

INTELLECTUAL  
PROPERTY LAW  
AND POLICY

Volume 11

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Edited by  
Hugh C Hansen



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# Intellectual Property Law and Policy

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VOLUME 11

*Edited by*

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and Policy Institute*



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## Foreword

This volume is an edited version of the formal presentations and colloquies from the Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy held at Fordham, March 27th and 28th, 2008. Starting with last year's volume, we have resumed the practice of our first nine years of publishing the conference proceedings. We expect to publish the proceedings from the tenth through the fourteenth conferences to make the printed record complete.

In light of the eminence of conference participants, the importance of the subject matter, and astonishing candor of the exchanges, we hope and expect that the ideas and analyses presented in this volume will make a valuable contribution to worldwide discussions of intellectual property law and policy. The entire series provides an exceptional record of the development of this vital area; pinpointing the issues, ideas, and personalities behind new legal and policy initiatives. For both practitioners and scholars, we have strived to make the conference and these volumes an accessible, comprehensive, and unbiased forum for the best thinking and analysis in this important and often contentious area.

Hugh C. Hansen  
Editor

## Acknowledgments

Many people and organizations have helped make the Conference and this volume possible. First and foremost are our conference sponsors. The support of thirty-five organizations, listed at the beginning of this volume, has been crucial to the conference's success and continued existence. We have benefited as much from their active interest in, and profound knowledge of intellectual property law, as from their generosity. In this regard, we wish to thank in particular Brad Smith, Microsoft Senior Vice President, General Counsel, Corporate Secretary, Legal and Corporate Affairs, for his personal and professional support, as well as the Microsoft Corporation itself, which has provided very generous support for the conference and for the publication of this volume. We are also grateful to the many representatives of our sponsors, as well as friends of the conference, who participated in the numerous group teleconferences and individual telephone calls that helped us determine which topics would be of most interest and relevance as we put together the program.

Of course, any conference is only as good as its faculty. Our distinguished speakers were from the private sector, government and academia; from across town and across the globe, in fact numbering 157 from 31 countries, and 6 continents. They are truly the *crème de la crème*. They came together in a lively, collegial spirit to offer presentations, discussion and commentary of the highest caliber. Also, as will be apparent to even the most casual reader of this volume, those attending the conference asked some of the most incisive questions, and made some of the most telling observations. I have often said that we could switch the speakers and the audience without any diminution in the quality of the proceedings.

William M. Treanor, Dean of the Fordham University School of Law, has from the very start of his nine-year tenure given the conference and intellectual property law at Fordham his full support, for which we are very grateful. Alice Wong, Associate Director of our Office of Public Programs, was instrumental in every step of the long arduous task from August through March of organizing this conference which, with its three concurrent sessions, is equivalent to a five-day conference. Also, David Quiles and the staff of the Public Programs office worked tirelessly for the weeks immediately before the conference and nonstop for the two days of the conference to efficiently manage the herculean tasks involved in administering the conference. In this regard, members of Fordham's *Intellectual Property, Media and Entertainment Law Journal* provided indispensable support throughout the two days of the conference, spearheaded by Anthony Rizzo and Erich Carey.

Jason Lunardi, a Fordham Law graduate and current Fellow at our Fordham Intellectual Property Law Institute, oversaw all of the footnoting and technical editing for this volume, and guided the book through to publication. His meticulous attention to detail and exceptional organizational focus kept this immense project on course. Assisting Jason was a diligent team of research assistants: Anthony Rizzo, Sarah Floyd, Louise Cherkis, and Ndidi Igboeli, who provided expert review of the manuscript including very valuable bluebooking. They were able to locate even the most obscure citations and correct the array of errors that always creep into the citations of every manuscript.

