

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**PATENTS COURT**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 3 February 2014

**Before :**

**THE HON MR JUSTICE ARNOLD**

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**Between :**

<b>ANDREW COOKE</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>WATERMIST LIMITED</b>	<b><u>Respondent</u></b>

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**Tom Alkin** (instructed by **Novagraaf UK**) for the **Appellant**  
**Ian Silcock** (instructed by **ip21**) for the **Respondent**

Hearing date: 23 January 2014  
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**Judgment**

**MR JUSTICE ARNOLD :**

**Introduction**

1. This is an appeal by Andrew Cooke against part of a decision by Phil Thorpe acting for the Comptroller-General of Patents dated 23 July 2013 (BL O/275/13) in which the hearing officer dismissed a claim by Mr Cooke to co-inventorship of, and co-entitlement to, UK Patent No. 2458698 (“the Patent”), which was granted to Watermist Ltd. There is no appeal by any party against the other parts of the decision.

**Background**

2. Mr Cooke is a former employee of Fireworks Fire Protection Ltd (“Fireworks”). Fireworks supplies and installs fire suppression systems manufactured by third parties. One such system is a hose reel unit covered by the Patent (“the Unit”). The owner of Fireworks, Derek Killaspy, has an interest in Watermist. The named inventor, William Bridgman, manages a third company, Warren Services, which manufactures the Unit under licence from Watermist. Mr Bridgman also has an interest in Watermist.
3. Mr Cooke is a fabricator and general mechanical and electrical engineer by trade. In 1999 he was employed by Fireworks to install and, eventually, to oversee the

installation of fire suppression systems. These included pressurised systems which generate a mist of fine droplets (“misting systems”) instead of the stream of water produced by traditional systems. Misting systems are more effective at penetrating and removing energy from fires than traditional systems. Prior to the invention, they consisted of a central pump set connected via high pressure pipework either to fixed overhead nozzles or to hose reels housed in wall-mounted cabinets (referred to as “Norsen” cabinets).

4. From about 2004 onwards, Fireworks began sourcing components for its installations from Warren Services. As a result, Mr Cooke began working with Mr Bridgman. The two became friends and Mr Cooke began spending spare time at Warren Services working on hobby projects.
5. In 2005 Mr Killaspy and Mr Bridgman and his father decided to develop a new misting system for sale by Fireworks. They incorporated Watermist as the vehicle for this venture. Mr Cooke was not involved in this decision, nor was he asked to participate in the design of the new system.
6. In 2007, while the new Watermist system was still under development, Mr Cooke handled a number of food factory installations on behalf of Fireworks. Two fire risks faced by food factories are oil fires and oven fires. The only safe way of extinguishing an oil fire using water is by means of an overhead misting nozzle, as a conventional stream of water tends to spread burning oil. The only effective way of extinguishing an oven fire is by means of a fire hose inserted into the oven, as the oven is an enclosed space.
7. Fireworks’ food factory clients told Mr Cooke that, although misting systems were desirable, central pump sets and high-pressure pipe work were too expensive. In response, Mr Cooke came up with the idea of a self-contained misting unit designed to deal with an individual deep fat fryer fire. This consisted of a single overhead misting nozzle connected to its own pump and motor, obviating the need for a central pump set. He outlined his idea to Mr Bridgman and built a prototype in his spare time at Warren Services. The prototype did not work very well, however, because of a leaky valve.
8. At around the same time, Mr Bridgman was in discussions with the Ministry of Justice (“the MoJ”). The MoJ was looking for a cost-effective means of tackling prison cell fires by insertion of a hose through the cell door.
9. Shortly after this point, the core inventive concept of the Patent was devised. Although Mr Cooke’s pleaded case was one of co-inventorship, his evidence was that he had devised the core inventive concept, and in his closing submissions before the hearing officer counsel for Mr Cooke put his claim as being one of sole inventorship. Watermist’s case was that Mr Bridgman had devised the inventive concept. Thus the issue the hearing officer had to decide was whether it was Mr Cooke or Mr Bridgman who had devised the concept.

