FEDERAL COURT OF AUSTRALIA

Global Fruit Protection Pty Ltd v Mount Sommerset Pty Ltd [2019] FCA 1264

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| File number(s): | QUD 462 of 2018 |
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| Judge(s): | **GREENWOOD J** |
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| Date of judgment: | 12 August 2019 |
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| Catchwords: | **PATENTS** – consideration of an application for leave to amend a cross-claim for invalidity of the two patents in suit by introducing particulars of contended pieces of prior art going to lack of novelty – consideration of an application to amend the cross-claim to introduce matters going to a lack of inventive step |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), ss 37M and 37N  *Federal Court Rules 2011* (Cth), rr 16.53 and 34.46  *Patents Act 1990* (Cth), ss 18 and 138  *Patents Regulations 1991* (Cth), reg 12.4 |
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| Cases cited: | *Stewart v Deputy Commissioner of Taxation* (2010) 76 ATR 66  *UPaid Systems Ltd v Telstra Corp Ltd* (2013) 220 FCR 182  *Woodbridge Foam Corporation v AFCO Automotive Components Pty Ltd* (2002) 58 IPR 56 |
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| Date of hearing: | 2 April 2019 |
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| Date of last submissions: | 2 April 2019 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Intellectual Property |
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| Sub-area: | Patents and Associated Statutes |
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| Category: | Catchwords |
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| Number of paragraphs: | 39 |
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| Counsel for the Applicant/Cross‑Respondent: | Mr D Logan QC |
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| Solicitor for the Applicant/Cross Respondent: | MacDonnells Law |
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| Counsel for the Respondents/Cross‑Claimants: | Mr B Gardiner |
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| Solicitor for the Respondents/Cross‑Claimants: | Preston Law |

ORDERS

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|  | | QUD 462 of 2018 |
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| BETWEEN: | GLOBAL FRUIT PROTECTION PTY LTD (ACN 119 875 071)  Applicant/Cross‑Respondent | |
| AND: | MOUNT SOMMERSET PTY LTD (ACN 126 184 923) (and others named in the Schedule)  First Respondent/Cross‑Claimant | |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 12 AUGUST 2019 |

THE COURT ORDERS THAT:

1. The interlocutory application filed 18 January 2019 is dismissed.
2. The parties file submissions on the question of the costs of the interlocutory application within ten days.
3. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011,* these orders and reasons for judgment in support of these orders are made and published from Chambers.

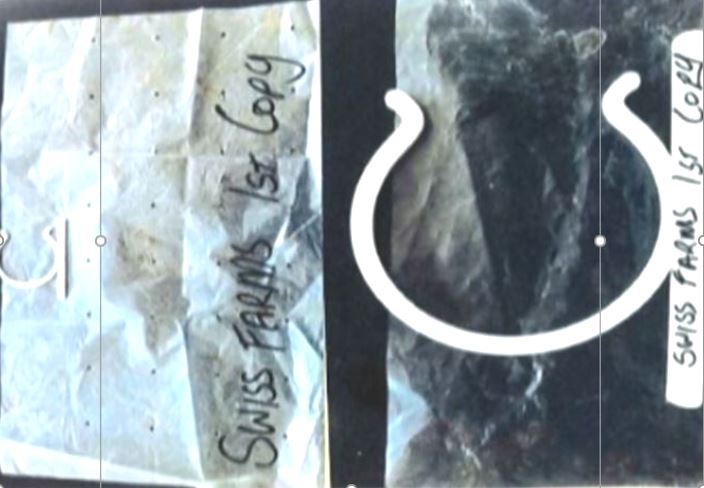
Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GREENWOOD J:

1. This is an interlocutory application filed on 18 January 2019 by Mount Sommerset Pty Ltd, Peter Joseph Inderbitzin, Franziska Maria Margaret Inderbitzin, Sharprock Pty Ltd and Red Valley Pty Ltd (the “respondents”) for leave to file and serve an *amended statement of cross‑claim* (“ASOCC”).
2. The substantive proceeding concerns a claim for declarations, injunctions, damages (or alternatively, an account of profits) and for the delivery up of certain things by Global Fruit Protection Pty Ltd (the “applicant”). The applicant is (and has been) in the business of “supplying fruit protection devices to assist with the cultivation, marketing and sale of bananas, and the provision of goods and services connected with the cultivation of bananas”. Whilst there is some dispute in the pleadings about the nature of the respondents, it is uncontroversial that Mount Sommerset Pty Ltd provided farm management services to Peter Joseph Inderbitzin, Franziska Maria Margaret Inderbitzin, Sharprock Pty Ltd and Red Valley Pty Ltd pursuant to a Banana Farm Management Contract. The farm management services included the cultivation, marketing and sale of bananas under the business names and brands *Swiss Farms*, *Inderbitzin’s Premium Bananas, Red Valley* and *Swiss Fresh*. Mount Sommerset Pty Ltd denies that these services have been provided since 1 July 2017.
3. Mr Logan QC, for the applicant, correctly points out that because of the “extensive admissions” of infringement in the respondents’ amended defence, the main substantive issues in dispute relate to the alleged invalidity of the two patents in suit (discussed further later in these reasons).
4. Peter Joseph Inderbitzin is the sole director, secretary and shareholder of Mount Sommerset Pty Ltd and Red Valley Pty Ltd; Maria Margaret Inderbitzin is the sole director, secretary and shareholder of Sharprock Pty Ltd and Sharprock Pty Ltd and Red Valley Pty Ltd are the trustees of the Sharprock Trust and the Red Valley Trust respectively. Peter Joseph Inderbitzin, Franziska Maria Margaret Inderbitzin and Sharprock Pty Ltd are partners in a partnership called “FM Inderbitzin & PJ Inderbitzin & The Trustee for Sharprock Trust”.
5. There are two patents in suit in this proceeding: Australian Standard Patent No. 2005283189 for an invention called “A protective device for fruits” (the “189 patent”) and Australia Standard Patent No. 2012232973 for an invention called “A protective device for fruits” (the “983 patent”). It is uncontroversial that the 189 patent was applied for on 23 September 2005; claims an earliest priority date of 23 September 2004; was granted to the patent applicant (Marc William Jackson) on 18 October 2012 and does not expire until 23 September 2025. The 189 patent was assigned to the applicant by Mr Jackson by a deed of assignment on 6 July 2017. It is also uncontroversial that patent 983 was applied for on 23 September 2005 and claims an earliest priority date of 23 September 2004.
6. The applicant pleads, by its Statement of Claim filed 6 July 2018, that “from a date presently unknown to the applicant but since about 2010” (in respect of Device 2 identified below)” one or more of the respondents by carrying on the “Swiss Farms Business” have imported into Australia from China and Vietnam the following “fruit protection devices”:

a. Device 1 (imported from China during the period 2008-circa 2010)



b. Device 2



c. Device 3



1. The applicant goes on to plead that from a “date presently unknown to the applicant but since at least June 2012”, one or more of the respondents, by carrying on either the “Swiss Farms Business” or the “Red Valley Business” in Australia used Devices 2‑3 in the conduct of the Swiss Farms Business or the Red Valley Business to perform the method in claim 19 of the 189 patent and to perform the method in claims 13 and 14 of the 973 patent.
2. The applicant then pleads that “from a date unknown” but since at least June 2012, one or more of the respondents by carrying on either the “Swiss Farms Business” or the “Red Valley Business” offered to sell or otherwise dispose of, to other banana growers, a quantity of Devices 2 and 3 and kept a quantity of Devices for the purposes of performing the method in claim 19 of the 189 patent and to perform the method in claims 13 and 14 of the 973 patent.
3. The applicant pleads that this conduct was not undertaken with Mr Jackson’s authority.

## The patent claims

1. The 189 patent makes the following claims:

**CLAIMS**

1. A fruit protective device to protect fruits growing on a stem or a branch branching from a stem of a plant, the device comprising a fruit protection member arranged to extend over an individual fruit, or one or more clusters of fruits on said stem or branch, and a securing means adapted to secure said protection member to a part of the stem or branch, the securing means having a retention element formed with an opening configured to receive and retain part of the stem or branch therein, and thereby secure said protection member to the stem or branch when said part of the stem or branch is in the opening.