Sandra Sherman, Assistant Director of the Fordham Intellectual Property Law Institute, along with Sharon Hammer, President of Verbatim Transceedings, Inc., assembled all of this volume's material and were vital in organizing the substantial task of collecting author revisions. Their ability to track down a missing presentation or a stray but crucial submission is

extraordinary, and often saved the day when we had nowhere else to turn. Sharon also managed the recording and transcription of the conference sessions. The accuracy and attention to detail of Verbatim's transcription and manuscript services are second to none.

Finally, we are very pleased with our association with our publishing partner, Hart Publishing of Oxford, England. Richard Hart and his colleagues have done a wonderful job in putting this volume together. In particular, Richard and Rachel have been very professional, agreeable, patient and supportive in a way that I do not think any other publisher could be, or even would want to be. Hart Publishing is in a class by itself.

H.C.H.

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**FORDHAM UNIVERSITY SCHOOL OF LAW  
FIFTEENTH ANNUAL CONFERENCE  
INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY  
New York, March 27–28, 2008**

**WELCOMING REMARKS**

PROF. HUGH C. HANSEN  
DEAN WILLIAM TREANOR

*Fordham University School of Law*

**PROF. HANSEN:** Welcome. This is the Sixteenth Annual Fordham Intellectual Property Law and Policy Conference. I am very happy that you have all come. We have a fantastic program today and tomorrow with great speakers and interesting issues.

We encourage audience participation and questions. Time for discussion has been set aside in all of the concurrent sessions. Please feel free to ask questions or make comments.



## **In Memoriam**

### **Rt. Hon. Lord Justice Nicholas Pumfrey**

**PROF. HANSEN:** Starting off, I would like to just spend a few minutes talking about Nicholas Pumfrey, whom many of you knew. Nicholas died, age 56, after a stroke on Christmas Eve.

For everyone who knew him, this is a major and sad loss. Nicholas was an outstanding person, friendly and a lot of fun. He went to Oxford for both law and physics. He had just been appointed the Court of Appeal and had an exciting appellate career ahead of him. He had been the youngest person appointed to the Court of Chancery, the trial court in the United Kingdom, where he was a highly-respected patent court judge. He was also was the youngest person appointed to the Court of Appeal.

Nicholas was a tremendous friend of the Fordham Conference. He loved participating. What he liked the most, he said, was that for the first time since he had been a barrister, he was forced “to get up on my hind legs and defend myself.” He would have been here this year. We dearly miss him.

Now we will have brief remarks from one of his judicial colleagues from the Continent, Judge Robert van Peursem of the District Court, The Hague, in The Netherlands.

**JUDGE VAN PEURSEM:** Thank you, Hugh.

I had known Nicholas actually only for four years. Yet I considered him a close professional friend. He made you feel like that.

Obviously, he was one of the giants in the patent world, which he loved so much. In one of the court transcripts in a parallel case I once read, after the Q.C.s had started with their vigorous cross-examination, he said to the Oxford professors who were examined there, “Welcome to the wonderful world of patents, gentlemen.” I forgot what it was about really, but that’s typical of him.

We had frequent talks and email contacts in parallel cases. I think that is a public secret. *Kirin-Amgen* was discussed at length between Lord Hoffmann and Peter Meier-Beck at that stage. And there are numerous more examples.

Fairly recently, we discussed a parallel case which he had done first. I won’t tell you which patent it was, but he said to me, “This one won this year’s prize of the worst patent I’ve ever seen.” That’s one of his famous one-liners. The best ones I can’t repeat here, I’m afraid.

Also, we had talks about conferences, who would attend and who would try to make what point. He really was keen on going to one but at a certain moment he said to me, “Sorry, can’t make it. Got to tend to the bees.” And off he went on his BMW motorbike to the south of France, to Provence, where he had a cottage and where he made his own honey. That’s also Nicholas – priorities first.

As you probably know, among judges there is always a certain uneasiness between the lower courts and the courts of appeal. Nicholas was a trial judge for a number of years, and being one myself, I jokingly asked him after went onto the Court of Appeal and just two days before he died, “How’s life in semi-retirement.” His dry answer was, “Well, it’s only ten years before a full pension for me and fourteen years for obligatory retirement.”

