

PATENTS ACT 1977

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IN THE MATTER OF applications under Sections 71 and 72 by Apex (Textiles) Limited respectively for a declaration of non-infringement in respect of, and for the revocation of, Patent No 2001238 in the name of H Flude and Co (Hinckley) Limited

DECISION

Apex (Textiles) Limited ("Apex") applied on 28 September 1989 under section 71 for a declaration that a particular gusset-inserting machine, referred to as the "modified Solis 11 machine" and described in appendix C to their statement under rule 74(1), does not infringe any valid claim of patent no 2001238. They also applied, initially as part of their section 71 application but on 30 March 1990 separately under section 72, for the revocation of the patent on the grounds of lack of novelty and inventiveness of the claims in relation to certain prior art and lack of clarity and completeness of the specification. The proprietors of the patent, H Flude and Co (Hinckley) Limited ("Flude"), contested all grounds of both applications, which they contended should be dismissed. They also requested that they be granted a certificate of contested validity in respect of the patent in suit.

The two proceedings under sections 71 and 72 were combined but the pleadings and evidence stages did not run smoothly. Essentially the proprietors questioned the relevance and admissibility of some of the applicants' evidence. As a result the applicants proposed to amend their rule 75(1) statement to delete certain of the grounds for revocation and to withdraw some of their evidence, subject to the reservation that this was "done without prejudice to the applicant's right to rely upon the deleted grounds and withdrawn evidence in separate revocation proceedings". Their right to reserve their position in this way was challenged by the proprietors.

At what was appointed to be a hearing of the substantive issues on 4 June 1992 this preliminary issue immediately arose, and I found it necessary to give an oral decision on it. Consistent with what I understood to be the practice of the courts, and having regard to what would be just to both parties and in the public interest through the elimination of uncertainty, I required the applicants to elect whether to proceed with the alleged grounds for revocation which they sought to withdraw conditionally, along with the remaining grounds, as part of a single action to be heard at a single hearing, or to withdraw them unconditionally from the proceedings. If they elected to withdraw them I ordered that these same grounds shall not be raised again in any proceedings between the parties before the Comptroller, and shall only be raised in the court with the leave of the court.

In the event the applicants elected at the hearing to withdraw the grounds in question unconditionally, and my order as to their later resurrection therefore took effect. Having given some consideration to the proper terms for the amended statements under rules 74 and 75, I admitted the amended rule 75(1) statement and gave permission for the rule 74(1) statement to be amended to make the two statements consistent. In addition, I confirmed that the only evidence remaining in the proceedings is the affidavit of Mr R J Bright, with exhibit RB1, and paragraphs 1-6 and 13-17 of the affidavit of Mr A W Pears, with exhibits AWP 1-6 and 8. Mr Bright is Chairman and director of Wells of Mayfair Limited, tailors and shirtmakers, and holder or past holder of a number of offices principally associated with the clothing industry. Mr Pears is Managing Director of Apex. Both affidavits were filed on behalf of the applicants, the proprietors declining to file any evidence.

The hearing was resumed on 3 July 1992 when the substantive matters in issue were argued before me. As at the June 1992 hearing, Mr Michael Silverleaf and Mr Nicholas Bragge appeared as counsel for the proprietors and applicants respectively.

The patent in suit relates to hosiery and particularly to the fixing of gussets on anti-hose or similar garments. According to the specification:

"Hitherto the seaming of gussets to anti-hose or similar garments has been effected either by hand using a single seam or by machine using two or more seams.

It has hitherto proved difficult to mechanically seam a gusset to a garment by a single continuous seam and in practice seaming has been effected by two or more machines producing separate portions of the final seam.

The present invention seeks to provide an improved manner of mechanically seaming gussets in garments."

Omnibus claims apart, there are three main claims, 1, 11, and 12, which read as follows:

Claim 1: "A method of seaming a gusset to a garment comprising supporting the garment and presenting the gusset to the garment with the periphery of the gusset juxtaposed with the garment, and mechanically seaming the garment and the periphery of the gusset together while simultaneously rotating the gusset and the garment relative to a seaming machine and through at least 360° about an axis passing through the gusset to secure the gusset to the garment by a single continuous seam."

Claim 11: "A garment having a gusset seamed thereto according to the method as claimed in any of claims 1 to 10."

