



BL O/085/05

30 March 2005

## PATENTS ACT 1977

BETWEEN

Cormon Limited

Claimant

and

Norsk Hydro a.s.

Defendant

---

PROCEEDINGS

Application under section 71 for a declaration of  
non-infringement of EP(UK) patent no EP0483578 B1

HEARING OFFICER

S N Dennehey

---

## DECISION

### Introduction

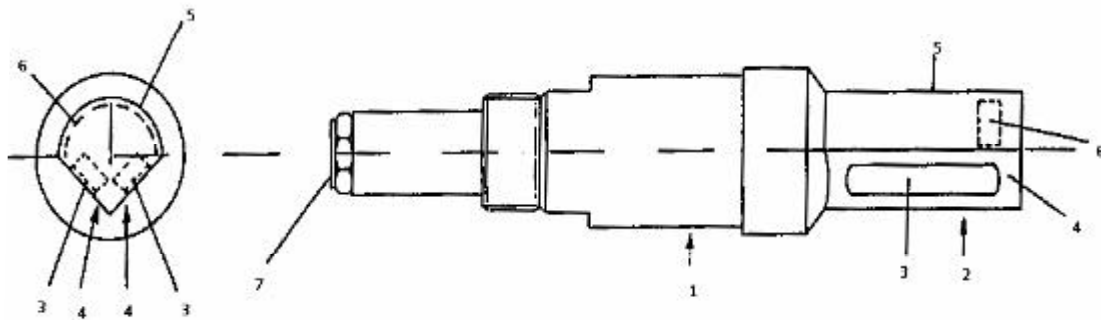
- 1 Patent no EP0483578B1 (“the patent”) was granted to Norsk Hydro a.s. (“the defendant”) on 21 February 1996. It relates to a probe for detecting particles in a fluid stream by measuring changes in the electrical resistance of an erosion element mounted on the probe and placed in the fluid stream. The probe finds particular application in detecting the amount of sand flowing in oil or gas pipelines.
- 2 An application under section 71(1) of the Patents Acts 1977 (“the Act”) was filed by Cormon Limited (“the claimant”) on 12 February 2003 requesting a declaration by the comptroller that two of the claimant’s erosion probes, referred to as CMEP 024 Rev1 and CMEP 026 Rev0, do not infringe the patent. The application followed an exchange of correspondence between the parties in which the defendant alleged infringement of the patent by virtue of the claimant’s manufacture in the UK of their CMEP 021 and CMEP 024 erosion probes. On 20 July 2001, the claimant wrote to the defendant providing details of the two probes that are now the subject of this application and sought confirmation that the probes would not infringe the defendant’s patent. The defendant did not respond.
- 3 Evidence in these proceedings was filed in the usual way. The matter duly came before me at

a hearing, at which Mr Colin Birss, instructed by patent agents Boulton Wade Tennant, appeared on behalf of the claimant and Mr Guy Burkill QC, instructed by patent agents Lloyd Wise, appeared on behalf of the defendant.

### The patent

- 4 The patented invention provides a method and apparatus for detecting the amount of particles flowing in a fluid stream based on the principle that the electrical resistance of an erosion element placed in the stream will change as a result of its gradual erosion by the particles. On page 2 of the specification, a prior art apparatus and method are acknowledged, but they are said to suffer the disadvantages that it is not possible to determine the quantity of sand in the fluid stream, and that they cause disturbances in the fluid stream which affect the erosion measurement. A preferred embodiment of the invention is shown in fig. 1 of the description.

Fig. 1



- 5 The probe consists of a body part 1 and a measuring head 2 adapted for mounting to the wall of an oil or gas pipeline. The measuring head is shown as having a plow-like or V-shaped form directed upstream of the oil/gas flow, with a semicircular part 5 on the opposite, downstream side. Erosion elements 3 are arranged on each of the sides 4 of the V-shaped part of the measuring head 2. These erosion elements 3 are partially moulded into the measuring head 2 such that only an outwardly facing side of each element is exposed to the environment. In addition to the measuring elements 3, the probe is provided with a third element 6 that is completely moulded into the measuring head 2. The element 6 is unaffected by erosion and serves as a reference element.
- 6 Claim 1 of the patent is a method claim dependant on the apparatus claims of claim 2-5. Claims 3-5 are dependant on claim 2. It is reasonable therefore to focus first on the broadest of the apparatus claims, claim 2, which reads as follows:

“2. A probe for detecting particles in a fluid stream where the probe has at least one corrosion-durable measuring element or erosion element (3) by which the particle content is determined by measuring changes in electrical resistance as a function (r) of erosion of the measuring element, characterized in that the probe's (1) measuring head has a V-shaped form directed upstream in that the two planar, flat surfaces defined by the V-shaped form are each equipped with one or more measuring elements (3).”