He so much welcomed his second life as an appellate judge. His first judgment that was handed down in that capacity shows what might have come. But it didn’t.

As a judge and a friend, he is dearly missed.

**PROF. HANSEN:** Thank you very much, Robert.

We are going to include in the published volume of these proceedings the remembrances of Nicholas by Christopher Floyd, Robin Jacob and David Neuberger.

## Nicholas Pumfrey — A Patent Lawyer’s Appreciation

Christopher Floyd<sup>1</sup>

Sir Nicholas Pumfrey, who died at the end of 2007, had just been sworn in as a Lord Justice of Appeal in Ordinary — a member of the civil division of the Court of Appeal in England and Wales. In 1997, at the age of 46, he had been appointed a judge in the Chancery Division of the High Court, and a nominated judge of the Patents Court, in 1997. When appointed to the Court of Appeal he had therefore just completed 10 years of service as a trial judge, and was still young enough to be considered for further promotion to the House of Lords.

Although Pumfrey was first and foremost a specialist in patent and other intellectual property matters, judges of the Chancery Division have to turn their hands to a wide variety of more general property and business related cases. Not all of Pumfrey’s contribution is therefore to be found in the pages of the Reports of Patent Cases or Fleet Street Reports, where IP cases are customarily reported. Pumfrey was called upon to take his share of the general business of the Chancery Division — deciding many important cases about land law, insurance, company law, insolvency and pensions. He also regularly presided in the “interim applications” court — a court in which no application may take more than two hours, and in which the judge may be called upon to decide or otherwise dispose of dozens of short applications in the course of one day. He proved himself well able to master this aspect of the work of a judge, as well as more substantial forays into areas where his background provided only the most general of preparations.

However it was in the field of IP that Pumfrey made his greatest contribution. Quite apart from his role as a judge, he gave very freely of his time to lecture on IP subjects both in the U.K. and abroad. He was also the first judge from the U.K. to be made a member of the Enlarged Board of Appeal of the European Patent Office.

When I was asked to contribute this short review of Nicholas Pumfrey’s contribution to IP law I found it difficult to pinpoint a particular case or set of cases on substantive law. That is not at all surprising. The principal role of the trial judge is to find the relevant facts and then to apply the law as interpreted by the higher courts to those facts. Many of his decisions are lengthy analyses of the relevant evidence, stating and applying settled principles of law. A trial judge will not often have to make fresh tracks in the law — at least not in the absence of at least some guidance from higher courts. This has particularly been the case since the first appointment of a specialist IP judge to the Court of Appeal, and judges with IP experience to the highest court, the House of Lords.<sup>2</sup> The scope for a trial judge single-handedly to mould the law is limited. Pumfrey’s ten years as a trial judge can be seen as his preparation to take on the more influential role in the appellate courts. He did not see his function to be that of law maker.

Nevertheless, the Patents Court that he left behind was improved in many ways by his decisions. Browsing through a stock that I have of the transcripts of his judgments, I was reminded of the themes of his time as a judge. In the remainder of this article I will discuss those that I which I came across in this process.

<sup>1</sup> A judge of the Patents Court, Royal Courts of Justice, London.

<sup>2</sup> Firstly Aldous LJ, then Jacob LJ appointed to the Court of Appeal. Law Lords Hoffmann, Neuberger and Walker all have experience of patent cases as trial judges.

*The Technology Behind Patent Cases*

During his tenure as a trial judge Pumfrey had his fair share, some would say more than his fair share, of very heavy, highly technical patent cases. His background in physics made him well suited deal with the upsurge in litigation about computers, electronics, telecommunications technology, and in particular mobile phones. Although the big cases in these areas tended to come his way, he was perfectly willing to tackle cases out of his technical field of specialisation. Whatever the technical area he viewed it as his first task fully to understand the underlying technology.

