

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA14/2010
[2010] NZCA 56**

BETWEEN	PETERSONS GLOBAL SALES LIMITED First Appellant
AND	P&B ENGINEERING LTD Second Appellant
AND	CARL JAMES PETERSON First Respondent
AND	KARL JACOB PETERSON Second Respondent

Hearing: 16 February 2010
Court: O'Regan, Arnold and Baragwanath JJ
Counsel: K T Browne for Appellants
C J Peterson in Person
Judgment: 5 March 2010 at 12.30pm

JUDGMENT OF THE COURT

- A The application for interim relief is declined.**
- B The application for leave to appeal is declined.**
- C The applicants must pay the respondents their usual disbursements.**

REASONS OF THE COURT

(Given by Baragwanath J)

Nature of the application

[1] The applicant companies seek leave under s 214 of the Employment Relations Act 2000 to appeal against a decision of the Employment Court in favour of the respondents Carl James Peterson (Carl) and his son Karl Jacob Peterson (Jake). They also seek interim relief or an order under s 215 referring the case back to the Employment Court to restore an order of the Employment Relations Authority, set aside by the Employment Court, to restrain the respondents' use of intellectual property claimed by the applicants.

[2] By s 214(1) an appeal to this Court lies only on the ground that the decision of the Employment Court was wrong in law. By subs (3) leave may be given only if the question of law is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.

[3] The shareholder and director of the first applicant, Petersons Global Sales Limited (PGSL), is Kerris Browne, the daughter of Carl and the sister of Jake. Her husband is the shareholder and director of the second applicant, P&B Engineering Limited (P & B).

[4] The applicants, who sought to appear by Mrs Browne, did not initially appreciate that this Court has no jurisdiction save as to errors of law. At a telephone conference on 18 December 2009 they were both advised of that fact. They now contend that while the respondents were employed by the applicants they infringed intellectual property, which the applicants claim is theirs, by its use in the design of a sawmill which they built. They submit that Chief Judge Colgan erred in law in rejecting their claims and by setting aside the decision of the Employment Relations Authority in their favour.

Background

[5] Peterson Portable Sawing Systems Ltd (PPSSL) was originally owned by Carl. In *Lucas v Peterson Portable Sawing Systems Ltd*, at the conclusion of heavy patent litigation, the Supreme Court overturned decisions of the High Court and this

Court which had been unfavourable to PPSSL.¹ But the success came too late for the company which in March 2005 ceased trading. Some 47 per cent of the shareholding had by then passed to Mrs Browne and her husband.

[6] In November 2003 PPSSL had entered into a contract (“the 2003 agreement”) with Mrs Browne’s company PGSL. PGSL contends that the agreement conferred intellectual property upon it but has been misconstrued to its disadvantage by the Employment Court.

[7] In addition, PGSL and P & B both claim that the respondents have wrongly used intellectual property, generated by the respondents while in their employment, to which they are entitled.

The application

[8] The applicants seek leave to argue in this Court the following six questions:

- (a) Is the agreement “pivotal to the case” as the Chief Judge found?
- (b) Did two patents known as ATS and ASM belong to PPSSL as the applicants contend?
- (c) Did the 2003 agreement provide, as they contend, for transfer of the intellectual property and confidential information of PPSSL to PGSL?
- (d) Was Jake Peterson subject to a restraint of trade covenant preventing him from using confidential information claimed by P&B but used by Carl and Jake in their mill?
- (e) Did other items of intellectual property and confidential information used by Carl and Jake in their mill belong to PGSL?
- (f) Did Carl and Jake breach their duty of fidelity and good faith to their respective employers PGSL and P&B?

¹ *Lucas v Peterson Portable Sawing Systems Ltd* [2006] 3 NZLR 721.

[9] The alleged errors of law can be distilled into two grounds:

(1) the Employment Court misconstrued the 2003 agreement, which the applicants claim conferred on them two of the items of intellectual property said to have been used in the design of the sawmill but which the Court held did not have that effect;

(2) the applicants were employing the respondents (PGSL employed Carl; P&B employed Jake) when a further four items of intellectual property said to have been used in the design of the sawmill were created by Carl and Jake respectively, so that the applicants were entitled to such property which the Court held did not belong to them.

Ground (1) misconstruction of the 2003 agreement

[10] Having lost the initial rounds of the patent dispute PPSSL lacked the cash required to continue trading. So Mrs Browne's company PGSL, formed in late 2002, entered the 2003 agreement with PPSSL to allow the business operated until then by PPSSL to continue.

[11] Material provisions of the agreement are reproduced with emphasis added:

[1] AGREEMENT SUMMARY

The Manufacturer [PPSSL] agrees that the Marketer & Retailer [PGSL] will be its exclusive agent to market, sell and distribute the Peterson Sawmill "Products" globally, and the Marketer & Retailer agrees that it will buy all its [sic] required Peterson Sawmill Products from the Manufacturer. This agreement endures until such time as either party is in default or non-compliance of the following "Terms and conditions", or either party gives notice of termination, in which case this agreement will be terminated. Any defaulting party will automatically hand over all right, title, interest in or claim to any of the patents, designs, copyright, trade marks, trade names and logos relating to the Products (including the name and mark "Peterson Portable Sawmills"), and all right, title, interest in or claim to all enquiries and customer data and records, manufacturing methods and processes, know-how or other industrial or intellectual property associated with the Products or gained during the operation of this agreement, to the party not in default.