Claim 12: "Apparatus for seaming a gusset to a garment comprising an elongate support for receiving said garment, means for mounting said gusset, said support and mounting means being relatively displaceable to

bring the gusset periphery into overlapping relationship with the periphery of an opening in the garment; a seaming machine for seaming the gusset and the garment together, said support and mounting means being displaceable relative to said machine to bring the machine into engagement with the garment and gusset, and wherein said support and mounting means are rotatable relative to the seaming machine through an angle of at least 360° and about an axis arranged to pass through the gusset to enable the gusset to be secured to the garment by a single continuous seam."

In one preferred embodiment, shown in figures 2 to 5 of the patent in suit, two coaxial tubes are provided, one of which is slidable within the other, there being a space between the two to which suction is applied. A garment is fitted around the outer tube and a gusset is offered to one end of the tubes. The inner tube is withdrawn into the outer one so as to form the gusset into a cup shape under the influence of the suction. The garment is then moved further along the outer tube so as to overlap the gusset. The tubes are then both moved to bring the overlapping portions of garment and gusset within a seaming machine. The tubes, with the garment and gusset, are rotated about the tubes' common axis through at least 360° while the seaming machine is running to seam the garment and gusset together. In an alternative embodiment, shown in figure 6, the outer tube is replaced by hinged plates.

It is convenient first to consider the request for revocation of the patent in suit.

Paraphrasing what is outlined in the amended statement under rule 75(1), revocation of the patent in suit is being sought under section 72(1)(a) on the ground that the invention is not patentable having regard to:

- a) Spanish patent no 462086 in the name of Aznar SA ("Aznar"), it being contended that at least claims 1 and 12 of the patent in suit are not entitled to a priority date earlier than its filing date;
- b) a standard sewing machine used manually to insert gussets into articles of clothing, at least in respect of claim 1.

I shall consider each of these in turn.

Aznar purports to have been published on 29 June 1978. The copy filed in evidence is a photocopy of the patent which is in Spanish and on which has been hand-written in English "published 29.06.78". At the hearing Mr Silverleaf argued that the manuscript comment was not part of the original document and that it did not constitute admissible evidence of publication on any particular date. Mr Bragge responded that no point about the publication date was made in the proprietors' counter-statement, and hence that the pleadings had not put the fact or date of publication of Aznar in issue. He also alleged that this matter was not raised by the proprietors in corresponding proceedings in the United States, where evidence of Aznar's publication was given and expressly accepted by the proprietors. With that alleged background, the applicants had not thought that it would become an issue in these proceedings. Mr Silverleaf submitted that paragraph 1 of the proprietors' counter-statement under rule 74(2) constitutes a clear, specific and unambiguous traverse of the claim regarding publication on the date alleged, in that it states that the proprietors deny statements made in paragraphs 8, 9, and 10 of the applicants' rule 74(1) statement, which inter alia allege that Aznar was published on 29 June 1978. Furthermore, paragraph 7 of the rule 74(2) counter-statement denies each and every contention of the applicants save where expressly admitted. Mr Silverleaf moreover suggested that in view of those denials and the lack of evidence of publication submitted by the applicants in the present proceedings, the

proprietors had considered that the publication had not been established.

Notwithstanding Mr Silverleaf's contention, it is not apparent to me from the pleadings that there was any specific challenge to the purported publication date of Aznar. It is important that the pleadings set out clearly all the points of contention in a manner particular enough that no-one is taken by surprise. In this respect if there was from the outset an intention to challenge the alleged publication date of Aznar, the proprietors' pleadings were unsatisfactory in that they did not obviously present the clear and specific denial asserted at the hearing by Mr Silverleaf.

On the other hand, there is very slight evidence before me as to the publication of Aznar, though, as Mr Bragge pointed out, whether or not Aznar was published on the alleged date is a matter of fact or public record. At the hearing I was conscious of the major public interest inherent both in an early resolution of an allegation that a patent on the Register may be invalid or should be revoked and in the importance of investigating a document which was prima facie relevant to these matters. I therefore ordered that the hearing should proceed on the assumption de bene esse that Aznar was published on the date presented, that is 29 June 1978. I left it to the parties to settle the matter if they could by correspondence between them after the hearing, and to notify the Patent Office of the outcome, while leaving open the possibility of further action before me if they could not do so. In a letter dated 16 July 1992 from their patent agents the proprietors agreed to accept 29 June 1978 as the date on which Aznar was made available to the public, and I therefore proceed on that basis.

At the hearing Mr Silverleaf suggested that if I accepted the alleged publication date of Aznar the proprietors should have an opportunity to file evidence dealing with its substance. That they had chosen, on his advice, not to do so before was because

they had not thought that the publication of Aznar had been established. However, as I said at the hearing, bearing in mind the public interest, I am satisfied that I am doing no injustice to the proprietors in declining to allow them to file further evidence, full opportunities having been available to them and not taken.