Pumfrey's judgments invariably contained masterly summaries of the background technology. This was not driven simply by his interest in such matters. He rightly considered that his most important function was to understand the technology and explain it in his judgment in the clearest possible terms. The availability of expert witnesses, who make reports to the court and are cross-examined orally (and are sometimes appointed as court experts) provides the trial judge with a unique opportunity to achieve an understanding of the technology. He understood that if the trial judge did not take advantage of the assistance available to him, the chances of the case being decided on the correct technical basis in the appellate courts were small. He would frequently interrupt a cross examination by saying "Hang on a minute, I need to get this right so I can explain it to the Court of Appeal."

In consequence, Pumfrey J was demanding of the experts who appeared in front of him. A low point was the expert in *R.I.M v. Inpro*,<sup>3</sup> the first Blackberry telephone case. The expert had suggested in a witness statement that he had taught and researched computer science. He had not. What was more, when he went into the witness box he behaved as no witness, let alone an expert, should. Pumfrey found him "a remarkably obstructive witness".

He said:

I was persuaded on at least two occasions to intervene, not for the purpose of elucidating answers or to obtain information, but to attempt to break into a refusal to answer a question.

The witness was "*simply an unsatisfactory expert.*" But there was no vindictiveness behind his finding — rather it was a sense of profound regret. Pumfrey's real concern was that he was thereby deprived of a reasonable view based on a through knowledge of the case that was contrary to that being advanced by the expert for the other side.

Pumfrey's ability to deal with these very highly complex cases gained him both national and international respect. His influence on patent litigation remains visible in a number of other ways.

*Disclosure*

One firm belief that one can see throughout his decisions was that a patent action ought to be capable of being decided within the four corners of the patent specification itself, and by reference to the prior art and the expert evidence. To say that he was not a fan of extensive documentary disclosure would be to understate his position. In *Nichia v. Argos*<sup>4</sup> he decided, almost as a matter of principle, that documentary disclosure of the historical record of the way in which the inventors had arrived at the invention did not need to be given. In refusing permission to the appeal to the court of appeal he said "I have waited nine years actually to do this."

<sup>3</sup> [2006] EWHC 70 (Pat).

<sup>4</sup> Reference in the Court of Appeal: [2007] EWCA Civ 741.

It had indeed been a consistent theme of his. In an earlier case he had said:

I have a rooted objection to permitting wide-ranging disclosure to be requested for the purpose of providing the sort of secondary indications described [in *Molnlycke*] as material which must be kept in its place, unless I have on the evidence a real apprehension that the documents may be of assistance. The evidence is actually to the contrary.<sup>5</sup>

His views in *Nichia* gained the support of Jacob LJ, who recognised that the time taken up by the disclosure and subsequent scrutiny of documents of this nature was one of the major causes of the high cost of patent litigation. But he did not gain the support of the other two members of the Court of Appeal, who thought that a more case sensitive approach to disclosure was appropriate.

Many of his early decisions reveal this firm belief in the wastefulness of disclosure. Another case he may have had in mind in refusing the disclosure in *Nichia* might have been *Norton Healthcare Limited v. Minnesota Mining*.<sup>6</sup> In that case, the patentees had discovered that those attacking the patent had themselves applied for patents which had been abandoned before they had been published. Every advocate loves such material: according to this theory there is no greater tribute to inventiveness than that which comes out of the mouth of the other side's patent attorney. The patentee sought disclosure of the application on the grounds that it would be likely to comment on the prior art and also to show that the defendants themselves thought the subject matter of the patent to be inventive.