#### The inventive concept of the Patent

10. The hearing officer considered the inventive concept of the Patent at [39]-[42]. Having noted that the Patent effectively described and claimed a standard wall-

mounted Norsen cabinet modified to include a pump and motor for pressurising the hose reel, he correctly observed at [42] that:

“... it is common ground between the parties that the idea of putting the pump and motor into the cabinet is, either the heart or one of the hearts of the invention set out in the patent ...”

11. The hearing officer did not expressly refer to the benefit that this arrangement offered over the prior art, which is that it allows for a pressurised hose reel without the need for an expensive central pump set.

#### The rival cases on inventorship

12. Mr Cooke’s first witness statement sets out the relevant background, in particular the feedback he received from food factory clients and his idea for a self-contained overhead misting unit as a cost effective solution for oil fires. It then describes his devising of the inventive concept as follows:

“38. One Saturday morning in late 2007 I was at the Warrens factory. I was thinking about cost effective suppression of oven fires and I had the related idea of turning an ordinary fire hose cabinet into a self-contained pressurised system by fitting a pump and a motor inside it.

39. I told Will about the idea and suggested that we try fitting a pump and a motor into the most common type of fire hose cabinet. These cabinets are manufactured by a company called Norsen... The hose reel is mounted on the inside of the door of the cabinet on an axis perpendicular to the face of the door. When you open the door, the hose reel can move through an arc defined by the movement of the door, meaning it will automatically orientate itself towards the fire as it is being spooled out.

40. Will and I went to the stores and found the smallest pump and motor that Warrens had. We were able to fit these in the bottom of the cabinet, but we could not close the door because the pump and motor fouled the hose reel. However all we needed to solve this problem was a taller cabinet.

41. Will was not particularly interested in the food factory application because he knew nothing about this field. However he did know something about the MOJ’s requirements. We both thought the self-contained fire hose module would also be popular with the MOJ, because they too were looking for cheaper alternatives to the central pump set.”

13. The cross-examination of Mr Cooke on this account was short and can be set out in full:

“Q. If I could take you to paragraph 38 of your witness at tab 3 of bundle 2, could you read paragraphs 38 and 39 to yourself, please. I have to suggest to you, Mr. Cooke, that your recollection of those events simply cannot be correct. What do you have to say to that?”

A. That is not true.

Q. If that is not true then the only other alternative explanation is that you are actually making this evidence up, that this never actually happened.

A. That would not be true, would it, because I did.”

14. Mr Bridgman’s written evidence on the issue was limited to the following:

“The idea underlying the invention which is the subject of patent GB2458698B standing in the name of Watermist Limited was mine and mine alone. I deny any suggestion that anyone else contributed to that idea as such. In particular I deny that Andy Cooke had the idea and then brought it to me. It was the other way round.”

15. Despite the lack of detail in Mr Bridgman’s evidence being queried in Mr Cooke’s second witness statement and criticised in counsel for Mr Cooke’s skeleton argument, counsel for Watermist declined the opportunity to ask Mr Bridgman any further questions in examination in chief. In cross-examination, Mr Bridgman only added this:

“I came up with the idea of putting all of the bits inside the cabinet. It is quite a long convoluted story. He said he did and that is not the truth. I did. It is as simple as that.”

16. It was put to Mr Bridgman in cross-examination that what he had really done was to spot the applicability of Mr Cooke’s idea to cell fires and therefore the MoJ’s requirements. Mr Bridgman denied this, however.

17. Mr Killaspy’s evidence on the issue of inventorship in his first witness statement was as follows:

“... DK [i.e. Mr. Killaspy] remembers WB [i.e. Mr. Bridgman] calling him very excited that he (WB) had thought of a new and brilliant idea of putting a pump & motor into a hosereel cabinet. AJC [i.e. Mr Cooke] was not mentioned in this conversation.”

In his third witness statement he gave a slightly, but potentially significantly, different account:

“In late 2007, as I have said in a previous Statement in these matters, Will rang me in some excitement to say that he had had a ‘new and brilliant’ idea of solving the MoJ prison cell fire

problem by fitting a pump, motor, and hosereel into the so-called Norsen fire hose cabinet...”

18. Mr Killaspy accepted in cross-examination that all he knew about the question of inventorship was what Mr Bridgman had told him. Neither version of Mr Killaspy’s account of the telephone call was corroborated by Mr Bridgman.

