "equiparate" with the invention. This case, which had been decided under the 1949 Act, was not helpful to determining the test of sufficiency under Section 72 of the Patents Act. The test of sufficiency under the Patents Act was concerned with enablement. The specification must contain an enabling disclosure of the invention, and as Section 125 of the Patents Act makes clear, the word "invention" is not restricted to meaning that specified in the claim if the

"...if the invention is a selection of certain compounds, in order to secure an advantage or avoid some disadvantage, not only must the specification contain sufficient information on how to make the compounds, it must also describe the advantage or how to avoid the disadvantage."

(Aldous LJ, Pharmacia v Merck)

American Home Products v Novartis (see UK Patents Review 2001) since in that case the patent did not disclose a principle of general application. It is clear that Neuberger J's decision in *Amgen* was influenced by the contribution that the patent had made to the art.

"Biogen sufficiency" requires an "enabling disclosure"

The Court of Appeal has upheld the first instance decision on validity in *Monsanto v Merck* (now *Pharmacia v Merck*), that was reported in our UK Patents Review 2001. In particular, the Court held that the patent in suit was insufficient since there was no enabling disclosure in the specification that enabled the skilled reader to establish which of the class of compounds claimed possessed the characteristics of the invention, being anti-inflammatory activity with reduced side effects due to "Cox II selec-

context and the specification otherwise requires. Accordingly, consistent with the decision of the House of Lords in *Biogen v Medeva*, if the invention is a selection of certain compounds, in order to secure an advantage or avoid some disadvantage, not only must the specification contain sufficient information on how to make the compounds, it must also describe the advantage or how to avoid the disadvantage. Further the compounds monopolised by the claim must all have that advantage or avoid the disadvantage. Accordingly since the evidence showed that a significant number of compounds covered by the claims did not have the characteristics of the class being the subject of the invention, the patent was invalid since insufficient. In contrast to the decision of the Patents Court in *Amgen* (see above) it appears the Court of Appeal here found that there had been no enabling disclosure of a principle of general application.



Amendment

Patent Office exercises discretion to refuse several bites of the cherry

In two cases at the beginning of 2001, the Patent Office exercised its discretion to refuse the applicants' requests for extensions of time. In *Re Baker Hughes Inc's Patent Application*, the Patent Office refused permission to allow late evidence to be adduced in support of proposed amendments. The new evidence could have been presented on time and the applicant's absence on maternity leave was thus not material. To allow the evidence would further delay proceedings that had been running for a substantial length of time, in light of the applicants' "several bites

not overcome the objections of a lack of novelty and obviousness. Even had the amendments been allowed, the Court would not have permitted the Claimant to seek damages from the Defendants for any past infringement since the patent had not been drafted with reasonable skill and knowledge. In particular, the patentee had failed to claim the very feature which was said to be inventive. Notwithstanding the arguments of the patent agent who had drafted the patent in suit, Neuberger J found the drafting to be unsatisfactory since he considered the inventive concept of the mechanical invention to be a simple one. He did not, however, consider the patent agent concerned to be dishonest,

the applicable principles as set out in *SKF v Evans Medical*, which included that there must be full disclosure, that there must be no delay and that the patentee must not obtain an unfair advantage.

On the facts, notwithstanding allegations of anticipation since 1996, it was only on the advice of Counsel at a conference on 16th August 1999, that the patentee had become aware of the anticipation of the patent in suit and the need to amend. Citing with approval the decision in *Matbro v Michigan*, the Court drew a distinction between culpable delay (in which the patentee was aware of the need to amend but failed to do so) and delay where the patentee had never thought, or should never have thought, that the amendment was the right course. The delay in this case became culpable after the conference with Counsel on 16th August 1999 and no reasons had been provided for the delay in formulating the application to amend which was not brought until December 2000.

Rumfrey J stated that a period of two months would have been more than adequate to formulate such amendment. In addition, the applicant was bringing proceedings on equivalent patents in other jurisdictions and had not informed the Defendants in such litigation of the anticipation of the patent and the need to amend. It should have done so.

Accordingly, whilst it is not necessarily in accordance with a modern law of patents, the Court confirmed that there is a line of authority that detriment to the public can be sufficient to require it to exercise its discretion to refuse an amendment. It was not in the public interest for Defendants to be forced to design around claims, particularly where they were framed broadly as in the present case. The application to amend was thus refused since the patentee's conduct had not been reasonable.

"Having drafted the patent, he was scarcely likely to be objective..."

(*Neuberger J, Micromatic v Dispense Systems*)

of the cherry" when filing its first round of evidence. A further bite was refused. Similarly in *Re Munier's Patent Application* the Patent Office refused to allow an extension of the period for a PCT application to enter the UK national phase. The applicant had simply changed his mind about pursuing the application in the national phase after the relevant deadline and it would be an unacceptable assault on public certainty to provide "a second bite of the cherry".

Damages not available since patent not drafted with reasonable skill and knowledge

In *Micromatic v Dispense Systems* the Court refused to allow the amendments sought to the patent in suit since such amendments did

merely unobjective – "having drafted the patent he was scarcely likely to be objective".