Pumfrey thought material of this nature to be "secondary evidence" in line with the decision of the Court of Appeal in *Molnlycke v. Procter & Gamble*.<sup>7</sup> His remarks are revealing about his attitude to this type of material, and indeed to self-serving statement in patents in general. He pointed out that patents were:

not merely records of work done. They are legal documents, and it must be realised that they are also exercises in advocacy aimed at the patent examiner. An applicant for a patent does not necessarily believe that the subject matter of his patent is inventive: he may be intent on making life difficult for his competitors whether or not his patent is valid. He may apply for patents as a matter of policy if he is proposing to commercialise a new product. Accordingly if the court is to take care to attribute the correct weight to statements contained in, and inferences drawn from, a patent specification, it must investigate the state of the knowledge of both the patent department and of the relevant workers at the material date; it must be satisfied that the workers did not have other knowledge irrelevant to the investigation; and all these tasks must be undertaken so as correctly to obtain a merely secondary indication of the obviousness or otherwise.

He concluded:

Experience has shown that investigation of secondary indications of obviousness and non-obviousness can wholly overshadow the assessment of the primary issues.

### *Procedural Fairness*

Whilst it was difficult to persuade Pumfrey J to make an order for disclosure, it would be wrong to suggest that he did not have a firm belief in procedural fairness. He was never impressed by the advocate's "rabbit from the hat" — the document which the expert as not had an opportunity of considering, sprung on the expert and the court in cross-examination. Under Pumfrey's direction a practice grew up of indicating to the expert in advance any new documents which he is to be asked about, such as previous statements of the expert himself, or other published materials.

<sup>5</sup> *Sandisk Corp. v. Koninklijke Philips Elecs.*, [2006] EWHC 2692.

<sup>6</sup> [1999] FSR 636.

<sup>7</sup> [1994] RPC 49.

In one of his last judgments<sup>8</sup> he proposed taking this procedure a step further, by suggesting that experts should be given notice of the points on which they would be tackled in cross examination:

... there may be something to be said for dealing with the expert evidence at trial in a manner slightly different from that to which we are accustomed. I was struck in this case by the strain placed on the cross-examiner and on the witness, and I suspect that had I been more enterprising in the management of the case, I would have tried to ensure that the experts were aware of the main points that would be raised in cross-examination, notwithstanding that they had read each other's reports and should therefore have been aware of the main differences between them.

The self-deprecating style in which this departure is presented is an indication of a genuinely modest man.

The same underlying belief in procedural fairness led him to treat computer calculations performed for the purposes of litigation in the same way as other experiments. That meant that the opposing party should be given proper notice and full detail of the way in which the analysis was performed. He did not like the idea that any aspect of the underlying thought processes should be hidden from view: In *Consafe v. Emtunga* (8th September 1998) he said:

Finite element analysis is not a procedure which always gives the same result. This is why Consafe asked Dr Billington to verify their results. It depends among other things on the selection by the analyst of the appropriate mesh of elements and the material properties which he attributes to each of those elements. It therefore involves an exercise of judgment, and if it is to be relied on in litigation adequate notice should be given to enable the party on the other side to assess the analysis and either criticise it or accept it. A finite element analysis is, in my view, an experiment ...

Again, in a trade mark case, *Decon v. Fred Baker*<sup>9</sup> he came to a conclusion which did not reflect a case that had been argued by either party. This became clear in the course of writing his judgment. So he notified the parties, sent them a provisional draft of his judgment, and gave them the opportunity to make further submissions. His sense of fairness pervaded everything he did.

Finally the same objective is visible in his decision to order disclosure of “work-up experiments” which lie behind an experiment in its final form as presented to the court by a notice of experiments. Particularly where a party is seeking to prove anticipation by inevitable result, it is often material to know how many false starts were necessary before the “inevitable” experiment achieved success. In principle, at least at the time at which they are performed, these experiments are the subject of legal professional privilege. In a case concerning this type of experiment,<sup>10</sup> Pumfrey J held, by analogy with cases on partial disclosure of privileged material, that where the purpose of an experiment is to show anticipation by inevitable result, any legal professional privilege otherwise attaching to documents relating to workup experiments for the experiment in the notice of experiments has been waived by the service of the notice of experiments.

