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No 25 of 1960

IN THE HIGH COURT OF AUSTRALIA

VINCENT AND ANOTHER

V.

SNAPPY PANTIES PTY. LIMITED

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on FRIDAY, 21ST JUNE, 1963

A. C. Brooks, Government Printer, Melbourne
C.7639/60

VINCENT AND ANOTHER

v.

SNAPPY PANTIES PTY. LIMITED

JUDGMENT McTIERNAN J.

VINCENT AND ANOTHER

v.

SNAPPY PANTIES PTY. LIMITED

This is an action for infringement of Letters Patent No. 224,025, sealed on the 2nd February 1960. There are four claims in the specification which are all dated the 26th February 1957. The plaintiffs allege that the defendant offered for sale, distributed or sold articles which are within the scope of claims 2 and 4. Examples of these articles were tendered in evidence. A ground of defence is a denial that the defendant infringed any of the claims of the patent. As the plaintiffs limited the allegation of infringement to claims 2 and 4 it is necessary to consider only whether the defendant infringed those claims or either of them. The articles in question are catamenial garments - it is to articles of this class that the plaintiffs' patent refers. Each of the articles alleged to be an infringement includes a lining of waterproof material (referred to in the specification as a "protective panel") covered entirely by an innermost lining of soft pervious material similar to the material of which the garment is made. The defendant says that neither of the articles of which the plaintiffs complain has one of the features necessary to bring it within the scope of claim 2. This claim is in these words: "An undergarment according to claim 1 wherein the pervious flap-like piece of cloth is extended over the whole of the protective panel". The only difference between this claim and claim 1 is that in the latter a flap-like piece of cloth forms a cover about portion only of the "protective panel". Subject only to this modification, it is necessary for an article to have all the features mentioned in claim 1 in order to fall within claim 2. One of these features is a "pocket" as described in claim 1. Neither of the articles alleged to infringe claim 2 has this feature. It follows that the defendant has not infringed

claim 2.

A ground of invalidity is urged in the case of claim 4. This claim is in these words: "A sanitary protective undergarment substantially as herein described and as illustrated in Figure 4 of the accompanying drawings". It is said that this claim is invalid under sec. 40 of the Patents Act 1952-1955. An undergarment which is substantially like that described "herein", that is in the specification, is characterized by a "pocket" formed by leaving the flap-like piece of material unsewn at its front edge. However, Figure 4 is diagrammatically a section of a garment which has no "pocket". The numeral 9 which is used in the other three diagrams to illustrate the "pocket" feature of the invention is absent from Figure 4. It may be that the plaintiffs had in mind an article in which the waterproof "panel" was entirely covered by a layer of pervious material which was sewn about its edges, and accordingly had no "pocket". But, in my opinion, claim 4 fails to define with certainty such an invention; and it is by no means clear that what is claimed by claim 4 is what is diagrammatically illustrated by Figure 4. It follows that this claim is invalid.

The essence of the alleged invention is the improvement in the making-up of the class of article in question by covering the waterproof "panel" wholly or partly with a covering of soft pervious material. It is said by the defendant that this improvement in such a garment is not an invention within the meaning of the Act. The defendant relies upon common general knowledge and the publication in Australia of a number of specifications relating to catamenial garments. These were not examined in detail at the trial. Since the conclusion of the trial I have perused

these citations. It appears to me that in British Patent specification No. 426,980, published in Australia in 1935, there is disclosed a catamenial garment containing a waterproof lining covered by a layer of material of which the garment is made, substantially similar to that described in the plaintiffs' specification. The way in which the plaintiffs put their case that a garment made in accordance with the specification is novel and has the quality of invention is that such a garment may be worn without a sanitary pad and gives added comfort to the wearer prior to menstruation. The specification itself describes a catamenial garment to be worn prior to and during menstruation, but none of the claims is restricted to a garment to be worn only before or at the time of, menstruation. In view of the abovementioned citation it does not seem to me that a catamenial garment made up in any of the ways described in the present specification is novel. In my judgment the plaintiffs' action should fail also on this ground. The defendant also alleged prior user. Evidence was led to prove that each of the alleged infringing articles resembles a sample of a catamenial garment which was made up for the defendant and offered by it for sale before the priority date. The sample was not produced but was described by oral evidence. The evidence adduced by the defendant on the issue of prior user was not, in my opinion, altogether satisfactory; it was, I think, justly criticized in some important respects by Mr. Bannon in his address. However, with hesitation, I think that the defendant proved its case on the issue whether previously to the priority date it made up and offered for sale a garment having an innermost lining of soft material over the waterproof layer within the garment. The action is dismissed with costs, except the costs relating to the drawing, engrossing and filing of the amended particulars of objection.