Exercise of discretion to amend will be refused where a detriment to the public is caused as a result of unreasonable delay

The case of *Instance v CCL Label* provides a warning to patentees that they should not delay in seeking amendments on becoming aware of the need to amend. The case concerned an opposition to an application to amend a patent concerning adhesive labels. The applicant accepted that the patent had been anticipated and was seeking a validating amendment. The Court, in determining whether to exercise its discretion to allow the amendment, confirmed



Evidence

“The cogency of an expert’s opinion will be in proportion to the strength of the technical reasons which support it.”
(Mr Prescott QC, Panduit v Band-It)

Third party disclosure ordered for relevant documents

In our UK Patents Review 2001 we reported the Court of Appeal’s decision in *American Home Products v Novartis* in which Novartis’ appeal of Laddie J’s finding that AHP’s patent was sufficient and infringed was upheld. Having found the patent to be sufficient, the Court proceeded to consider the issues of novelty and obviousness. In connection with these latter issues, Novartis wished to obtain disclosure from a third party, Fisons, of documentation relating to a close structural analogue of Papamycin, FK-506, an immunosuppressant developed by Fujisawa and licensed to Fisons. Laddie J refused Novartis’ application on the grounds that the documents sought were not relevant, and related to a “secondary issue”, namely whether other persons at or before the priority date had done, or had thought of doing, that which the patentee said was his invention. Further, disclosure would tend to increase costs without adding significantly to the ability of the Court to dispose fairly of the substantive issues before it. This decision has now been reversed on appeal.

The Court of Appeal considered that the documents were relevant to the issues of both novelty and obviousness and therefore could be ordered to be disclosed under CPR r31.17. This is notwithstanding that “relevance” is no longer an express requirement under such provisions. Further Fisons did not object to disclosure and the documents had previously been selected and seen. It was therefore not a “fishing expedition” and the costs involved with complying with the order were very small.

Value of expert evidence lies in the technical reasons; the devil is in the detail with distant recollections

In *McGhan v Nagor*, the Court gave consideration to the evidence of both parties’ expert witnesses on an alleged prior use in assessing novelty and inventive step. It is interesting to note the Court’s preference in this case for the evidence of the Defendant’s expert since, although there was an uncompromising entrenchment of positions between the experts, both adamantly sticking to their positions, the Defendant’s expert was able to furnish plausible bases for many of his interpretations and at times was prepared to make admissions.

The case also provides interesting commentary upon the recollections of the Defendant’s witness of fact and the considerable handicap he was under with most important events having taken place in 1988. Mr Fysh QC, sitting as a Deputy High Court Judge, commented “the recollection of events and roughly when they happened is not enough in my judgment to make good this objection; the devil is in the detail”. Accordingly the Defendant’s objections of lack of novelty and obviousness on such prior use both failed.

Similarly, in *Panduit v Band-It* Mr Prescott QC, sitting as a Deputy Judge in the Patents County Court, noted that it is nearly always possible to find an independent expert who holds an opinion favouring one’s own side of the case (and who does so in good faith). He commented that the value of expert evidence lies in the technical reasons which the witness offers in support of his opinion. Indeed, the cogency of an expert’s opinion will

be in proportion to the strength of the technical reasons which support it. Accordingly, whilst it is dangerous for a Court to attempt to arrive at a conclusion on obviousness without the benefit of expert testimony (as stated in *Molnlycke v Procter & Gamble (No. 5)*) it is cogent expert evidence that is required and not merely bare unsupported assertions. Such reasoning was also evident in *Eida Faberge v Colgate-Palmolive* in which the evidence of both experts and witnesses was viewed with caution as a result of a failure to provide reasoning to support their views.

Use of expert evidence on issues of construction

Once again, the Courts this year have been keen to emphasise that construction is a matter for the Court. For example, in *Dyson v Hoover*, Aldous LJ stated that he had not found the evidence of experts on the issues of construction helpful as they had not sought to attribute to the relevant words and phrases the meaning required by the Protocol. It was not a skill scientists have. On the other hand, it is not the case that expert evidence will never be admissible on such issues. In *Rohm & Haas v Collag*, the Court of Appeal stated that where the Court had to determine the meaning of a technical expression (or term of art) (such

experiments, the Judge was not persuaded that the experiments carried out were entirely reliable. In particular, the experiment relied on was not merely carried out by the Claimant with a view to establishing its case, but was carried out with equipment which had already been tested as being satisfactory from the Claimant's point of view. The Judge was thus not satisfied that the experiments were typical of the performance of the valve in question or established any general attributes of such valve. In reaching this conclusion the Court was clearly influenced by the fact that the experiments were not carried out "until nearly the last minute in these proceedings" and that there was considerable reason to doubt the good faith of the Claimant's expert and possibly the Claimant. Whilst the Defendant's solicitors, and indeed the Court, had been informed that the Claimant's expert was very ill, and would therefore be unable to attend trial to give evidence, a telephone call from the Defendant's solicitors established that the Claimant's expert was in fact at work and apparently in reasonable health. Further, the Court had considerable sympathy with the suspicion advanced on behalf of the Defendant to the effect that the Claimant had not given full disclosure and therefore may well have had damaging documents which originated from before the priority date.