The hearing officer’s decision

19. Having set out the relevant statutory provisions, the hearing officer cited the following passage from the speech of Lord Hoffmann in *Yeda Research and Development Co Ltd v Rhone-Poulenc Rorer International Holdings Inc* [2007] UKHL 43, [2008] RPC 1 as representing the correct approach to the issue he had to decide:

“19. In my opinion, therefore, the first step in any dispute over entitlement must be to decide who was the inventor or inventors of the claimed invention. Only when that question has been decided can one consider whether someone else may be entitled under paragraphs (b) or (c). ...

20. The inventor is defined in s.7(3) as ‘the actual deviser of the invention’. The word ‘actual’ denotes a contrast with a deemed or pretended deviser of the invention; it means, as Laddie J. said in *University of Southampton’s Applications* [2005] R.P.C. 11, [39], the natural person who ‘came up with the inventive concept.’ It is not enough that someone contributed to the claims, because they may include non-patentable integers derived from prior art: see *Henry Brothers (Magherafelt) Ltd v Ministry of Defence* [1997] R.P.C. 693, 706; [1999] R.P.C. 442. As Laddie J. said in the *University of Southampton* case, the ‘contribution must be to the formulation of the inventive concept’. Deciding upon inventorship will therefore involve assessing the evidence adduced by the parties as to the nature of the inventive concept and who contributed to it. In some cases this may be quite complex because the inventive concept is a relationship of discontinuity between the claimed invention and the prior art. Inventors themselves will often not know exactly where it lies.

21. The effect of s.7(4) is that a person who seeks to be added as a joint inventor bears the burden of proving that he contributed to the inventive concept underlying the claimed invention and a person who seeks to be substituted as sole inventor bears the additional burden of proving that the inventor named in the patent did not contribute to the inventive concept. ...”

20. The hearing officer had the advantage seeing Messrs Bridgman, Cooke and Killaspy cross-examined. He set out his assessment of the witnesses at [20]-[31]. It is important to note that, although the decision was not issued until about nine months after the hearing (something for which the hearing officer apologised at [7]), the

hearing officer stated at [19] that he had assessed the credibility of the witnesses shortly after the hearing while their evidence was fresh in his mind.

21. The hearing officer's assessment (at [29]) was that Mr Cooke was "not a particularly reliable or convincing witness". The hearing officer's reasons for this assessment were as follows:

"25. Mr Cooke provided two witness statements. Mr Cooke was cross examined on these at some length by Mr Silcock. I found Mr Cooke responses at times evasive. His exchange with Mr Silcock as to whether a prototype of the invention covered by GB 2479863 A had actually been 'delivered' to Fireworks premise bordered on farce at times with Mr Cooke determined to downplay any significance it might have. In doing so however he gave the impression that he was being particularly evasive and unhelpful. His response on whether that prototype had been covered up was also clearly inconsistent with his earlier witness statement. More generally he often sought to contest or query the question put to him rather than simply providing a straightforward response. His recollection of events also appeared at times selective. For example he was unable to recall clearly what he knew or had been told about the filing of the patent application GB 2458698 B. In contrast he was much surer about the events that led him to come up with the ideas covered by the patent and the application.

...

27. Mr Silcock also questioned whether Mr Cooke had been open and honest in his business dealings alleging in particular that Mr Cooke had somehow sought to hide for financial reasons his involvement in certain enterprises from his estranged wife. When asked about this during his cross examination noted, Mr Cooke accepted that he had renamed the company to 'protect him from his wife' but denied it was in anyway an attempt to avoid any financial obligation on his part. This denial was in my mind at odds with what Mr Cooke had said in the five page letter contesting his dismissal where he clearly suggests that the renaming of the companies was related to possible financial payments to his estranged wife.

28. I would add that the admission by Mr Cooke that he had in dealings with potential customers deliberately misstated his position in Fireworks was also harmful to his credibility. He accepted that he had sent out various quotes and communications to potential customers of Fireworks and had signed these as 'Andrew Cooke Operations Director'. I asked him whether he had done this in the knowledge that he was not in fact the Operations Director and he confirmed that was the case. He explained that he had done it because he felt that customers, particularly larger customers did not want to receive

correspondence from ‘some Herbert in the workshop’ as he called it. Irrespective of whether that is the case it is clear on the basis of his own testimony that he sought to deceive customers. Even if the intent behind this was to benefit the company rather than to secure any personal gain, I do not think it is something I can ignore when considering his credibility as a witness.”