7 For reasons which will become apparent, I shall also need to consider the terms of the method claim, despite its dependency on claim 2. That method claim, claim 1, reads:

“1. A method for detection of e.g. sand particles in a fluid stream, comprising one or a plurality of probes (1) as defined in any of claims 2-5 which are equipped with at least one measuring element or erosion element (3) placed in the fluid stream and that the particle content is determined by measuring changes in electrical resistance as a function (r) of erosion of the measuring element, characterized in that the amount of sand, P, is determined by

$$P = \frac{(A \rho_m^{1.5})^n}{(V_m^B \cdot f \cdot d_p \cdot N) \cdot r}$$

where

r = the response (the wear)

N = number of elements in the cross section of a fluid stream

$\rho_m$  = density of the fluid mixture

$V_m$  = velocity of the mixture

$d_p$  = particle size in nm

f = function which is dependent upon the element's shape and orientation

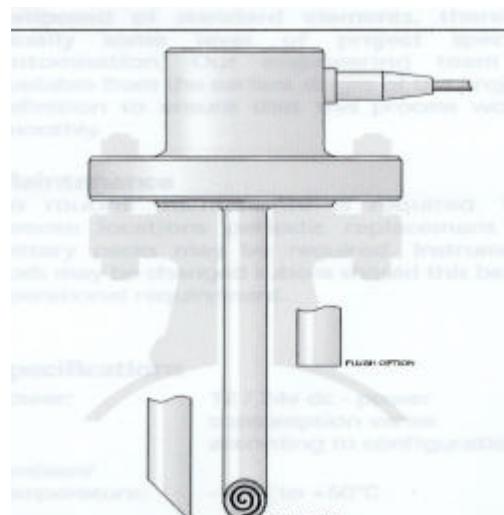
A and B are estimated constants.”

### The claimant's probes

8 The probes in which the claimant seeks a declaration of non-infringement are referred to by reference numbers CMEP 024 Rev1 and CMEP 026 Rev0. They are described in detail in two technical data sheets respectively exhibited at MG1 and MG2 to a witness statement of 6 February 2003 of Mr Michael Greenaway which was filed with the claimant's statement of case. Extracts from the data sheets are reproduced below.



CMEP 026 Rev0 (© Cormon Ltd 2000)



- 9 As is evident from these extracts, both probes are manufactured in either a flush or an angled option. In the flush option, both probes comprise a cylindrical probe body and a measuring head that occupies a single plane perpendicular to the longitudinal axis of the probe. In the angled option, the probes define an oblique circular cylinder in which the measuring head occupies a single plane which is transverse, but not perpendicular, to the longitudinal axis of the probe.

### **The law**

- 10 Section 71 of the Act gives the comptroller the power to make a declaration that an act (or proposed act) does not (or would not) constitute an infringement of a patent provided that the applicant has first sought such a declaration from the patentee and not been given one. In seeking a declaration of non-infringement from the patentee, the applicant is required to furnish full particulars in writing of the act in question.
- 11 The defendant does not dispute that full particulars of the act in question were provided in the claimant's letter of 20<sup>th</sup> July 2001, nor does it dispute the fact that it declined to make such a declaration. The acts in question are further set out in the claimant's statement accompanying the application under section 71, namely the manufacture, disposal of, offer to dispose of, use and importation of the CMEP 024 Rev1 and CMEP 026 Rev0 probes and the keeping of such probes whether for disposal or otherwise in the United Kingdom, the probes being as described in the technical data sheets referred to above.
- 12 At the hearing, Mr Burkill argued that a declaration of non-infringement may, and indeed must, be refused if there is not enough information to decide the issue one way or the other. He referred me to several passages in *Mallory Metallurgical Products Limited v Black Sivalls and Bryson Incorporated* [1977] RPC 321, including that at page 345, where Scarman LJ said:

“Nevertheless, this is clear that, if, as in this case, the article has not been produced but the plaintiff chooses to rely solely on the description contained in his particulars, the description must be sufficiently clear and precise to enable the court to declare that an article corresponding with the description would not constitute an infringement.