"I have not found [the experts'] evidence helpful [on construction] as they did not seek to attribute to those words and phrases the meaning required by the Protocol. It is not a skill which scientists have."
(Aldous LJ, *Dyson v Hoover*)

as "surfactant" in the case) expert evidence may, exceptionally, be admissible on the issue of construction.

Caution with experiments required

Caution is required in conducting experiments following the guidance of the Court in *Micromatic v Dispense System*. Although the Claimant was acquitted of "fixing" the



Remedies

Post patent expiry injunction granted

In the landmark decision of *Dyson v Hoover*, the Patents Court held that injunctions may be granted for a specified period after the date of expiry of the patent as an alternative to damages for this same period. A person wishing to exploit an invention relating to a product after the patent had expired must wait until expiry before undertaking any practical steps to this end, save perhaps on paper. Hoover's in-house development of prototypes prior to the expiry of the patent had involved infringing activity and, to have been legitimate, should have awaited the expiry of the patent. In light of the difficulty of calculating secondary damages in accordance with the principles set out in *Gerber v Lectra*, the Court granted an injunction for a period of twelve months to prevent the Defendant from obtaining a "springboard" into the market. The Court noted the distinction between the prevention of infringing activities during the post-expiry period and prevention of an infringer benefiting in the post-expiry period from infringing activities committed pre-expiry. Such post-expiry injunctions may be awarded where just and convenient and the decision is likely to have a significant impact in patent litigation, particularly where the patent in suit is nearing expiry and where the lead-in time in the relevant industry is relatively long.

Dyson also sought a trade mark injunction to prevent Hoover from marketing any vacuum cleaner under the Vortex trade marks. The Court rejected this application finding insufficient evidence to support the breadth of the injunction sought and since

it was not clear that loss would flow from use of the Vortex trade marks as a foreseeable consequence of the patent infringement. It appears that the way has been left open, however, for patentees in future cases to argue this point again.

"See v Scott-Paine" cost order considered for late allegations of prior use

The case of *See v Scott-Paine* established that a party is entitled to a costs order in its favour in the event that new prior art is introduced at a late stage in proceedings and the Defendant can be shown to have lacked due diligence in seeking out material on which he might rely. In *CIL International v Vitrasshop*, Pumfrey J has confirmed that this approach is consistent with the overriding objective of the CPR. On the facts, however, the Claimant's application for such a costs order was refused since the prior art would have come as no surprise to the Claimant and there was no lack of due diligence on the part of the Defendant in locating the relevant prior art. Further, a delay of three and a half weeks between acquiring evidence of the prior use and serving that evidence did not amount to a lack of reasonable diligence.

The overall winner of a patent infringement action is entitled to its entire costs even should its counterclaim fail

In *McGhan v Nagor*, the Claimant's patent was found not to have been infringed by the Defendant's activities. The Defendant's counterclaim for revocation, however, failed. The Claimant argued that

"The Court indeed has jurisdiction to make inter alia post-expiry injunctions of the kind sought where it is just and convenient to do so."

(Mr Fysh QC, Dyson v Hoover)

the Defendant should only have 25% of their costs. The Court, however, did not accept such argument. The effect of CPR r43.3 was not to force the Court to adopt an “issue based approach” to the question of costs. Bearing in mind the idiosyncrasies of patent infringement litigation, the overall winner of a patent infringement action containing a counterclaim was entitled to its entire costs subject to there not being any unreasonable conduct. At trial the issues of construction and infringement, upon which the Defendant had won, had taken up two thirds of the time and since the issues of construction, infringement and validity were classically interconnected, it was appropriate for the Defendant to obtain its entire costs. There was, however, a small discount of 10% applied in respect of one allegation of prior use which should not have been pursued. The Court thus appears to view a counterclaim more as a defence to infringement than as a separate claim for revocation.

The “slip rule” cannot enable a Court to have second or additional thoughts

In our UK Patents Review 2001 we reported the decision of the Court of Appeal in *Bristol Myers Squibb v Baker Norton* allowing the Defendants’ appeal of the Patents Court decision awarding only one set of costs for both Defendants. The effect of the order of the Court of Appeal, setting aside the Patents Court order as to costs was that interest would run from the date of the Court of Appeal order and that interest that had accrued pursuant to the Judge’s original order up to the date of the Court of Appeal order had been lost - the evidence suggested that this could be around £50,000. The Defendants on a subsequent application argued that this loss of interest had not been the intention of the Court of Appeal. They submitted that the appropriate order was rather to vary the Judge’s original order to delete the restriction imposed on recovery of two sets of costs, and that the Court of Appeal had power to correct its order pur-

suant to the “slip rule” under CPR r40.12, which provides “the Court may at any time correct an accidental slip or omission in a Judgment or Order”. Case law has established that the slip rule could not enable a Court to have second or additional thoughts. It is possible, however, under the slip rule to amend an order to give effect to the intention of the Court. In the present case the only issue raised had been whether the restriction imposed by the Judge was appropriate and it had not been the intention of the Court of Appeal to alter the part of the order requiring the Claimant to pay the Defendants’ costs. The intention had merely been to remove the restriction on recovery of two sets of costs. The Defendants’ application was thus allowed.