2. The device according to claim 1 wherein the retention element has a gap leading to said opening so that the part of the stem or branch can be inserted through the gap into the opening.

3. The device according to claim 1 or 2 wherein the retention element is integrally formed with or fixed to the protection member at a position on or adjacent to an edge thereof.

4. The device according to claim 2 or 3 wherein the protection member has a slit extending from said edge to said opening and in substantial alignment with said gap.

5. The device according to any one of claims 2‑4 wherein the retention element is deformable to widen said gap and thereby facilitate insertion of said part of the stem or branch into the opening.

6. The device according any one of the preceding claims wherein the retention element is formed as a band or disk of metallic, plastic or cardboard material.

7. The device according to claim 6 wherein the band or disk is resilient and the gap is configured as a mouth which, during engagement with said part of the stem or branch, expands from its normal shape to assist passage of said part into the opening and to grip onto said part to secure the protective member therein.

8. The device according to any one of the preceding claims wherein the retention element is formed of one or more layer materials formed integrally with or fixed to the protective member.

9. The device according to any one of the preceding claims wherein said retention element is substantially C‑ or U‑shaped and has opposing free ends bordering said gap.

10. The device according to claim 9 wherein the free ends having respective curved lateral extensions bordering said gap for guiding said part of the stem or branch into the opening.

11. The device according to any of the preceding claims wherein the protection member is formed as a sheet with said securing means being formed on or fixed to the sheet, the sheet being sized to extend over said individual fruit, or one or more clusters of fruits.

12. The device according to any one of the preceding claims wherein said protection member is formed as a bag‑like body having a first sheet member joined to or integrally formed with a second sheet member, the first and second members being arranged to present an interior cavity to receive said individual fruit, or one or more clusters of fruits, said securing means being formed on or fixed to said second member.

13. The device according to claim 11 or 12 wherein the securing means is provided along or adjacent to an edge of said sheet; or second sheet member.

14. The device according to claim 13 wherein the edge of said sheet; or second sheet member, has a cut‑out portion and the securing means is provided at said cut‑out portion.

15. The device according to any one of claims 12 to 14 wherein the second sheet member is arranged to be longer than said first sheet member.

16. The device according to any one of claims 12 or 15 wherein the end of said bag‑like body remote from said edge is arranged to be open or closed.

17. The device according to any one of the preceding claims wherein the protection member is formed of a transparent or translucent material.

18. The device according to any one of the preceding claims wherein the protection member is produced from a material adapted to shield the fruit from certain harmful components of sunlight.

19. A method of protecting fruit comprising applying to a stem or a branch extending from said stem of a plant, a fruit protecting device as claimed in any one of claims 1‑18 and extending said fruit protection member over an individual fruit or one or more clusters of fruits on said stem or branch.

1. The 973 patent makes the following claims:

**CLAIMS**

1. A fruit protection device for fruits growing on a stem or a branch branching from a stem of a plant, the device comprising:

a fruit protection member, adapted to extend over an individual fruit, or one or more clusters of fruits, wherein said protection member is substantially planar, and

a securing means, adapted to secure said protection member to a part of the stem or branch, the securing means comprising an opening configured to receive and retain said part of the stem or branch therein, and thereby secure said protection member to the stem or branch; and wherein the securing means has a gap leading to said opening such that part of the stem or branch can be inserted through the gap into said opening.

2. A device according to claim 1 wherein said protection member is flexible and deformable such that it is adapted to drape over said fruits.

3. A device according to claim 1 or claim 2 wherein the protection member has a slit extending from an edge to said opening and in substantial alignment with said gap.

4. A device according to any one of the preceding claims wherein said securing means comprises a retention element.

5. A device according to claim 4 wherein said retention element is a substantially C‑ or U‑shape clip with opposing free ends bordering said gap.

6. A device according to claim 4 or claim 5 wherein said retention element at least partially surrounds said opening.

7. A device according to any one of claims 4 to 6 wherein said retention element is deformable to widen said gap and facilitate the passage of the stem or branch into the opening.