The accepted publication date of Aznar is before the filing date of 3 July 1978 of the patent in suit but after its priority date of 4 April 1977. The applicants allege that at least claims 1 and 12 of the patent in suit are not entitled to the claimed priority date and therefore that Aznar is available as prior art. The first question I therefore need to determine is whether or not the invention claimed in the patent in suit is entitled to the earlier priority date.

Section 5 of the Patents Act 1977 sets out the requirements that need to be satisfied if an invention or any matter contained in a patent is to be accorded a priority date earlier than the filing date. In respect of an invention sub-section (2)(a) specifies that it is necessary that the invention be "supported by matter disclosed in the earlier relevant application".

Mr Bragge argued, with support from current text books, that this test of "support" under the Patents Act 1977 was at least as stringent as that of "fair basis" which existed under the Patents Act 1949. He asserted, correctly in my view, that the three-fold investigation for fair basis set out by the Patents Appeal Tribunal in Mond Nickel Co Ltd's Application [1956] RPC 189 was relevant here; namely the invention should have been described broadly (that is in a general sense) in the earlier document, there should be nothing in the earlier document which is inconsistent with the invention claimed, and the invention as claimed should not include a feature as to which the earlier document is silent.

Mr Bragge also briefly mentioned Insituform Technical Services Ltd and Another v Inliner UK PLC and Another [1992] RPC 83, in

which the authorities relating to fair basis have recently been reviewed through the medium of an extensive quotation from Mr Justice Falconer in E I Du Pont De Nemours & Co v Enka BV [1988] FSR 69.

I should perhaps also note, though it was not argued before me, that the House of Lords judgment in Asahi Kasei Kogyo KK's Application [1991] RPC 485 indicated that a description in an earlier application which contains no enabling disclosure will not support an invention and thereby afford it an earlier priority date. However, enablement does not seem an issue in the present case and I need do no more than note that I have considered it.

The patent in suit was granted on an application filed under the Patents Act 1977 on 3 July 1978. It claims priority from an earlier GB application filed under the Patents Act 1949 on 4 April 1977 by John Charles Humphreys, an employee of the proprietors. Mr Bragge emphasised that claim 1 of the patent in suit requires "... presenting the gusset to the garment with the periphery of the gusset juxtaposed with the garment ...". He sought to contrast this with the method described in the priority document. There, he pointed out, the garment is first mounted on the outside of the outer tube and the gusset is then presented to the front of the tube, where it is held by vacuum and drawn slightly into the outer tube by movement of the inner tube. The garment is then moved over the outer tube to overlap the periphery of the gusset. Thus, he argued, the gusset is presented to the mounting means and the garment then moved or presented to the gusset, not the reverse as demanded by claim 1. Moreover, he contended that by use of the apparatus of the priority document it was not possible to present the gusset to the garment as claim 1 requires because if the garment was initially placed in its seaming position where it overlaps the end of the tube, the material at the garment edges would flop and become trapped by the gusset when it was presented. Mr Bragge also drew my attention to the requirement in claim 1 for "a

single continuous seam" but did not develop an argument in this connection.

Mr Silverleaf argued that the invention claimed in Claim 1 is plainly described in a general sense in the priority document and that there is no inconsistency between the two. Focusing on these details of wording, he submitted, gives no weight to the underlying inventive concept which the priority document illustrates. He also contended that all that is required from the movement is the bringing of the two seam edges into juxtaposition so they can be sewn. He argued that presentation of the gusset to the garment or of the garment to the gusset amounted to the same thing.

Mr Bragge referred to a passage from the affidavit of Mr Pears which contrasted the principles of operation of the Solis machine with those of a machine constructed in accordance with the invention, arguing that it supported his assertion that the claim is unsupported by the priority document as regards which item is presented to which. However, as Mr Silverleaf pointed out, Mr Pears was not addressing the issue of how the skilled man would interpret the scope of the claims or what is disclosed in the priority document. His evidence therefore does not assist me in deciding whether the terms of the claim are supported by the priority document. A further point made by Mr Bragge was that in section (c) of Form 2, which is the first page of the priority document, the invention is described "as a device for the insertion of either a circular or variable shaped gusset by mechanical means ..." (his emphasis). He argued that by contrast claim 1 does not contain this feature or limitation of "mechanical means". So far as the claim does refer to "mechanically seaming" Mr Bragge's assertion may be doubtful, but even if I were to accept it I would not regard the feature as having been given such weight in the priority document that its absence from the claim constituted a significant inconsistency.