Normal form of injunction continues to apply

Following the Court of Appeal decision in *Coflexip v Stolt*, reported in our UK Patents Review 2001, the Court of Appeal has again in *Taylor v Ishida* confirmed that the usual form of injunction, prohibiting infringement of the patent in suit generally, rather than limited to the particular acts of infringement pleaded, is appropriate. The parties in this case accepted that this was the position and the patentee’s cross-appeal against the limited injunction granted by Pumfrey J was allowed.

Accounts of profits re-visited

The Court has provided a useful summary of the principles to be applied when considering an election for an account of profits in the case of *Spring Form v Worlds Apart*. The Patents Court had upheld the validity of Spring Form’s patent and found that it had been infringed by the tent-like structures sold in the jurisdiction by Worlds Apart. Subsequently an order was made by consent in which the Claimant elected for an account of profits. Certain preliminary issues concerning such account were raised by the parties. In addition to providing a general overview of the principles to be applied, the Court held that, in principle an

In an action for patent infringement the patentee and exclusive licensee must elect either for damages or an account, and, if they elect for the latter, one account only will be awarded against the infringer.”

(Pumfrey J, Spring Form v Worlds Apart)

account of profits was available in respect of infringing activities after the date of application but before the grant of the patent. Whilst Section 69(3) of the Patents Act (which provided a defence of unforeseeability in the case of a damages claim) did not refer to accounts of profits, such remedy was not impliedly excluded. It might be, however, that an account of profits, as an equitable remedy, would not be awarded in respect of infringement of a patent framed without good faith or the exercise of reasonable skill and knowledge. The Court further held that where a patentee and an exclusive licensee both have causes of action, there is a requirement that the exclusive licensee make the same election (for damages or an account of profits) as that made by the patentee. The exclusive licensee's right was the same right as that possessed by the licensee. Further, if an account of profits was elected for, then only one account would be awarded against the infringer.



Reported case analysis

Case name	Judges	Date	Product area
Re Baker Hughes Inc's Patent Application	Patent Office	02.01.01	Engineering
Re Meunier's Patent Application	Patent Office	08.01.01	Engineering
Dyson Appliances Limited v Hoover Limited	R Fysh QC	11.01.01	Vacuum Cleaners
American Home Products Corp v Novartis Pharmaceuticals UK Ltd & anr	Aldous LJ Robert Walker LJ Sir Anthony Evans	09.02.01	Pharmaceuticals
CIL International Ltd v Vitrasop Ltd	Pumfrey J	15.02.01	Shop Merchandising Systems
McGhan Medical UK Ltd v Nagor Ltd & anr	R Fysh QC	28.02.01	Medical Devices
Panduit Corp v Band-It Co Ltd & anr	P Prescott QC	05.03.01	Cable Ties
Kalsep Ltd v X-Flow BV	Pumfrey J	09.03.01	Filtration Technology
Cairnstores Ltd v Aktiebolaget Hassle	Pumfrey J	19.03.01	Pharmaceuticals
Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc & anr	Aldous LJ Laws LJ Blackburne J	28.03.01	Pharmaceuticals
Kirin-Amgen Incorporated, Janssen-Cilag Limited and Roche Diagnostics GmbH	Neuberger J	11.04.01	Biotech
Hewlett Packard GmbH & anr v Waters Corp & anr	Pumfrey J	25.04.01	High Performance Liquid Chromatography
Deutsche Institute Fur Textil Under Faserforschung Stuttgart v Fibreguide Limited	C Floyd QC	27.04.01	Textiles
Micromatic A/S v Dispense Systems International BV & ors	Neuberger J	09.05.01	Valves for Beer Kegs
Spring Form Inc & anr v Worlds Apart Ltd	Pumfrey J	30.05.01	Tents
David J Instance Limited v Denny Bros Printing Limited	Aldous LJ Ffrench LJ Lloyd J	20.06.01	CD Labels
Inhale Therapeutics Systems Inc v Quadrant Healthcare plc	Laddie J	20.06.01	Storage of Materials
Icon Health and Fitness Ltd v Precise Exercise Equipment Inc	Laddie J	20.06.01	Abdominal Exercisers
Ciba Vision UK Ltd & anr v CooperVision Limited	Neuberger J	02.07.01	Contact Lenses
Amersham Pharmacia Biotech AB v Amicon Limited	Aldous LJ Hale LJ Jonathan Parker LJ	05.07.01	Chemicals

Useful links

This is an analysis of reported cases, which can be found on the following websites: www.courtservice.gov.uk and [www.newLawonline.co.uk](http://www.newlawonline.co.uk). The following analysis of how Counsel and Judges compared is based only on these reported cases. Other cases may have been reported elsewhere.