22. The hearing officer’s assessment of Mr Bridgman was as follows:

“20. Mr William Bridgman as the sole named inventor on GB 2458698 was always going to be one of the key witnesses. His written evidence is brief – it extends to just 4 paragraphs. He provides some general background on his role within Warren Services and Watermist. He states that it was him and not Mr Cooke who had the idea for the invention that is the subject of the patent although he gives little by way of background as to how he came up with the idea.

21. Under cross examination he appeared nervous, to some extent uncomfortable and also reluctant to engage. His recollection was also imprecise at times. For example he could not recall whether he had had sight of Mr Cooke’s earlier witness statement before he drew up his statement. He was also uncertain when pressed on the guidance given to him by Watermist’s legal representatives when drawing up his witness statement. Despite having the opportunity on a number of occasions he did not really add anything to his witness statement in terms of how he arrived at the idea in GB 2458698 B. Overall I had reservations about the reliability of his evidence, thin though it was, and so I feel I should consider it carefully.”

23. The hearing officer’s assessment of Mr Killaspy (at [22]) was that he was “a generally reliable witness”.

24. The hearing officer considered the evidence of the three witnesses on the question of inventorship at [43]-[56]. He began by observing, correctly, at [43] that there was little by way of documentary evidence to assist him. He then summarised Mr Cooke’s evidence. Counsel for Mr Cooke criticised one aspect of this summary as inaccurate, but it seems to me that nothing turns on that. The hearing officer then summarised Mr Killaspy’s evidence, noting at [50] that Mr Killaspy had accepted that he was present neither when the idea occurred nor during the initial discussions between Mr Cooke and Mr Bridgman. The hearing officer then turned to Mr Bridgman’s evidence and commented (at [54]) as follows:

“Somewhat surprisingly Mr Bridgman does not corroborate any of [Mr Killaspy’s account]. His single witness statement extends to just four paragraphs. This essentially just says that he and he alone had the idea for the invention in GB2458698 B and that he communicated it to Mr Cooke. What is noticeable

about the written and oral evidence given by Mr Bridgman is that he gives no indication as to how he came to arrive at the idea. He was pressed on this by Mr Alkin during cross-examination. There was I believe ample opportunity for Mr Bridgman to respond to Mr Cooke's explanation of how he came up with the idea with an explanation of his own. All that he did say during cross-examination was that 'it was quite a long convoluted story'. That does not in my mind sit comfortably with Mr Killaspy's version of events. It would have taken little effort on Mr Bridgman's part to simply say that Mr Killaspy had shared his experience from the Ministry of Justice tests and that that had provided Mr Bridgman with the catalyst for the invention. Mr Bridgman was however adamant when questioned by Mr Alkin that his contribution was not limited to recognising the potential prison application of the invention but rather extended to also cover devising the core idea of putting the pump and the motor in the cabinet."

25. The hearing officer next turned to consider Mr Cooke's delay in making his claim, and concluded at ([60]) as follows:

"I find it surprising that Mr Cooke did not raise the matter earlier. On the evidence before me, including the testimony of Mr Cooke himself, I am satisfied that he was aware of the patent application relatively soon after it was filed. If he had been able to put forward some evidence to show that he had at least made enquiries about whether his claimed contribution was being recognised then that would have strengthened his case. ..."

26. Finally, the hearing officer set out his analysis of Mr Cooke's claim and his conclusion. Having regard to the arguments on the appeal and in fairness to the hearing officer, it is necessary to set out this passage of the decision in full:

"63. The onus or burden of proof in this instance is on Mr Cooke to demonstrate on the balance of probabilities that he was the inventor or at least co-inventor of the idea of putting the pump and the motor inside the hose reel cabinet. Mr Alkin argues that because his client has at least presented a version of how he came up with the invention that this somehow shifts the evidential burden of proof onto Mr Bridgman. What Mr Cooke's explanation may do is to bolster the strength of his evidence in the same way that the lack of a corresponding explanation may lessen the weight of Mr Bridgman's evidence. But in order for me to decide the point I still need to carefully weigh up all the evidence and then decide whether on the balance of probabilities that evidence shows that Mr Cooke should be named as an inventor on GB2458698B.