### *Patent Claim Amendment*

Pumfrey was also one of the first to recognise that the old English rules about the amendment of patents did not sit easily with the corresponding practice of the European Patent Office. In that Office, when a patent is under opposition, amendments to the claims can be obtained without a

<sup>8</sup> *Nokia Corp. v. InterDigital Tech. Corp.*, [2007] EWHC 3077 (Pat).

<sup>9</sup> [2001] RPC 17.

<sup>10</sup> *Mayne Pharma v. Debiopharm*, [2006] EWHC 164 (Pat).

detailed consideration of the patentee's conduct in having originally obtained wider and invalid claims. Aldous J had held that the principles applied by the courts before the Patents Act 1977 continued to apply, despite the now concurrent jurisdiction in matters of amendment with the EPO. Pumfrey, along with other first instance judges at the time, thought that to cling to these old principles was no longer appropriate: see *Boston Scientific Limited v. Palmaz*.<sup>11</sup> It struck him as absurd that a patent could be successfully amended in the EPO in circumstances where the same patent in proceedings in England could not. In those circumstances the English rules of amendment were akin to additional grounds of invalidity, nowhere provided in the EPC.

The mini-rebellion by the trial judges was short lived. The Court of Appeal, in an interlocutory judgment in *Kimberley Clark v. Procter & Gamble*,<sup>12</sup> held that the 1977 Act had not introduced any change in the law. The old rules about the restrictive discretion on amendment continued to apply. It is significant that when the case came before Pumfrey J as the trial judge, the discretionary objections to amendments (which were also being sought in the EPO) were all rejected: Judgment 21 July 2000.

It was not until much later that the legislature intervened and provided by section 2(5) of the Patents Act 2004:

(5) In considering whether or not to allow an amendment proposed under this section, the court or the comptroller shall have regard to any relevant principles applicable under the European Patent Convention.

Legislation was therefore ultimately needed to achieve what Pumfrey J and the other trial judges had been prepared to do from the outset.

### *Declarations of Inessentiality*

In the second half of his career as a patents judge, Pumfrey was the judge in charge of a number of complex cases about mobile telephony. The companies involved in the operation of mobile telephony standards have a system under which they undertake to grant licences on patents which are "essential" to the standard. The royalty they receive in return can depend on the number of declared essential patents which they own. Whether the patents are truly essential to the standard is often, therefore, a subject of dispute. In order to unlock these disputes a number of actions in the U.K. have sought declarations about "essentiality."

The jurisdictional basis for these declarations was the subject of repeated assault. But Pumfrey J, backed up by the Court of Appeal, considered declarations of this kind had the potential to fulfil a business need and were therefore a legitimate use of the court's resources. He heard evidence about what the impact of a decision by a single judge in one country would be on negotiations for pooled patent rights in respect of a number of countries. With characteristic precision he asked whether the declaration sought would be of practical utility or whether "it would be the legal equivalent of shouting in an empty room."

One of his last acts as a first instance Judge was to grant declarations of this nature: see *Nokia v. Intedigital Corp.*<sup>13</sup>

The overall utility of this type of litigation can be seen from the fact that a previous action for similar declaratory relief was brought the other way: by Nokia Corporation against InterDigital for declarations of inessentiality in relation to 29 of InterDigital's patents. By the time the parties came to face up to the issues and exchange written evidence the 29 patents originally said by InterDigital to be essential had reduced to 7. Of those 7 Interdigital chose

<sup>11</sup> [1999] RPC 47.

<sup>12</sup> [2000] RPC 11.

<sup>13</sup> [2007] EWHC 3077 (Pat).

not to advance a case in relation to 3. That left 4, two of which were a parent and divisional, meaning that only three specifications had to be considered at trial.