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

- 13 A very similar point was made in *MMD Design & Consultancy Ltd's Patent* [1989] RPC 131, where the Hearing Officer had to consider whether design drawings were sufficiently clear and precise to be able to make a declaration of non-infringement. In particular, the Hearing Officer says at page 135 that,

“It is clear from these passages that the criteria I must employ in determining whether Becorit have met the formal requirements of section 71(1) are rigorous as to the quality of the information they must have provided. To make the requested declaration I must

first be quite satisfied that Becorit have so clearly and unambiguously described their machine that no machine falling within that description could reasonably be taken to infringe the claims of the patent.”

- 14 In deciding whether or not a patent is infringed, it is necessary to establish the extent of protection conferred by the patent. Section 125(1) of the Act provides the basis on which this should be done, namely that the extent of protection is defined by the claims as construed in light of the description and drawings. Section 125(3) of the Act further requires that the extent of protection be construed in light of the Protocol on the Interpretation of Article 69 of the European Patent Convention, which requires that the claims be given a broader interpretation than their literal meaning but not to the extent that the claims serve only as a guideline of the protection conferred. It is clear that the Protocol seeks to strike a balance between fair protection for the patentee and reasonable certainty for third parties.
- 15 Both Counsel referred me to case law that deals with the approach to be taken in construing claims and in establishing the extent of protection conferred by the patent. Much of this case law is well established and so I will only summarise very briefly the main points referred to by Counsel in relation to the cases they cited.
- 16 *Catnic Components Ltd and Another v Hill & Smith Limited* [1982] RPC 183 and *Improver Corporation v Remington Consumer Products Ltd* [1990] FSR 181 both provide that the claims of a patent should be given a purposive construction rather than a purely literal one. *Improver* provides three questions which the court should ask if an alleged infringement falls outside the scope of the claims on a strictly literal interpretation:
- Does the variant have a material effect upon the way the invention works? If yes, the variant is outside the claim. If no,
  - Would this have been obvious at the date of publication of the patent to a reader skilled in the art? If no, the variant is outside the claim. If yes,
  - Would the reader skilled in the art nevertheless have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention? If yes, the variant is outside the claim.
- 17 In *Pharmacia Corp. v Merck & Co. Inc.* [2002] RPC 41, the Court of Appeal stated that, although the *Improver* questions are useful, they are no more than guidelines which should ensure that the final conclusion is based on the Protocol. In *Société Technique de Pulverisation STEP v Emson Europe Ltd and Others* [1993] RPC 513, Hoffmann LJ says at page 522 that,
- “The well known principle that patent claims are given a purposive construction does not mean that an integer can be treated as struck out if it does not appear to make any difference to the inventive concept. It may have some other purpose buried in the prior art and even if this is not discernible, the patentee may have had some reason of his own for introducing it.”
- 18 I was also referred to, and have noted, *Mabuchi Motor KK's Patents* [1996] RPC 387 for

authority on how purposive construction applied to claims including numerical limits.

- 19 In *Merck & Co. Inc. v Generics (UK) Ltd* [2004] RPC 31, Laddie J says at paragraph 47 that,

“There is no canon of construction which would justify the courts in granting a patentee more protection than that which, objectively assessed, he indicated he wanted.”

At paragraph 48, he goes on to add that,

“It seems to me that what the Protocol requires is that the monopoly should cover all embodiments, whether explicitly mentioned in the claims or not, which the notional skilled reader would conclude, with reasonable confidence, the inventor wanted to cover. Where it is clear that the patentee did not intend to obtain protection for particular variants, it is not open to the court to extend the monopoly to cover them. Similarly, if a notional skilled addressee cannot conclude with reasonable confidence that the inventor wanted to obtain protection for a particular embodiment, it must follow that the patent conveys the message that the patentee might well have intended to exclude that embodiment.”