There is some force in Mr Bragge's main argument that whereas claim 1 requires the gusset to be presented to the garment, the priority document appears to show the opposite, particularly when account is taken of the full phrase from claim 1 "supporting the garment and presenting the gusset to the garment". To construe this as covering an arrangement such as that disclosed in the priority document wherein the gusset is held still while the garment is slid along and partly off the support to bring it into juxtaposition with the gusset appears to require a substantial stretching of the natural meaning of the language of the claim. Mr Silverleaf's simple counter-argument that presentation of gusset to garment and vice versa were entirely equivalent seems to me not to address the central issue that "supporting A and presenting B to A" does not, as a form of words, appear identical in meaning to, or even to encompass, "supporting B and presenting A to B". If I were to construe claim 1 in accordance with the natural meaning of its language, therefore, I believe that there would be a strong case for concluding, for example in relation to the second and perhaps also the third Mond Nickel criterion, that this claim was not supported by the matter disclosed in the priority document.

However, there is a further factor in this consideration which, in my judgement, is critical in the present circumstances. In all significant respects touching on the question of support of claim 1 by the disclosure of the priority document, the disclosure of the specification of the patent in suit is identical in substance to that of the priority document. The objection that a claim is not supported by the description, while it may be raised pre-grant under section 14(5) and may thereby preclude grant of a patent including a claim subject to it, is not available post-grant in revocation proceedings under section 72, even if the court or the Comptroller is satisfied that the patent should not have been granted in its present form. This was emphasised by the Court of Appeal in Genentech Inc's Patent [1989] RPC 147. The implication seems to be that a claim which suffers post-grant from the flaw of lack of support (assuming

that it cannot also be faulted on the distinct, if sometimes overlapping, available revocation grounds of insufficiency or that it extends beyond the matter disclosed) is not thereby rendered invalid. It is therefore necessary for the court or the Comptroller to construe the invention claimed in such a claim in a manner consistent with its validity, even if, to a degree, that appears to cut across the guidance of Mond Nickel and the corresponding authorities. The mechanism whereby this may be done is provided by section 125(1), which states that, unless the context otherwise requires, an invention shall be taken to be that specified in a claim as interpreted by the description and drawings. This approach may perhaps also properly be regarded as resulting in the purposive construction required by Catnic Components Ltd v Hill & Smith Ltd [1982] RPC 183.

In the present case it appears to me that this requires me to construe claim 1 in such a way as to render it consistent with the matter particularly disclosed in the specification of the patent and, therefore, because of the identical nature of the disclosure in the two documents, also in the priority document. On this basis, notwithstanding what I take to be the natural meaning of the language of claim 1, I conclude that I am required to construe the claim as covering the embodiments described in the body of the specification, and therefore as also covering the embodiments described in the priority document. In practice I take this to mean that it is not critical to the invention whether the gusset is "presented" to the supported garment or vice versa. I cannot therefore, I consider, avoid the conclusion that the invention of claim 1 is supported by the priority document, and, in accordance with section 5(2)(a), attracts the priority date of that document.

In relation to claim 12, Mr Bragge emphasised that the claim requires "... said support (for the garment) and mounting means (for the gusset) being relatively displaceable to bring the gusset periphery into overlapping relationship with the periphery of an opening in the garment ...". He argued that no relative

movement between the two is shown in the apparatus illustrated in figures 5 and 6 of the priority document, and that it was therefore impossible for that apparatus to achieve the desired result. Mr Silverleaf's response was that the important concept is that the support and the mounting means be relatively displaceable and that it does not matter which actually moves.

I am satisfied that Mr Bragge is wrong in his broad contention that the priority document does not show relative movement between the support and the mounting means, his error arising from the fact that he chose to concentrate on figures 5 and 6. The support is constituted by the outer tube over which the garment is fitted while the mounting means is constituted by the inner tube and a grille attached to the end thereof to prevent the gusset being sucked into the space between the tubes. The figures preceding figures 5 and 6 plainly show the latter moving relative to the former in order to draw the gusset into a cupped shape under the influence of suction applied to the space between the tubes. Mr Bragge's criticism may have some foundation, though, in that while the movement that takes place between the two elements arguably contributes to the bringing into overlapping relationship of the gusset and garment peripheries, in that it moves the gusset into position in readiness for completion of this process, it is not wholly or even primarily responsible for it. The overlap is achieved by sliding the garment along the outer tube, as already described. As with claim 1, the natural meaning of the language of claim 12 does not in itself, in my view, lead convincingly to the conclusion that the claim is supported by the matter disclosed in the priority document. However, again as with claim 1, the relevant disclosure in both the priority document and the specification of the patent in suit is identical in substance, and the reasoning I found myself obliged to apply to the earlier claim therefore applies also in relation to claim 12. The construction which this reasoning requires me to apply to claim 12 is such, I take it, that the relative displacement of the support and mounting means need only contribute to the overlapping