8. A device according to claim 7 wherein said retention element is adapted to return to its original shape after deformation for retaining the stem or branch.

9. A device according to any one of claims 4 to 8 wherein said retention element is integrally formed with or fixed to the protection member.

10. A device according to any one of the preceding claims wherein the opening is a substantially circular cutout positioned inwardly from the edge.

11. A device according to any one of the preceding claims wherein the securing means is provided substantially along or adjacent to an edge of said protection sheet.

12. A device according to any one of the preceding claims wherein said securing means is adapted to securing said protective device between and/or over the hands of a banana plant.

13. A method of protecting fruit growing on a stem or a branch, branching from the stem of a plant, the method comprising securing a fruit protection device according to any one of claims 1 to 12 to the stem or branch, and extending said protection member over an individual fruit, or one or more clusters of fruit.

14. A method of protective fruit according to claim 13 wherein said device is secured between and/or over the hands of a banana plant such that said protection member drapes over said fruits.

1. The applicant claims that Device 2 embodies claims 1, 2, 3, 5, 6, 7, 9, 10, 11, 17 and 18 of the 189 patent; and claims 1, 2, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the 973 patent. The applicant also claims that Device 3 embodies each of the claims of both the 189 and 973 patents.
2. The applicant’s pleaded case is that each of the respondents, in the conduct of either the Swiss Farms Business or the Red Valley Business has directly infringed the 189 and 973 product claims by importing Devices 2 and 3, using Devices 2 and 3, offering to sell or otherwise dispose of Devices 2 and 3 and keeping Devices 2 and 3.
3. The applicant also makes a claim of indirect infringement against the respondents. The applicant pleads that Devices 2 and 3 are capable of only one reasonable use – being the protection of fruit in such a way that contains all the features of one or more of the 189 method claim and the 973 method claim.

## The Cross‑Claim

1. By the statement of cross‑claim filed 22 August 2018 the respondents seek revocation of both the 189 patent and the 973 patent.
2. The respondents plead that the invention embodied by claims 1, 2, 5, 6, 7, 9, 10 and 19 of the 189 patent is not a “patentable invention” for the purposes of s 138(3)(b) and s 18(1)(b)(i) of the *Patents Act 1990* (Cth) (the “Act”) as it is *not novel* when compared with the prior art base as it existed before the priority dates for the claims (being 23 September 2004). The particulars of lack of novelty are that Australian Standard Patent No. 199732409 (the “409 patent”) entitled “A clamping apparatus” was made publicly available on 7 January 1999.
3. The respondents also say that the invention embodied in the 189 patent is not a “patentable invention” within the meaning of s 138(3)(b) and s 18(1)(b)(ii) of the Act because it did not involve an *inventive step* when compared with the prior art base as it existed before the priority date of the claims. In order to make good this claim, the respondents particularise their reliance on common general knowledge in Australia at or before the priority dates because the 409 patent was first made available on 7 January 1999.
4. The respondents plead that the invention as claimed in each of the claims 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13 and 14 of the 973 parent is not a “patentable invention” within the meaning of s 138(3)(b) and s 18(1)(b)(i) of the Act in that it was not novel when compared with the prior art base as it existed before the priority date. Again, the supporting particulars provided for that claim is that the 409 patent was made publicly available on 7 January 1999.
5. The respondents also plead that the invention claimed in each of the claims in the 973 patent is not a “patentable invention” within the meaning of s 138(3)(b) and s 18(1)(b)(ii) of the Act because it did not involve an inventive step when compared with the prior art base as it existed before the priority date of the claims. The respondents particularise that they will rely upon the common general knowledge in Australia at or before the priority date of the claims or that the 409 patent was made publicly available on 7 January 1999.