### *Computer Programs*

It is no secret that Nicholas Pumfrey had a particular interest in computers. Whilst still at the Bar, he was instructed by the Comptroller of Patents in *Gale's Application*<sup>14</sup> one of the first cases on the “computer program as such” exclusion in the Patents Act 1977. In the ensuing years, the exclusion has proved difficult to interpret, and even when interpreted, has proved difficult to apply in practice. Pumfrey’s judgments in this area, such as *Shopalotto.com's Application* [2006] RPC 293 were amongst those that shed light on this somewhat intractable area. In that case he said:

There has been a tendency, especially in the earlier decisions of the Technical Boards of Appeal, to consider that the exclusions have in common a lack of ‘technical effect.’ While this may be true of many members of the list, it is not necessarily the case. A programmed computer provides an obvious example. Suppose a program written for a computer that enables an existing computer to process data in a new way and so produce a beneficial effect, such as increased speed, or more rapid display of information, or a new type of display of information. It is difficult to say that these are not technical effects, and, indeed, that the programmed computer, itself a machine that ex hypothesi has never existed before, is itself a technical article and so in principle the subject of patent protection. The real question is whether this is a relevant technical effect, or, more crudely, whether there is enough technical effect: is there a technical effect over and above that to be expected from the mere loading of a program into a computer? From this sort of consideration there has developed an approach that I consider to be well established on the authorities, which is to take the claimed programmed computer, and ask what it contributes to the art over and above the fact that it covers a programmed computer. If there is a contribution outside the list of excluded matter, then the invention is patentable, but if the only contribution to the art lies in excluded subject matter, it is not patentable.

As Lewison J said about that passage in *Autonomy Corporation's Application*:<sup>15</sup>

The clarity of analysis demonstrates what a loss to the law has been caused by his premature death.

I could not agree more. The loss to the profession of IP law in the U.K. and internationally has been immense.

<sup>14</sup> [1991] RPC 305.

<sup>15</sup> [2008] EWHC 146 (Pat).



## **In Memoriam: Nicholas Pumfrey**

*22nd May 1951 – 24th December 2007*

The Rt. Hon. Sir Robin Jacob<sup>1</sup>

“The Honey Judge” is what the wife of one of my colleagues called Nicholas. That was not merely because he kept bees at his beloved house, surrounded by lavender fields, in the Haute Provence. Indeed he did keep bees and at some point usually just before Christmas he was apt to appear in your room grinning and bearing a giant pot of honey in a plastic bag. But the name “honey judge” was more appropriate than just because of that — it correctly summarised what he was — a really, really sweet man.

It is an inevitable feature of life that people die. But it is ever so hard when it happens to one so young, so full of life, so life-enhancing. Even though it is now nearly a year since he died, people keep saying to me they feel the same way as I do about his death — that they go on missing him very badly. I still cannot bear to take the name “Pumfrey” off one of the quick-dial buttons on my phone. I still miss those phone calls at about 9.30: “Good morning. Here is your wake-up call” was how he often started these. The conversation was 95% gossip and 5% law.

But that 5% was serious — though never solemn. If we disagreed about a point, Nicholas would say: “Now look here ...” and proceed to expose any weakness I had. Of course after I had gone to the Court of Appeal we could not talk about any pending appeal — though I would get told why I was wrong in those rare cases (I can only think of one) where I was party to reversing him. Nor could we talk about cases pending before him in case they came my way later. But that left plenty to discuss — whatever the problem which he or I had had.

Nicholas’ funeral service took place in the ancient Temple Church — the place was crowded out — how many is anyone’s guess but it can’t have been much less than 1,000. He himself had no religion — many of our jokes were about it.

Nicholas had just come to the Court of Appeal before he died. His breathtaking knowledge of so many areas of the law beyond intellectual property itself was about to be deployed in judgments which would have been wise, readable and humane. Many are losers by his death — his friends, his colleagues, both intellectual property law and the law in general, and not just in my country but well beyond. The Fordham conference itself will be the poorer — many at it will miss that great shock of white hair, the incisive comments and that enormous grin.

<sup>1</sup> A judge of the Court of Appeal of England and Wales.