relationship of the gusset periphery and the periphery of the opening in the garment, and is not in itself required to achieve that relationship alone or primarily. I must therefore conclude that the invention of claim 12 is supported by the priority document and attracts the priority date of that document.

It follows from my conclusions that the invention of claims 1 and 12 is entitled to the claimed priority date of 4 April 1977 that Aznar, accepted as being published on 29 June 1978, does not form part of the state of the art under section 2(2). Its disclosure and relevance to the invention defined in the claims of the patent in suit do not therefore fall to be determined. However, I think it proper that I should consider the matter in case I am wrong in my determination of priority date.

Aznar describes a machine for sewing gussets on knitted garments. It comprises a head having a piece on which a garment is retained against an elastic ring by suction. The head can be tilted so that the garment can be moved into contact with a gusset lying on a table. The piece and hence the garment are said to be rotated while a conventional sewing unit sews the gusset to the garment. The table appears to be fixed relative to the sewing unit.

With regard to claim 1, Mr Bragge argued that all its features are disclosed in Aznar except that in the citation the garment is presented to the gusset and not the other way around. However, he implied, and I have already accepted in construing claim 1, that the difference is immaterial since the claim covers both arrangements. Mr Silverleaf focussed mainly upon what he saw as the inconsistency of Mr Bragge's position in arguing that the "garment-to-gusset/gusset-to-garment" discrepancy was significant in relation to priority date but immaterial in relation to anticipation by Aznar. While Mr Silverleaf's observations may truly identify Mr Bragge's overall dilemma, they do not assist me in my present exercise.

In a more pertinent submission Mr Silverleaf also argued that it was not clear from Aznar whether or how rotation of the gusset, which is required by claim 1, is achieved. He pointed out that the translation of Aznar refers to "a gusset fixed on a lower table of the said machine". I do not think this wording taken in isolation should be construed too narrowly. I believe that the skilled man would recognise, in spite of the sparseness of Aznar's disclosure, that since the gusset table is fixed to the same bed as the sewing unit, the gusset must move on the table by sliding brought about by frictional engagement with the rotating garment. Mr Silverleaf argued too that rotation of the work-piece through 360° is not expressly stated in the text of Aznar, but has to be drawn out of the figures. I would accept that there is nothing explicitly stated to that effect, but I believe it must be implicit from the method and apparatus that are described and shown, especially since it would only be from such a rotation that the gusset and the garment could be completely seamed together around their peripheries. I also regard it as implicit, although neither party argued the point, that as a result of normal operating practice using the apparatus described in Aznar would produce a single continuous seam as required by claim 1.

My conclusion, then, is that had I found that the invention of claim 1 of the patent in suit was not entitled to its claimed priority date, making Aznar available as citable prior art, that claim would have lacked novelty in relation to Aznar. I do not regard it as necessary for me to consider the position of claims 2 to 11 on the hypothesis that my finding on the priority of claim 1 is incorrect.

Turning to claim 12, Mr Bragge employed some of the same arguments as against claim 1, and in general I consider that these succeed. However, Mr Silverleaf highlighted the fact that claim 12 requires the mounting means for the gusset (ie the table in Aznar's terms) to be displaceable relative to the seaming machine. He regarded Aznar as obscure in this regard, but

appeared to come to the conclusion that I have already indicated seems correct to me, namely that the gusset table in Aznar appears to be fixed relative to the sewing unit. I regard this as a significant distinction, and therefore conclude that, even had I found that the invention of claim 12 was not entitled to its claimed priority date, I would not have found that it lacked novelty in relation to Aznar.