## The proposed Amended Statement of Cross-Claim

1. The proposed ASOCC seeks to amend the statement of cross‑claim in order to add five pieces of prior art to the respondents’ novelty and inventive step case on cross-claim. These are:

(a) a device used by the Chiquita banana company in Costa Rica since 1999 (paragraph 4(ii));

(b) a device referred to in a paper entitled “Growing to Retailing, A Global Perspective Australia’s position” by Mr Marc Jackson, who is a director of the Applicant (paragraph 4(iii));

(c) devices used by the Reybanpac company in Ecuador since at least 2002 (paragraph 4(iv));

(d) devices manufactured and trialled in Ecuador by Espumas de Polietileno del Ecuador, Espolec (now known as Polyton SA) in approximately 2002 (paragraph 4(v));

(e) devices which were available for sale, and were sold, by Espuas de Polietileno del Ecuador, Espolec (now known as Polylon SA) from at least 2003, and publicly available from that time, and which continue to be sold in Ecuador and Colombia, at least, by Polylon SA (paragraph 4(v)).

## The respondents’ position

1. Mr Gardiner of Counsel (for the respondents) contends that each of the devices is said to anticipate the relevant claims of the applicant’s patents. Alternatively, Mr Gardiner contends that each of the relevant claims in the applicant’s patents were obvious in light of common general knowledge together with knowledge of one or more of these devices.
2. Mr Gardiner submits that these are the grounds on which this Court should exercise its discretion under r 16.53 of the *Federal Court Rules 2011* (“the Rules”) to grant leave to amend. They say that the amendments:

(a) are very important to their case and may be determinative of it. They raise new prior art that goes directly to the validity of the Applicant’s patents;

(b) will not cause any delay to the proceeding or result in any undue or wasted costs. They do not add any new cause of action or even any new ground of invalidity. There is no substantial change in the nature, content or structure of the case which is put against the Applicant (c.f. *Clarke v Sandhurst Trustees Ltd* [2017] FCA 401 at [127].

(c) will result in no undue prejudice to the Applicant or to any third party. There is no reason to conclude that the amendments will result in any additional costs and certainly will not result in any wasted costs.

(d) are late due to the recent discovery of the relevant information as explained in the affidavit of Mr Kempton. The Applicant was put on notice of the proposed amendments at the earliest possible opportunity.

1. In the course of oral argument, Mr Gardiner conceded that he must abandon sub-paras (2) and (3) (meaning reliance on (a) and (b) of the pieces of prior art described at [20] of these reasons): eg, the Devices at para 4(ii) and the devices mentioned in the Jackson Paper; 4(iii).

## The applicant’s position

1. The applicant says that leave should not be granted to the respondents to file the ASOCC because:

First, the proposed amendments are susceptible to being struck out for failing to disclose reasonable causes of action (at least for want of novelty) and are likely to cause prejudice, embarrassment or delay in the proceeding;

Second, prejudice to the applicant following from the proposed amendments; and

Third, unexplained delay in pleading this information.

1. With respect to the first matter, the applicant points to the requirements of r 34.46 of the Rules and Reg 12.4 of the *Patents Regulations 1991* (“the Regulations”). Rule 34.46 provides:

**Dispute of validity of patent -- particulars of invalidity**

(1) A party who disputes the validity of a patent under the Patents Act must include in the pleading or other document in which the party disputes the validity, particulars of the grounds of invalidity on which the party relies.

(2) If a ground mentioned in subrule (1) is that the invention is not a patentable invention because of information about the invention in a document or through the doing of an act or thing, the particulars must specify:

(a) for a document -- the time when, and the place where, the document is alleged to have become publicly available; and

(b) for an act or thing:

(i) the name of the person alleged to have done the act; and

(ii) the period within which, and the place where, the act is alleged to have been done publicly; and

(iii) a description that is sufficient to identify the act; and

(iv) if the act relates to apparatus or machinery -- whether the apparatus or machinery exists and, if so, where it can be inspected.

(3) If a ground mentioned in subrule (1) is that the invention, to the extent that is alleged in the complete specification of the patent, is not useful, and it is intended for that ground to rely on the fact that an example of the invention that is the subject of the claim cannot be made to work at all or as described in the specification, the particulars must:

(a) identify each claim; and

(b) state that fact; and

(c) include particulars of each such example, specifying the respect in which it is alleged that it does not work at all or as described.

(4) A party is not entitled to tender any evidence in, or make any submissions in support of, a ground for revocation or rectification not stated in the application.