- 20 A similar point is made by Aldous LJ in *Wheatley (Davina) v Drillsafe Ltd.* [2001] RPC 133. Finally, in *Beloit Technologies Inc. and Another v Valmet Paper Machinery Inc. and Another* [1995] RPC 705, Jacob J observes at page 720 that,

“In all this it must be remembered that it is the patentee who has set out the limits of his monopoly. Moreover, those reading his claim are entitled to see that it has a scope that goes thus far and no further and to design around the patent. There is no such thing as the tort of non-infringement. Finally if claims are given the sort of loose construction contended for, the whole approach to examination of patents is rendered more uncertain.”

## **Evidence**

- 21 Evidence of fact from the claimant comprises a witness statement from Michael Greenaway, joint Chief Executive of Corron Limited, outlining the events and the exchange of correspondence leading up to this action. This witness statement, which was filed with the claimant’s statement of case, is supported by a copy of the letter sent to the patentee requesting a written acknowledgement pursuant to section 71(1). A witness statement from Nicholas McLeish, the patent agent acting for the claimant, principally offers an opinion on the construction of the patent and on the issue of infringement. A witness statement from Barry Hemblade, Technical Director of Corron Limited, provides further operational details regarding the probes.
- 22 Evidence for the defendant comprises a witness statement from Kjell Wold, Business Unit Manager of CorrOcean ASA, outlining the events and the exchange of correspondence leading up to this action. This is supported by copies of letters exchanged between the two parties. A witness statement from Terje Søntvedt, one of the inventors mentioned on the patent, describes the research involved and the experimental results produced in developing

the invention.

23 None of the witnesses was cross-examined at the hearing.

### **The issues**

24 I shall deal first with the preliminary issue of whether the detail provided in the technical data sheets provides the clarity and precision required to allow me to make a decision on this application for a declaration of non-infringement. Mr Burkill referred me to two cases where direction has been given on this matter, the suggestion being, I think, that in the absence of a physical sample it would be difficult to frame a satisfactory description of the article. Having reviewed both the *Mallory* and *MMD* decisions, it seems to me that what is important in such circumstances is to have a clear and unambiguous description of the article to be tested for infringement, and that in some instances, the description of the article may better be provided by way of a physical sample. It may be that in some circumstances a physical sample is essential, but I do not accept that must always be the case.

25 It is clear from claim 2 that the characterizing features of the claimed apparatus reside in the shape and geometry of the measuring head of an erosion probe together with the positioning of measuring elements on that head. Having regard to the description provided by the claimant, it seems to me that both the photograph and the drawing contained in the technical datasheets do provide a precise representation of such a measuring head and the positioning of elements on it. This is regardless of whether a physical sample had been provided or not; indeed, I am not persuaded that a physical sample could add much to the detail already contained in the photograph and diagram. In this respect, I accept Mr Birss's point that much in this case is about geometry. Nothing contained in the data sheets suggests that the measuring heads could be configured in any other way than that shown in the photograph and drawing, and I am satisfied that the particulars provided by the claimants constitute a clear and unambiguous description enabling me to decide whether the probes in question fall within the scope of the patent.

26 Mr Burkill argued that the technical details contained in the data sheets were vague and unspecific, covering at least four variations of probe, i.e. the flush and angled option of both CMEP 024 Rev1 and CMEP 026 Rev0 probes, with each variation comprising a range of possible sizes, materials, shapes, mounting options, software options and angles. That may well be the case, but it is equally true of the apparatus claim of the patent, claim 2, which makes no mention of the size of the probe, the material it is to be made of, nor the optimum angle of the V-shaped form. The fact that these features have not been precisely specified in the technical data sheets is, I consider, irrelevant to the question of infringement of the claims of the patent.

27 With the preliminary issue out of the way, I can move on to consider whether the claimant's probes would infringe, first, claim 2 of the patent. On a purely literal interpretation of the claim, it seems clear to me that the claimant's probes do not comprise a measuring head having a V-shaped form made up of two flat surfaces each equipped with one or more measuring elements, and therefore would not infringe the defendant's patent. Indeed, the defendant accepts this to be the case in its counter-statement. However, the correct

interpretation according to the law is broader than the strict literal one and must be based on a purposive construction of the claims.