The second ground on which the applicants wish to rely for revocation is that at least claim 1 is anticipated and/or rendered obvious by a standard sewing machine used manually to insert gussets into articles of clothing. This assertion is apparently intended to be supported by Mr Bright's affidavit and the exhibit RB1, which is an extract from a publication entitled "Coat and Skirtmaking". I should say that there seems to me to be a mismatch between the pleadings and the evidence on this point. Mr Bright's affidavit does not refer specifically to the claims of the patent in suit but to what might be regarded as a paraphrase of at least part of claim 1. This affidavit does not therefore appear to constitute evidence to the effect that at least claim 1 is anticipated or rendered obvious by manual use of a standard sewing machine. Rather, it appears to present the exhibit RB1 as a citation, or at least as an example of common general knowledge in the field. To that extent it might be questioned whether that evidence is properly admissible in support of the pleading made. However, since the proprietors have not taken issue on this point I am prepared to consider it.

Mr Bragge argued that Mr Bright's affidavit anticipates or renders obvious claim 1. Mr Silverleaf countered that the affidavit and exhibit show that it has been known to sew manually around a closed seam using a conventional sewing machine, but no more, the implication being that it is not specified precisely how the sewing machine is used.

I should first observe that it is not clear when the publication of which exhibit RB1 is an extract was actually published. In

paragraph 3 of his affidavit Mr Bright refers to the Magyar style of the 1950's being described and illustrated in the exhibited extract, but this is a separate matter from the date of the publication. It has not therefore been demonstrated to me that the extract was published before the priority date of the claims of the patent in suit. However, even if I were to accept that it was, I do not believe the applicants' cause would succeed. As Mr Silverleaf pointed out, Mr Bright's affidavit and its exhibit do not describe use of the sewing machine in the terms detailed in the claim. The most significant difference in my view arises from the fact that in the prior method outlined by Mr Bright three distinct rotations of the work-piece take place as the seam traverses its four sides. Each rotation is made about a different axis at a respective corner of the gusset and is accompanied by a pause in seaming. By contrast, claim 1 specifies "... mechanically seaming the garment and the periphery of the gusset together while simultaneously rotating the gusset and the garment ... through at least 360° about an axis passing through the gusset ..." (my emphases). From the description of the patent in suit, it appears that a single axis of rotation is used whatever the shape of the gusset. There is therefore a clear distinction between the two methods, and not clearly one that in my judgment the skilled man would regard as obvious. I do not therefore find that claim 1 is anticipated or rendered obvious by this evidence. Furthermore, it is immediately clear to me that Mr Bright's evidence does not even approach claim 12 or any of the other claims.

I need now to determine the applicants' request for a declaration of non-infringement. The declaration sought is that "the manufacture, disposal of, offers to disposal of, import or use of a gusset inserting machine as described in appendix C does not constitute infringement of any valid claim of UK patent 2001238 B". It is common ground between the parties that their patent agents exchanged letters about such a declaration and that a request for a voluntary declaration of non-infringement in respect of the so-called modified Solis 11 machine was refused.

It is also common ground that this machine is described and illustrated in appendix C to the applicants' original rule 74(1) statement. I am therefore satisfied that, as the applicants submit, the formal requirements of section 71(1)(a) and (b) are met, notwithstanding that the proprietors have made no admission to this effect.

The authorities relating to applications for declarations of non-infringement make it clear both that the onus for establishing non-infringement rests upon the applicant and that the description of the article or process in respect of which the declaration is sought must be clear and precise. With these rigorous requirements in mind, therefore, I will consider the description submitted by the applicants.

Using the terminology of appendix C, the modified Solis 11 machine has a central spider structure having six arms which index a central axis to move successively to six work stations A to E. The functions performed at the stations are:

- A: loading and positioning of the garment to which the gusset is to be attached;
- B: turning of the garment in preparation for presentation of the gusset;
- C: presentation of the gusset to the garment;
- D: cutting of excess fabric from gusset and garment prior to stitching;
- E: stitching of the gusset to the garment;
- F: discharge of the completed garment.

Each arm supports a garment holding sleeve from which projects a garment support in the form of an inverted funnel. Each arm

also carries a gusset support which includes a circular plate which is moveable radially of the central axis between a radially extended position and a radially retracted position. The circular plate is non-rotatably mounted on a shaft which is vertically movable.

For the purposes of the present consideration it only appears necessary for me to repeat here the full description from appendix C of the processes which occur at stations C, D and E. At station C the gusset support is extended to its radially outer position and a pneumatic ram slides a gusset piece onto the top surface of the circular plate. The shaft upon which the plate is non-rotatably mounted is hollow and suction applied thereto holds the gusset piece in position on the plate after retraction of the ram. The garment (previously loaded onto the garment support) and gusset are then indexed to station D, where the plate is raised such that the gusset engages the bottom of the garment support. A trimming machine is advanced and the garment support is rotated via a belt driven by a motor. At the same time, suction applied through the hollow shaft is removed and rotation of the garment support causes the garment and gusset to rotate together past the trimming machine thereby to enable excess fabric to be removed. During rotation of the gusset the plate is stationary and the gusset slides across its surface. I note that this description from appendix C differs slightly from the appendix's above-quoted summary of functions at the various stations, in that presentation of the gusset to the garment actually appears to take place at station D rather than at station C. This does not, however, appear to be of any significance.