1. Regulation 12.4 provides:

**Applications to revoke patents**

(1) An applicant to a prescribed court for an order to revoke a patent under subsection 138(1) of the Act must include, in the pleading or another document disputing the validity of the patent:

(a) particulars of the grounds on which the applicant relies; and

(b) for an innovation patent -- the date on which the patent was certified.

(2) If 1 of those grounds is that the invention is not a patentable invention because of information about the invention in a document or through the doing of an act, the particulars must specify:

(a) in the case of a document--the time when, and the place where, the document is alleged to have become publicly available; and

(b) in the case of an act:

(i) the name of the person alleged to have done the act; and

(ii) the period in which, and the place where, the act is alleged to have been done publicly; and

(iii)  a description that is sufficient to identify the act; and

(iv) if the act relates to apparatus or machinery--whether the apparatus or machinery exists and, if so, where it can be inspected.

(3) Except by leave of the court:

(a) evidence is not admissible to prove a ground of invalidity that has not been disclosed in the particulars in relation to that ground; and

(b) evidence as to apparatus or machinery that exists at the date of lodgment of the particulars is not admissible unless it is proved that the party relying on the evidence:

(i) if the apparatus or machinery is in his or her possession--has offered the opportunity to inspect it; or

(ii) in any other case - has used reasonable endeavours to obtain its inspection;

to, or by, each other party to the hearing of the application.

(4) The court may:

(a) extend the time for giving particulars; and

(b) allow the amendment of particulars.

1. Mr Logan QC says that (excluding subparas 4(ii) and (iii) as they are not pressed by the respondents), subparas 4(iv), (v) and (vi) of the ASOCC are “so seriously flawed and likely to be struck out” that “leave to file it should not be granted”. As to subpara 4(iv) (the “Reybanpac device”), the applicant says that this particular “fails to provide the name of the person alleged to have done the act” as required by r 34.46(2)(b)(i) of the Rules. The applicant says that the “vague reference” to the “Reybanpac Company in Ecuador” is “insufficient and embarrassing”. The applicant says that the respondents have ignored the applicant’s written request for particulars (see the affidavit of Benjamin Meredith deposed 11 February 2019: “BPM4” p 19). The applicant also says that there is no pleading of the use having being made of the Reybanpac device. Nor is there “relevant retention information”. The applicant says that there is “real prejudice” to it because the evidence is not available for inspection: see the affidavit of Alison McMillan deposed 11 February 2019 at [6] and [10]. The applicant restates this complaint for subpara 4(v) (“Espumas Device 1”).
2. As to subpara 4(vi), the applicant says that while the device is available for inspection, the allegation “must fail” because there is no disclosure of a use of a device for protecting fruit growing on a stem or branch. Mr Logan QC asserts that “we are not told anything about what these devices were used for (or suitable for), but simply that they were available for sale and sold” (see the McMillan affidavit referred supra at [7(d)].
3. The applicant also says that the delay by the respondents in identifying relevant prior art (in circumstances where the statement of claim was filed on 9 July 2018; the first case management hearing was on 23 July 2018; the statement of cross‑claim was filed on 22 August 2017; further particulars were filed on 21 September 2018; the pleadings were closed on 28 September 2018; and the matter went to mediation in November 2018), is not adequately explained (although the respondents have filed an affidavit of Mr Kempton on 18 January 2019 for this purpose, which will be discussed later in these reasons) such that the Court should refuse to allow the ASOCC to be filed.

## Disposition

1. In the context of providing particulars in a patent infringement suit, Yates J has explained in *UPaid Systems Ltd v Telstra Corp Ltd* (2013) 220 FCR 182 at [27] that “one function of such particulars is to point out to the alleged infringer the specific acts relied upon, so as to prevent surprise at trial. … Importantly, however, such particulars define the scope of the proceeding, including the scope of discovery”.
2. In *Woodbridge Foam Corporation v AFCO Automotive Components Pty Ltd* (2002) 58 IPR 56, Finkelstein J emphasised at [3]‑[4] the “well established” principles of pleadings and particulars and decried at [5] “a sloppy approach to pleadings” which “simply will not do if the result is to undermine or compromise their function”. His Honour went on at [20]‑[21] to conclude that:

[20] The want of novelty claim also relies on acts of prior use. The use is particularised in paragraph 2C of the Particulars of Invalidity. It is alleged that the use was by five named corporations and some examples are given. However, O 58 r 15 and reg 12.4(2) require the respondent to specify for each alleged act the name of the person who did the act, the period in which, and the place where, the act was done publicly, a description that is sufficient to identify the act and, if the apparatus exists, where it can be inspected.