Infringement	Novelty	Obviousness	Added matter	Insufficiency	Threats	Amendment	Procedure
X	X	X	X	X	X	✓	✓
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	✓	✓
✓	✓	✓	✓	X	X	X	X
✓	X	✓	X	X	X	X	X
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	X	✓
✓	✓	X	✓	✓	X	X	X
✓	✓	✓	X	X	X	X	X
✓	X	✓	X	X	X	X	X
✓	✓	✓	X	X	X	X	✓
✓	✓	✓	X	X	X	X	X
✓	X	✓	X	X	X	X	X
✓	✓	✓	X	X	X	X	X
✓	X	X	X	X	✓	X	X
X	X	X	X	X	X	X	✓
✓	X	✓	✓	X	X	X	X



Reported case analysis (continued)

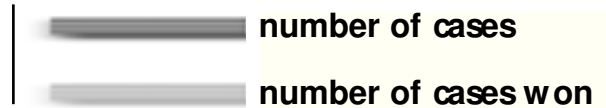
Case name	Judges	Date	Product area
Taylor v Ishida (Europe) Ltd & anr	Aldous LJ Hale LJ Jonathan Parker LJ	12.07.01	Packaging
Celltech Chiroscience Limited v Medimmune Inc	Laddie J	20.07.01	Biotech
Sabaf SpA v MFI Furniture Centres & anr	Laddie J	31.07.01	Gas Burners
Spring Form Inc & anr v Toy Brokers Ltd & ors	Pumfrey J	31.07.01	Tents
Arjo Ltd & anr v Liko AB & anr	Laddie J	08.09.01	Lifting Hoists
Whirlpool Europe BV v BSH Bosch und Siemens Hausgerate GmbH	Laddie J	19.09.01	Washing Machines
Dyson Appliances v Hoover Ltd	Aldous LJ Sedley LJ Arden LJ	04.10.01	Vacuum Cleaners
Instance & anr v CCL Label Inc	Pumfrey J	10.10.01	Adhesive Labels
Fohm & Haas Co & anr v Collag Limited & anr	Peter Gibson LJ Robert Walker LJ Keene LJ	29.10.01	Agro-chemicals
Eida Faberge Ltd v Colgate-Palmolive Company	Pumfrey J	01.11.01	Toothbrushes
Thiebierge and Comar SA v Flexam CFP	Jacob J	09.11.01	Colour Tracing Paper
Clear Focus Imaging Inc v Contra Vision Ltd	Jacob J	16.11.01	Transparent Panels
Sara Lee Household and Body Care UK Ltd v Johnson Wax Ltd	Aldous LJ Chadwick LJ Sr Murray Stuart-Smith	20.11.01	Toilet Freshener
Pharmacia Corp. & ors v Merck & Co Inc & anr	Aldous LJ Sedley LJ Arden LJ	14.12.01	Pharmaceuticals

Infringement	Novelty	Obviousness	Added matter	Insufficiency	Threats	Amendment	Procedure
✓	X	✓	X	✓	X	X	X
✓	X	X	X	X	X	X	✓
✓	X	✓	✓	X	X	X	X
X	X	X	X	X	X	X	✓
✓	✓	X	X	X	X	✓	X
X	X	✓	X	X	X	X	X
✓	✓	✓	X	✓	X	X	X
X	X	X	X	X	X	✓	X
✓	X	X	X	X	X	X	X
X	✓	✓	X	X	X	X	X
X	X	X	X	X	X	X	✓
X	X	X	X	X	X	✓	✓
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✓	✓	✓	✓	✓	X	✓	X