- 28 In addressing infringement in the light of a purposive construction of the claims, both parties in their submissions have, to a significant extent, taken account of the three *Improver* questions set out above to assist in the proper construction of the patent. At the hearing, Mr Birss was keen to emphasize that whilst the *Improver* questions can be useful in certain circumstances to decide the proper construction of a claim, ultimately the task should be to apply the requirements of the Protocol. I did not get the impression from him that he considered the *Improver* approach inappropriate in the present case, but merely that he wished to outline the position of the law in the United Kingdom. I am content to adopt the *Improver* approach advocated by both Counsel insofar as it assists in balancing fair protection for the patentee with reasonable certainty for third parties. Furthermore, since there is no substantial difference between the two types of probe referred to as CMEP 024 Rev1 and CMEP 026 Rev0, I need only do so by considering the flush and angled options of measuring head design common to the two probes. This approach is consistent with the arguments set out by both parties in their written submissions and at the hearing.
- 29 Turning then to the first of the *Improver* questions, i.e. does the variant have a material effect upon the way the invention works, the defendant argues that the flush option of measuring head operates on the same principle as the probe of claim 2 in that the head does not present a solid surface to the fluid stream and will therefore avoid causing disturbances in the fluid stream and harmful wear on the probe head. By mounting the probe at an angle to the fluid stream, e.g. on the bend of a pipe as recommended in the technical data sheets, the defendant argues that the flush option operates in exactly the same way as the claimed invention. The claimant argues that there is a material difference between the way the claimed invention and the flush probes work, pointing to the defendant's own evidence in the witness statement of Terje Søntvedt which suggests that measuring elements having a low angle of attack would not work for the defendant's particular purpose. However, it is quite clear from the recommendation in the claimant's technical datasheets that the flush option of measuring head is to be positioned so that particles will strike the face of the sensor and cause erosion. The probe is not intended to be positioned with a low angle of attack with respect to the fluid stream, and can only work effectively when the measuring elements are placed at an angle to the fluid stream. As such, I am persuaded by the defendant's argument that the flush options of the probes operate in the same way as the claimed invention.
- 30 Similar arguments were also made in respect of the angled option of measuring head, although even Mr Birss for the claimant accepted that any difference between the way in which the angled option and the claimed invention works is less obvious than for the flush option. For the angled option, the specific intention is to place the measuring element at an angle to the fluid stream so that particles will strike the element and cause erosion without the need to position the probe on a bend. As with the flush option, I am persuaded by the defendant's argument that the angled option of measuring head operates in the same way as the claimed invention.
- 31 Having found that neither the flush nor the angled option of measuring head has a material difference upon the way the claimed invention works, I must now give consideration to the



second of the *Improver* questions, namely whether this would have been obvious at the date of publication of the patent to a reader skilled in the art. In other words, would it have been obvious that the flush or angled options had no material effect on the way the invention worked. Needless to say, the defendant considers that the answer to this second question should be “yes” for both options. However, as Mr Birss pointed out at the hearing, rightly in my view, the defendant has provided very little evidence to support this assertion. I might add that little evidence was presented by the claimant to deny it either. That said, I am not sure to what extent such evidence is really necessary in this particular case. It seems to me that the skilled reader with knowledge of the flush and angled options would appreciate that the erosion probe required the measuring element to be placed at an angle to the fluid stream. On the basis of that knowledge, I consider that it would then be obvious to the skilled reader that the flush and angled options had no material effect on the way the invention defined in claim 2 worked, realizing that the two options merely departed from the claimed invention in terms of design of the probe head and the number of measuring elements on it. I therefore consider the answer to the second *Improver* question is “yes” for both the flush and angled options, and must now move on to consider the third and decisive *Improver* question.