64. I start with the evidence in support of Mr Cooke's claim. Central to this is the evidence of Mr Cooke. Mr Cooke as

discussed above was not an entirely convincing witness. He was at times evasive and selective with his memory. That he was, as he acknowledged, less than truthful to customers about his position in the company also undermines his credibility to some extent. He did however at least present a credible and consistent story as to how he arrived at the invention. He was also consistent under cross examination that it was he and he alone who had the idea for putting the pump and motor in the housing. Mr Cooke was also involved in developing the idea into a working prototype. But other than his own witness statements and testimony he has not provided any real evidence to support his claim.

65. On the other side is the witness statement and testimony of Mr Bridgman. He too was a far from convincing witness and what stands out about his evidence is that it is in essence just a bare assertion that it was he and he alone that had the idea. Unlike Mr Cooke he does not even attempt to explain how he came up with the idea. He had ample opportunity to provide some background but chose not to do so. I find that surprising and particularly harmful to Fireworks' case.
66. I turn next to Mr Killaspy. He was of the three the most convincing witness. Mr Killaspy attempted to fill the void left by Mr Bridgman by suggesting that it was his reporting to Mr Bridgman of the Ministry of Justice tests that was the catalyst for Mr Bridgman coming up with the invention. Had Mr Bridgman backed up Mr Killaspy on this then this would probably have been enough for me to find in Firework's favour. Unfortunately without the support from Mr Bridgman, Mr Killaspy's evidence on this point loses some of its weight. The other significant aspect of Mr Killaspy's evidence, at least in relation to the question of inventorship, was the telephone conversation that he had with Mr Bridgman shortly after the invention had been devised. I find Mr Killaspy's evidence on this not as strong as other parts of his evidence. There is I believe some confusion in his various witness statements as to what precisely Mr Bridgman told him. Was it for example that he (Mr Bridgman) had had the idea of putting the pump and motor in the housing? Or was it merely that he had had the idea that the design that Mr Cooke had told him about as a possible solution to oven fires might also work in prisons?
67. Of the other arguments put forward by Firework's in support of its case, the only one which had in my view any traction was the delay by Mr Cooke in raising inventorship as an issue. I am satisfied that he did know about the patent application relatively soon after it had been soon yet he did not raise the issue of his entitlement until after he and Mr Musk had been informed that they may be infringing the patent. Mr Cooke's

argument that he didn't think a patent would be granted was in my mind not entirely persuasive.

68. So where does this leave me? The scales are certainly not straining under the weight of evidence provided by both sides. However the total weight of evidence is ultimately not important. What matters is whether after having carefully weighed up all the available evidence I believe that it was more likely than not that Mr Cooke came up with the idea of putting the pump and motor in the cabinet.
69. I have come to the conclusion that Mr Cooke has not done enough to convince me that was the case. In a case such as this where there is no documentary evidence, credibility is crucial. Unfortunately I found both Mr Cooke and Mr Bridgman to be lacking equally in this respect. The burden of proof, together with what other little evidence there was, for example the testimony of Mr Killaspy, works against Mr Cooke to the extent that I am unable to find in his favour.”

#### Grounds of appeal

27. Mr Cooke appeals on two grounds. The first ground is that the hearing officer erred in law by making impermissible resort to the burden of proof. The second ground is that the hearing officer's conclusion was contrary to the evidence.

#### First ground of appeal

28. In *Stephens v Cannon* [2005] EWCA Civ 222, [2005] CP Rep 31, the Court of Appeal considered the question of when a tribunal is entitled to resort to the burden of proof as a means of resolving an issue of fact. Giving the leading judgment, Wilson J (as he then was, and with whom Arden and Auld LJ agreed) summarised the applicable principles at [46] as follows:
- “(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
  - (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
  - (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