At station E a sewing machine is arranged to sew the gusset to the garment during rotation of the garment support caused by another motor. The sewing machine is mounted on a slide for radial advancement/retraction and is operated in synchronism with the motor in the following manner. The rotational drive to the garment holding support provides intermittent rotational movement

of the garment holding support through predetermined arcs. The sewing head is caused to sew a seam during movement through selected rotational arcs of the garment and gusset to thereby produce separate seams. As illustrated in a diagram in appendix C, the sewing machine is advanced and engages the gusset/garment at angle 0° and the gusset/garment rotate through an arc of 130° . The sewing machine is then retracted from the gusset/garment and the gusset/garment is then rotated in the opposite direction through an arc of 50° . The sewing machine is then advanced to engage the gusset/garment and these are rotated in the opposite direction (ie, as is made clear in the diagram, the original direction of rotation) through an arc of 320° to complete the seam. The completed composite seam thereby comprises two separate seams which have overlapping end sections. During rotation of the gusset, the plate is stationary and the gusset slides across its surface.

At the hearing both parties reminded me that the proper approach to the interpretation of patent documents demands a purposive construction as laid down by the authorities. I do not consider it necessary for me to review their submissions in full at this point, since I have already indicated that, in my judgement, I have, to the extent that I have had to construe the claims of the patent in suit, taken a purposive view of them. I should, though, perhaps note that I do not agree with Mr Bragge to the extent that he appeared to contend that there was an onus upon the proprietors to establish that a purposive (and, by implication, broader), as distinct from a literal (narrower), construction should be placed upon the claims in the context of an application for a declaration of non-infringement. I agree with Mr Silverleaf that, on the authorities, there is only one correct construction of a claim, namely a purposive one, though no doubt the extent to which this differs from the literal reading of the claim will vary in dependence upon the nature of the case. I have, I think, made it clear that in the present case I consider that the correct, purposive, construction of both claims 1 and 12 differs to a marked extent from the literal

reading. It is against that single correct construction that the issue of non-infringement must be judged. To the extent that certain aspects of the claims which I have not already construed require to be construed in relation to the application for non-infringement, I shall address this shortly.

Turning to the specifics of the present case, the nub of the matter seems to have been set out in the letter of 31 July 1989 from the applicants' patent agents to those of the proprietors originally seeking a voluntary declaration. This is appended to the original statement under rule 74(1). The letter states:

"The proposed modification to the Solis 11 resides at the gusset sewing station whereat the machine has been modified so as to secure the gusset by two or more seams. Thus the proposed modification does not perform the essential feature of claims 1 or 12 viz, securing a gusset to the garment by a single continuous seam".

I shall focus first on the question of infringement of method claim 1. Whether or not the method of use of the modified Solis 11 machine described in appendix C falls within the scope of the claim turns on the claim's requirement for "... seaming ... while simultaneously rotating the gusset and the garment relative to a seaming machine and through at least 360° ... to secure the gusset to the garment by a single continuous seam". I am satisfied that in all other respects the method described in appendix C reads on to claim 1 as I have construed it. As Mr Bragge pointed out, the provision of a single continuous seam is an essential part of the invention of the patent in suit. Mr Bragge contended that the appendix C method was differentiated from claim 1 by producing not a single continuous seam but two separate seams which have overlapping end sections. Mr Silverleaf argued that the appendix C method does in practical terms produce a single seam, but one with double stitching over a portion of it. He added that the same result would be achieved by a single unbroken rotation through 380°, though I think he

meant 400°. I find myself unable to accept this submission. It seems to me clear that the method of operating the Solis machine described in appendix C produces not one but two seams. Although there is overall rotation through more than 360°, it is interrupted since the sewing machine is retracted from the gusset and garment when they are rotated together through 50° in the reverse direction between sewing the first 130° seam and the second 320° seam. The appendix C method cannot therefore in my judgment be said to produce a single continuous seam.