32 A good deal of time was spent at the hearing in addressing this third question of whether the reader skilled in the art would have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention. The defendant argues that the specification makes clear that it is not the V-shaped form, as such, that is the basis of the invention but rather the use of a surface provided at an angle to the fluid flow. The defendant points to a particular reference on page 5 of the description which says “It should be noticed that the invention as defined by the claims is not limited to such a construction. The probe can have a different form...”. As further support for this broader interpretation, the defendant points to the description at page 2 of the patent referring to problems associated with the prior art and, in particular, the problem of having erosion elements placed perpendicular to the fluid flow causing disturbances in the fluid stream. It was also suggested for the defendant that the wording of claim 1 supports this broad interpretation, where the equation for the amount of sand,  $P$ , includes a summation from 1 to  $N$  of the  $N$  elements in the fluid stream. With  $N$  being 1, this would represent a probe having one measuring element on a single surface. At the hearing, Mr Burkill argued that the V-shaped form defined in claim 2 is “a metaphor” for putting the measuring element at an angle, and that a skilled person would understand this to be the case from both the description and claim 1. In his view, half a “V” would be embraced in the purposive construction of the claims, provided that the single limb has an angle to and effect on the flow of the same kind as a full “V”.

33 Again, very little evidence has been provided to help establish what the skilled reader would have understood from the patent. The reference on page 5 of the patent suggests that the claims themselves make clear that the invention is not limited to the specific V-shaped construction. That is clearly wrong, given the specific requirement of a V-shaped form defined by claim 2. So why does page 5 of the patent say so? The answer to this question becomes apparent from the published application for the patent in suit, submitted in evidence on behalf of the claimant. In the application as published, claim 3, which is the broadest of its apparatus claims, makes no reference at all to a V-shaped construction:

“A probe for detecting particles in a fluid stream, characterized in that the probe has at least one corrosion-durable measuring element or erosion element (3) by which the particle content is determined by measuring of the changes in electrical resistance as a function (r) of erosion of the measuring element.”

- 34 It appears from the original application that it was not the defendant’s intention to limit the probe to such a V-shaped construction. I say this *not*, I stress, because I am seeking to rely on the file history to interpret the scope of the claims. I mention it only because it seems to make clear that for whatever reason during the processing of the application the defendant saw fit to narrow the scope of the patent by including the V-shaped requirement in the main apparatus claim, the description which ended up on page 5 of the patent as granted was left unchanged. But does this affect matters? I am not persuaded that it does: the question that I have to consider is what the skilled reader would understand from the language of the claim of the granted patent, and not that of the application as filed. I accept that the passages of the specification referred to by the defendant point to a non-V-shaped probe; they were included in the original application for this very purpose. However, they have remained in the granted patent despite a narrowing in the scope of the claims; although ideally they ought to have been deleted, do these passages lead the skilled reader away from the form of probe clearly defined in claim 2?
- 35 In my opinion they do not. The wording of claim 2 is definite. Even if it were unclear from claim 2 what was intended by a V-shaped form, it is apparent from the patent as a whole what that form should take. There is no ambiguity in what is meant by a V-shaped form, regardless of any careless suggestion that the invention could be broader than that actually defined. The natural position is to ignore the passage on page 5 as an erroneous inconsistency, and not to elevate it to the status of a determinative statement. As Mr Birss rightly argued, the claims are there for a purpose: those reading the claim should be entitled to see that it has a scope that goes thus far and no further. A skilled reader presented with claim 2 would conclude, in my view, that despite minor inconsistencies in the description the patentee had explicitly specified the V-shaped form for a purpose, and would have understood from the language of the claim that strict compliance with the primary meaning was an essential requirement of the invention. I am supported in my view by Hoffmann LJ’s comments in *STEP* and of Jacob J’s comments in *Beloit*, both of which are quoted above. I therefore find that the answer to the third *Improver* question is “yes”.
- 36 In the normal way of things, when all the other claims are dependant on one claim, in this case claim 2, that would be the end of the matter. A determination of non-infringement in respect of claim 2 would have settled the question also in respect of the dependant claims. In this case the matter is not quite so cut and dried. The reason for that, as Mr Burkill submitted, arises from a lack of clarity in and consistency between claims 1 and 2. Mr Burkill was using this difficulty as a reason for denying a declaration of non-infringement to the claimant. While I recognize that such a difficulty arises, I am also conscious that it would be wrong if the defendant were in a better place to defend its position through having unclear claims in its patent specification.
- 37 A number of points were made, but I think it boils down to this. I paraphrase it in this way. Claim 2, which is directed to a probe, requires, in its pre-characterizing part, “at least one