- (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.
- (e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary.”
29. Counsel for Mr Cooke also relied on my decision when sitting as the Appointed Person in *BRUTT Trade Marks* [2007] RPC 19. In that case I allowed an appeal from a decision of a hearing officer in a trade mark case. Having stated at [19] that “[t]he fundamental problem with the hearing officer’s decision is that it does not contain any clear findings of fact based on the hearing officer’s assessment of the evidence”, I went on at [21] as follows:
- “The hearing officer rightly observed that the burden of proof lay on the applicants. He went on to decide that, not that the applicants were either right or wrong, but that they had failed to discharge the burden of proof. This is a case, however, in which each side has a clear case on the central issue: the applicants contend that the proprietor was their agent or distributor while the proprietor contends that the converse is true. In such circumstances the fact-finding tribunal should strive to decide what the correct version of events is (which is not to say that the tribunal is confined to the versions advanced by the parties). In civil proceedings a tribunal should only decide a disputed issue purely on the basis that the party bearing the burden of proof has not discharged that burden in exceptional circumstances, that is to say, where it cannot reasonably make a finding in relation to that issue despite having striven to do so: see *Stephens v Cannon* [2005] EWCA 222 at [46].”
30. Counsel for Mr Cooke submitted that the hearing officer in the present case had fallen into the same error as the hearing officer in *BRUTT*. Counsel for Watermist submitted first that, on a proper reading of the decision, the hearing officer had not in fact resorted to the burden of proof; but secondly that, if he had, he was justified in doing so.
31. In considering these submissions, the first point to make is that the present case differs from *BRUTT* in a number of respects. In *BRUTT* there was no cross-examination of the witnesses, whereas in the present case there was; in *BRUTT* there

was a considerable amount of relevant documentary evidence, whereas in the present case there is none; and in *BRUTT* the hearing officer not only explicitly decided the matter on the basis of the burden of proof without attempting to decide who was right, but also made other errors as well.

32. Turning to counsel for Watermist's first submission, it is common ground that the hearing officer asked himself the correct question at [68]: did he believe that "it was more likely than not that Mr Cooke came up with the idea of putting the pump and motor in the cabinet"? Counsel for Mr Cooke argued that the hearing officer had not answered that question at [69], but had merely held that Mr Cooke had not discharged the burden of proof.
33. Counsel for Watermist argued that, on a fair reading of that paragraph, the hearing officer had answered the question in the negative. In support of this argument, he relied in particular on the first sentence and on the hearing officer's reference in the last sentence to the evidence of Mr Killaspy as lending some slight support for his conclusion. Counsel acknowledged that the hearing officer had borne the burden of proof in mind, but submitted that that did not mean that the hearing officer had merely held that Mr Cooke had failed to discharge the burden of proof.
34. In my view the hearing officer's decision is not clear on this point. After some hesitation, I have concluded that I accept the submission of counsel for Watermist. Given my doubt on the point, however, I shall proceed to consider counsel for Watermist's second submission.
35. Counsel for Watermist argued that this was a proper case for resort to the burden of proof for the following reasons. First, it was largely one man's word against another's, there being no documentary evidence and Mr Killaspy not having been present when the invention was conceived. Secondly, the hearing officer had concluded that neither Mr Cooke nor Mr Bridgman was a more credible witness than the other, and thus was unable to determine the issue by reference to their credibility. Thirdly, the hearing officer had striven to decide the issue without resort to the burden of proof and had clearly explained why he had not been able to do so. In support of these submissions, counsel relied on *Stephens v Cannon* at [46(b)] and *Verlander v Devon Waste Management Ltd* [2007] EWCA Civ 825, in which Auld LJ (with whom Rix and Moses LJJ agreed) said at [24]:

"When this court in *Stephens v Cannon* used the word 'exceptional' as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice -- and a respectable and useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue ... that he had considered carefully whether there was evidence on which he could rationally decide one way or

the other. It is more than plain from what he has said and why, that he concluded he could not. ...”

36. Counsel for Mr Cooke argued that the hearing officer could and should have decided who was right on the central issue. He emphasised that it was only where there was no rational basis for deciding one way or the other that the tribunal was entitled to resort to the burden of proof.
37. In my judgment the hearing officer was entitled to resort to the burden of proof for the reasons given by counsel for Watermist.