Mr Bragge effectively argued that on a purposive construction the requirement in claim 1 for a "single continuous seam" would be understood by the skilled reader to be an essential limitation, so that any method which did not provide such a seam would not infringe the claim. Mr Silverleaf suggested that a rational patentee would not wish to limit his claim to one seam and so allow it to be so easily avoided. However, the passage from the specification which I quoted earlier in this decision, taken with the disclosure as a whole, with the clear emphasis it places on a single continuous seam, leaves me in no doubt that claim 1 is so limited, and hence that the method as described in appendix C does not infringe it.

Several other points were raised in this regard with which I should deal. First, Mr Bragge tried to import the idea that the appendix C method, by providing two separate seams with overlapping end sections, has an obvious advantage over the claimed method of affording greater strength. However, as I think he accepted and Mr Silverleaf certainly pointed out, this point was not made in the pleadings or supported by evidence, and I have no reason to believe that it is either right or relevant. In short, I take no account of it. Second, Mr Silverleaf suggested that the variation described in appendix C was made simply to avoid the requirement of the claim for a single continuous seam. Whether or not this is so is immaterial, as Mr Bragge noted, and I need not consider it further.

Mr Bragge and Mr Silverleaf both focused mainly on the production of a single continuous seam as the feature on which hinged the issue of whether or not the patent in suit would be infringed. To the extent that they are correct in this, my finding in relation to the non-infringement of claim 1 applies equally to claim 12. However, the matter does not rest there, since claim 12 is directed to apparatus, not a method. As such, although it is clear that it is not described in the patent in suit as being used to form other than a single continuous seam, the claimed apparatus may be capable of being used in such a way. Thus it could be argued, though it was not at the hearing, that the extent of rotation and the type of seam formed are not relevant for the purpose of drawing distinctions between the claimed apparatus and the modified Solis 11 machine, as the latter would clearly be capable of being operated to form the double seam described. However, as Mr Bragge pointed out, it is clear from appendix C that the modified Solis 11 machine is differentiated from that defined in claim 12 in that, as I have already noted, "during rotation of the gusset, the plate is stationary and the gusset slides across its surface"; that is it is not rotatable relative to the seaming machine as claim 12 requires.

Mr Silverleaf countered that compliance with this element of the claim 12 is met by rotation of the gusset. He argued that whether the gusset mounting is specifically rotated or not does not matter so long as the gusset itself rotates. However, I do not believe that the skilled man would have understood from the language of claim 12 or from the specification as a whole that it was not intended that the strict compliance with the primary meaning in respect of the rotatability of the gusset mounting means was an essential requirement of the invention. So on this count too I do not find that claim 12 would be infringed by the modified Solis 11 machine described in appendix C.

I find therefore that the applicants have discharged the onus upon them and are entitled to the requested declaration. I therefore declare that the manufacture, disposal of, offers to disposal of, import or use of a gusset inserting machine as

described in appendix C to the applicants' statement under rule 74(1) filed on 28 September 1989 does not constitute infringement of any valid claim of patent no 2001238.

The proprietors of the patent have also requested the grant of a certificate of contested validity. The conditions of section 65(1) regulating the issue of such certificates have been met and, in view of my earlier findings, it is appropriate that I should accede to this request. I therefore certify that the validity of patent no 2001238 has been contested in proceedings under sections 71 and 72(1)(a), and that the patent has been found to be valid in respect of those grounds under sections 71 and 72 where validity was put in issue.

In relation to costs, Mr Silverleaf argued at the June hearing that the proprietors deserved an award in respect of that day because they had been put to wasted costs of considering the preliminary matter of the staying of certain grounds, an issue on which they had won. Mr Bragge felt that would be wrong on two counts. First, the applicants had not expected the proprietors to try to put them to election on staying. Second, the June hearing was billed from the outset as a substantive one. However, matters developed which required me to take the whole of that day on a preliminary issue, and there can be no doubt that the applicants lost on that. So far as the substantive issues are concerned, the applicants obtained their declaration, which the proprietors had refused to give voluntarily, but the proprietors were successful on revocation/invalidity. Thus, in relation to the substantive proceedings, I conclude that the parties have emerged relatively even, and I make no award in this regard. I consider it appropriate, however, to reflect the outcome of the hearing of 4 June 1992 in costs, and therefore award to the proprietors, H Flude and Co (Hinckley) Limited, the sum of three hundred pounds (£300) as a contribution to their costs, and I direct that this sum be paid to them by the applicants, Apex (Textiles) Limited.

Since this is a substantive matter, the time within which an appeal may be lodged is six weeks from the date of this decision.

Dated this 19 day of November 1992



DR P FERDINANDO

Superintending Examiner, acting for the Comptroller



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