corrosion-durable measuring element or erosion element (3)". In its characterizing part, it then requires the probe's head to have a V-shaped form having two planar, flat surfaces each of which is equipped with one or more measuring elements (3). Arguably these two parts of the claim are inconsistent. Further, claim 1 is directed to a method comprising one or a plurality of probes as defined in claim 2. However, in its pre-characterizing part, claim 1 also says these very probes "are equipped with at least one measuring element or erosion element (3) placed in the fluid stream". Also, the equation in claim 1 depends on a sum from 1 to N "elements in the cross section of a fluid stream". The questions then arise: how are the pre-characterizing and characterizing parts of claim 2 reconciled, and what does the skilled man think claim 1 means?

38 As regards claim 2, Mr Birss argued that the pre-characterizing part in essence reflects a known form of probe, and the characterizing part reflects the invention. This seems to me a natural, reasonable and satisfactory way of reconciling the language of the claim without the complexities I have previously mentioned which Mr Burkill advocated. I am reinforced in this construction by the passages of the description at lines 6 to 9 and lines 52 to 55 of page 3, which emphasise respectively the essential or important advantage that having a plurality of measuring elements gives.

39 As for claim 1, Mr Burkill represented the dilemma in the terms that claim 1 requires at least one measuring element, and hence possibly *only* one, and yet claim 2 requires two. He denied that claim 1 was hopelessly unclear, but accepted that there was tension between the parts or pieces of language that one has to construe. He took the view that in fact claim 1 was in essence an independent claim, and that the point of claim 1 was to say that in its method only one measuring or erosion element needed to be placed in the fluid flow.

40 This is nice point, and seductive. However, it seems to me that these are avenues into which I do not need to delve. I do not believe any of these attempts to reconcile the language of claims 1 and 2 detracts from the fact that claim 1 requires the use of probes according to claim 2. It may, and I put it no stronger than that since it unnecessary to dwell on the point, say something about how that probe is used – but it is still about that same probe as defined in claim 2. On the basis that, as I have already found, the claimant's probes do not infringe the requirements of claim 2, I do not find their use infringes the method of claim 1.

41 I must also address another of Mr Burkill's arguments. This revolved around the question of possible contributory infringement arising from the supply of multiple probes by the claimant according to its data sheets, which probes could then be deployed or modified in a way which might infringe the claims of the patent. It seems to me that such an argument could be applied in the circumstances of almost every declaration of non-infringement applied for, at least to the comptroller. I see no reason, in the present case, why the potential which Mr Burkill argued is real or significant in a way that I should deny the claimant the declaration it specifically seeks.

42 I say "specifically seeks" for a reason. The claimant sets out the scope of the declaration it seeks in paragraph 12 of its statement of case. To the extent that the claimant's requested declaration could be as wide as covering "dealings" in its named probes, I agree with Mr Burkill that it is very broad, indeed too broad. I will therefore make the declaration in the

narrower terms of the specific acts listed in paragraph 12 of the claimant's statement of case.

### **Conclusion**

- 43 In the result, I have found that claim 2 would not be infringed by the claimant's probes. Claims 3, 4 and 5 are all apparatus claims dependant on claim 2 and, similarly, would not be infringed. Claim 1 is a method claim which, I have also found, would not be infringed.
- 44 I therefore declare, on the basis of the evidence and arguments before me, that the manufacture, disposal, offer to dispose, use or importation of the CMEP 024 Rev1 and CMEP 026 Rev0 probes, as defined in the Technical Data Sheets exhibited at MG1 and MG2 to Michael Greenaway's witness statement of 6 February 2003 filed in these proceedings, or the keeping of such probes whether for disposal or otherwise, in the United Kingdom, do not and would not constitute an infringement of the claims of patent no EP0483578B1.

### **Costs**

- 45 The claimant has succeeded in this action. It has requested costs but made no specific representations in that regard. I shall therefore award costs according to the standard Patent Office scale, opting for the lower end given the relatively small volume of evidence submitted. I therefore order Norsk Hydro a.s. to pay Cormon Limited £1600 as a contribution towards its costs.

### **Appeal**

- 46 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days from the date of this decision.

**S N DENNEHEY**

Director, acting for the Comptroller