#### Second ground of appeal

38. Counsel for Mr Cooke submitted that the hearing officer ought to have concluded that Mr Cooke had devised the inventive concept for the following reasons:
  - i) Mr Cooke’s account was inherently credible;
  - ii) by contrast, Mr Bridgman’s account was bare assertion which carried little weight;
  - iii) Mr Killaspy was not in a position to corroborate Mr Bridgman’s account (and Mr Bridgman had not corroborated Mr Killaspy’s);
  - iv) Mr Cooke’s account was not meaningfully challenged in cross-examination, whereas Mr Bridgman’s was;
  - v) the hearing officer’s reasons for not regarding Mr Cooke as a credible witness were inadequate;
  - vi) the hearing officer had been wrong to treat Mr Cooke’s delay in asserting his claim as counting against him; and
  - vii) the hearing officer had failed properly to weigh the evidence.
39. Before turning to consider these arguments, it is important to be clear as to the applicable principles. The first point is that this is an appeal from a specialist tribunal. In those circumstances, the warning given Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30], which was approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2007] UKSC 49, [2011] 2 All ER 65 at [43], is salutary:

“ ... This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not

heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. ...”

40. The second point is that the hearing officer had the advantage of seeing and hearing the witnesses give evidence. I have not had that advantage. The correct approach of an appellate court to the lower court or tribunal’s findings of fact in such circumstances has been considered by the House of Lords and Supreme Court in a considerable number of cases, recent examples being *Biogen Inc v Medeva plc* [1997] RPC 1, *Piglowska v Piglowski* [1999] 1 WLR 1360, *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 and *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477. In short, the appellate court should only overturn a finding of primary fact involving the assessment of witnesses if it is satisfied that the lower court or tribunal was plainly wrong.
41. Turning to the submissions made by counsel for Mr Cooke, his first point was that Mr Cooke had given a (relatively) detailed account of the conception of the invention, which if unchallenged would have sufficed to discharge the burden of proof. I accept this, but it is evident that the hearing officer did too, since he described Mr Cooke’s account at [64] as “a credible and consistent story”.
42. Counsel’s second and third points were that Mr Bridgman’s account of the conception of the invention was so lacking in detail as to amount to bare assertion and that Mr Killaspy was not in a position to corroborate it (and Mr Killaspy’s account was not corroborated by Mr Bridgman). Again, I accept these points; but again, so did the hearing officer at [54], [65] and [66]. Furthermore, the hearing officer expressly took into account the difference between the nature and extent of Mr Cooke’s account and that of Mr Bridgman at [63].
43. Counsel’s fourth point was that Mr Cooke’s account was not meaningfully challenged in cross-examination, whereas Mr Bridgman’s was. I do not accept that this is a significant point. Both men’s accounts were challenged in cross-examination, and the difference in the nature and extent of the challenges reflects, but does not add to, the difference in the nature and extent of the other person’s evidence.
44. Counsel’s fifth point was that the hearing officer’s reasons for not regarding Mr Cooke as a credible witness were inadequate. I am unable to accept this. The hearing officer gave three reasons for his assessment. Although counsel endeavoured to persuade me that they were all minor or peripheral matters, they cannot be dismissed as being of no weight, particularly when they are considered cumulatively. The weight to give them was a matter for the hearing officer who saw and heard Mr Cooke. This is particularly so given that, as the hearing officer clearly appreciated, what mattered was the *relative* credibility of Mr Cooke and Mr Bridgman.
45. Counsel’s sixth point was that the hearing officer had treated Mr Cooke’s delay in asserting his claim as another factor which undermined his credibility, and that he was

wrong to do since the delay was explicable on other grounds. Again, however, this was a matter which the hearing officer was entitled to take into account.

46. In my view, counsel's last point goes to the heart of the matter. On the face of the decision, the hearing officer did conscientiously weigh the evidence. Having done so, he concluded that he was not persuaded on the balance of probabilities that Mr Cooke's account was the correct one, or at least that Mr Cooke had not discharged the burden of proof. Although he did not articulate it in this way, what counsel's argument boils down to is a submission that there was only one conclusion which was open to the hearing officer on the evidence, namely that Mr Cooke had devised the inventive concept, and hence the hearing officer's decision to the contrary was plainly wrong. I am unable to accept that submission.

#### Conclusion

47. The appeal is dismissed.