[21] Mr Hess acknowledged that these particulars have not been provided but complains that to do so is a difficult task. I accept that may well be so but that is not a proper basis for ignoring the rules. If the respondent wishes to persist with this part of its defence the particulars must be given.

1. As regards the Reybanpac device (subpara 4(iv), the respondents have not provided particulars in accordance with r 34.46(2)(b)(i) as they have failed to state the “name” of the company which is said to have used the Reybanpac devices in Ecuador since at least 2002. Further, no particulars are provided as to the *use* of this piece of prior art and, unless and until the required particulars are given, reliance on the asserted prior art is liable to be struck out as embarrassing and for failing to comply with the Rules and the Regulations.
2. The Espumas Device 1 suffers from the same difficulties. In circumstances where the applicant cannot test the device for its *use* with respect to securing fruit, it too is liable to be struck out.
3. Reliance on the Espumas Device 2 would prejudice the applicant’s ability to plead in response because, again, the prior art is not sufficiently particularised as to what the particular devices were used *for* and what they may be *suitable for*.
4. The respondents seek to address the *delay* in pleading this prior art in an affidavit of Mr Kempton, filed 18 January 2019. Mr Kempton deposes that on 14 November 2018 he travelled with counsel to Lakeland to the respondents’ banana farm to take instructions. During the course of taking instructions, Mr Kempton says that the respondents showed him, for the first time, an example of a banana protection device which “they knew to have been used in many overseas countries”.
5. As a result of these discussions, Mr Kempton made further enquiries. Because of apparent “difficulties of making contact with people in South America”, this took some time but Mr Kempton says his enquiries “showed” that “these protection devices have been used in Colombia, Costa Rica and Ecuador” before the priority dates of the patents in suit.
6. As Perram J has explained in *Stewart v Deputy Commissioner of Taxation* (2010) 76 ATR 66 at [35]:

Pleadings are succinct statements of a case designed to inform court and foe alike of what is said and how it will be put. Properly done, they promote the identification of the issues in dispute and, by so doing, their more prompt and efficient resolution. So much has always been so. The enactment of provisions such as s 37M of the *Federal Court of Australia Act 1976* (Cth) with its injunction to the expeditious and inexpensive resolution of proceedings gives added impetus to these considerations. It follows that a pleading which departs from its principal purpose of affording procedural fairness to the opposing party is a pleading which confounds the ends of justice. It engenders expense, delay and the wastage of public resources; it is not to be countenanced

1. It is not in keeping with s 37M of the *Federal Court of Australia Act 1976* (Cth) (the “FCA Act”) for a party to plead prior art without the required particulars of what exactly is alleged and then assert, as the respondents do, that any lack of specificity in argument will be cured by evidence that will be led at trial. This is not an acceptable way of conducting patent litigation and is inconsistent with the principles governing the overarching purpose: see ss 37M and 37N of the FCA Act.
2. Accordingly, leave is refused to file the ASOCC. The parties are to put on submissions as to the costs of the interlocutory application within ten days.

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| I certify that the preceding thirty‑nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 12 August 2019

SCHEDULE OF PARTIES

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| --- | --- |
|  | QUD 462 of 2018 |
| Respondents |  |
| Second Respondent/Cross‑Claimant | PETER JOSEPH INDERBITZIN |
| Third Respondent/Cross‑Claimant | FRANZISKA MARIA MARGARET INDERBITZIN |
| Fourth Respondent/Cross‑Claimant | SHARPROCK PTY LTD (ACN 128 361 348) |
| Fifth Respondent/Cross‑Claimant | RED VALLEY PTY LTD (ACN 126 185 788) |