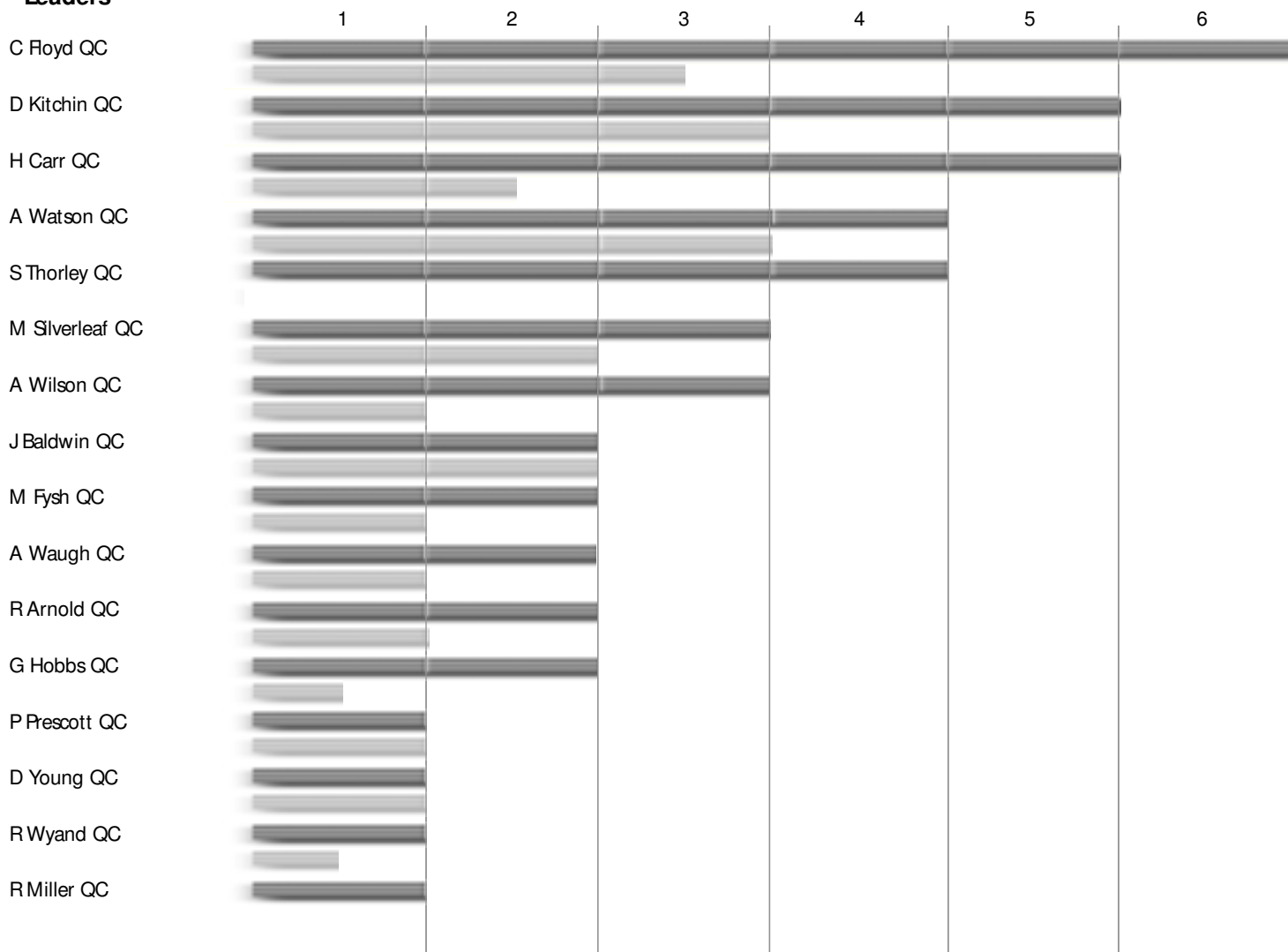


How Counsel compared

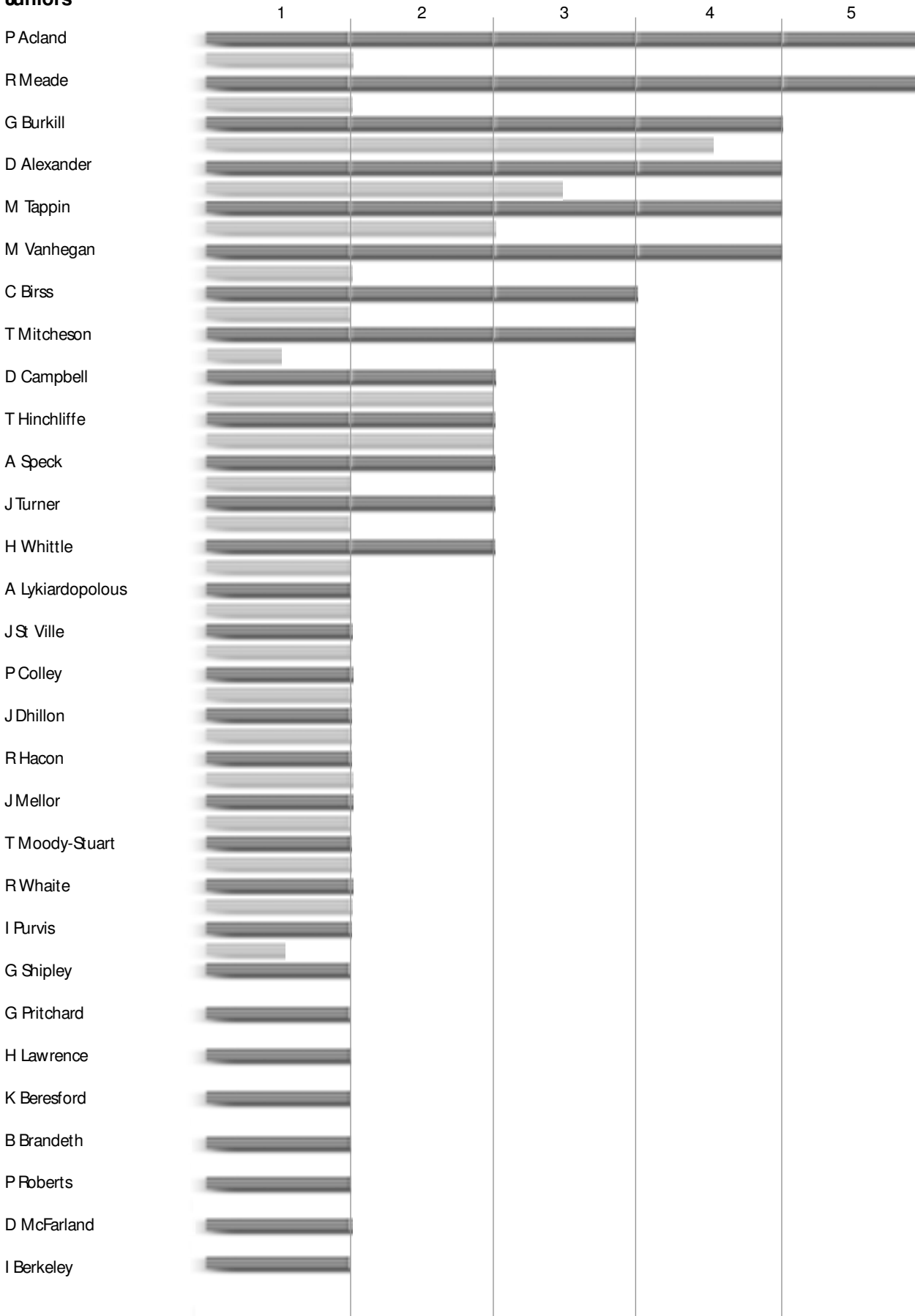
(based on reported case analysis on page 18)



Leaders



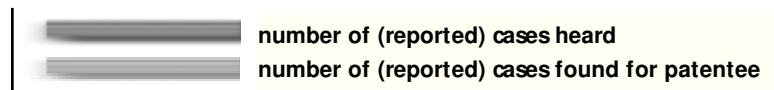
Juniors



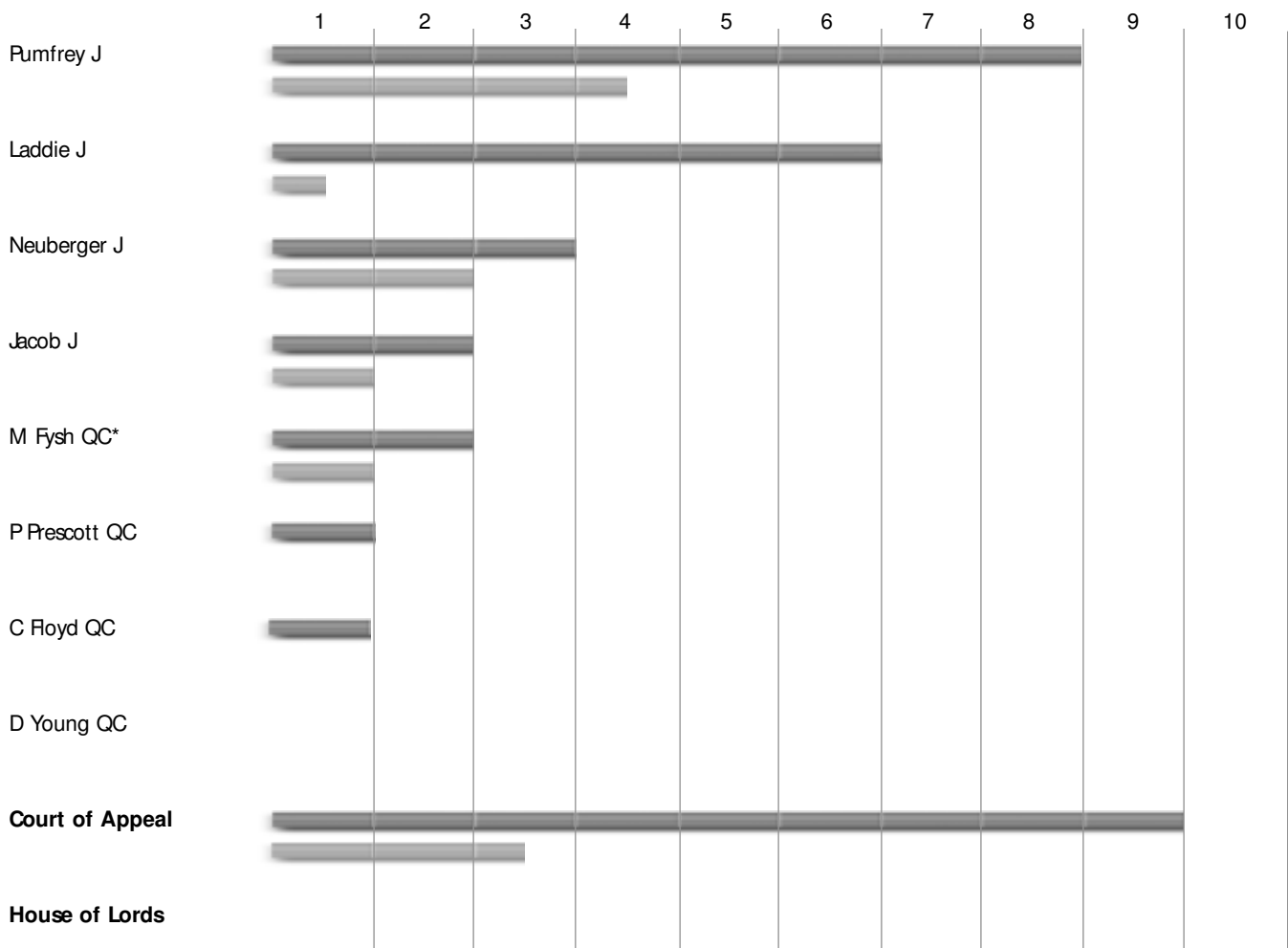


How the Judges compared

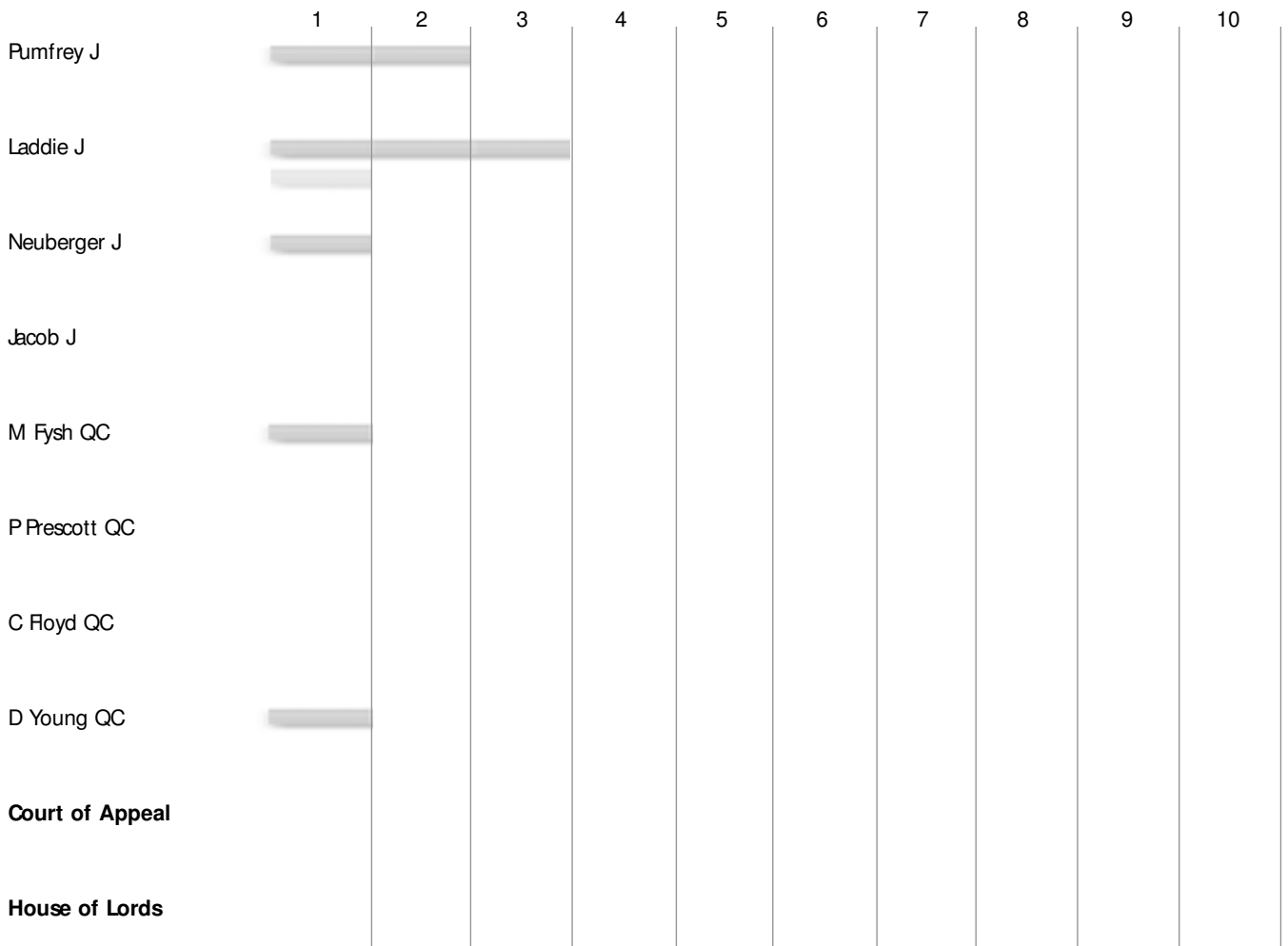
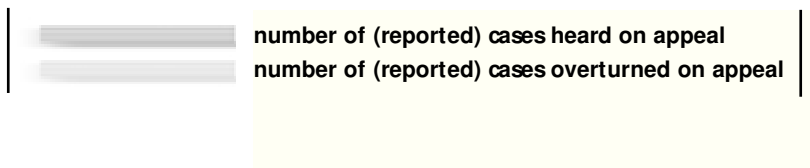
(based on reported case analysis on page 18)



Patents Court/Patents County Court



* Michael Fysh QC was appointed as the judge in the Patents County Court in October 2001



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