It defined the subject-matter of the agreement:

"Products" shall be the models of Peterson Sawmill that are currently manufactured by the Manufacturer at the commencement of this

agreement, and may extend to include new models where acceptable to both parties.

...

“Products” shall be those models manufactured by the Manufacturer at the date of commencement. **Any new products manufactured by the Manufacturer must first be accepted in both entity and price by both parties, prior to becoming part of the “Products” marketed by the Marketer and Retailer....**

It stated as to term:

This agreement endures until such time as either party is in default or non-compliance of the following “Terms and Conditions”, or either party gives notice of termination, in which case this agreement will be terminated.

It stated the consequences of default:

Any defaulting party will automatically hand over all right, title, interest in or claim to any of the patents, designs, copyright, trade marks, trade names and logs relating to the Products (including the name and mark “Peterson Portable Sawmills”), and all right, title, interest in or claim to all enquiries and customer data and records, manufacturing methods and processes, know-how or other industrial or intellectual property associated with the Products or gained during the operation of this agreement, to the party not in default.

It went on to state the parties’ rights to the product:

34 Right to Product – Both parties have equal right, title, interest in and claim to all of the patents, designs, copyright, trade marks, trade names and logos relating to the Products (including the name and mark “Peterson Portable Sawmills”) and equal right, title, interest in or claim to all enquiries, customer data and records, manufacturing methods and processes, know-how or other industrial or intellectual property associated with the Products. At Termination of this Agreement, all aforementioned rights shall automatically pass to the non-defaulting party.

[12] The Employment Relations Authority had held that the agreement, when breached, conferred on PGSL the whole of PPSSL’s intellectual property. The Employment Court disagreed. The Chief Judge stated:

[45] It is common ground that the patents and intellectual property in designs and products that the plaintiffs are alleged to have infringed unlawfully were not among the models of Peterson sawmill that were being manufactured by PPSSL in November 2003. Although some confusion surrounds the proprietorship of the intellectual property at issue in this case, what is clear is that it was not encompassed by the agreement so that property cannot have vested in PGSL.

[13] The applicants contended in support of their application that there is an arguable error of law in the Court’s decision. In particular, they relied on the

broadly worded consequences of default set out in the Agreement Summary (reproduced at [11] above) in arguing that the whole of PPSSL's intellectual property would pass on breach. But we discern no arguable error of law.

[14] The policy of the Act is not to engage this Court in disputes which, while advanced as errors of law, turn substantially on the facts. In *New Zealand Employer's Federation Inc v NUPE* it was stated:²

As this Court has emphasised in its decision under [the predecessor section to s 214], the stringent requirements of that section must be satisfied and neither determination of what comprises a question of law nor the question of whether that point of law raises a question of general or public importance is to be diluted (*R v Slater* [1997] 1 NZLR 211). And in considering whether a question of law which is not of general or public importance ought nevertheless "for any other reason" to be submitted to the Court for decision, and in exercising the residual discretion, the Court can be expected to have regard to the special jurisdiction of the Employment Court under the [Employment Relations Act] (cf s 216).

Section 216 requires this Court to have regard to the special jurisdiction of the Employment Court, which has the primary task for finally resolving employment disputes.

[15] The first ground fails.

Ground (2): claim of rights resulting from the respondents' employment

[16] Where an employee makes a literary work in the course of his or her employment that person's employer is the owner of the copyright.³ The position is otherwise where the contract is not of employment but for services, in which case copyright resides in the author. As Denning LJ said in *Stephenson Jordan & Harrison Ltd v MacDonald & Evans*,⁴ it is almost impossible to give a precise definition of the distinction. There is the further problem that it can be difficult to discern whether the work was made in the course of the author's employment. So such cases are fact-dependent.

² *New Zealand Employer's Federation Inc v NUPE* [2001] ERNZ 212 (CA) at [27].

³ Copyright Act 1994, s 21(2).

⁴ *Stephenson Jordan & Harrison Ltd v MacDonald & Evans* (1951) 69 RPC 10 (CA) at 22.

[17] Here there is a factual dispute as to whether, as the applicants contend, it can be said that the remainder of the intellectual property which they claim to have been infringed, derived during the period of Carl's relationship with PGSL and Jake's with P & B, is in fact the property of the applicants. The Employment Court has made factual findings against them which this Court has no jurisdiction to review.

[18] But even if there were some error of law in the way the Employment Court approached the claim of rights resulting from the respondents' employment this ground is particular to the present dispute and does not otherwise meet the criteria of s 214(3).

[19] Returning to the individual questions we comment:

- (a) Is the agreement "pivotal to the case" as the Chief Judge found?

The agreement is of considerable importance. But the case for interpreting it in the manner for which the appellants contend is weak.

- (b) Did two patents known as ATS and ASM belong to PPSSL as the applicants contend?

The argument to that effect raises questions of fact which this Court lacks jurisdiction to consider.

- (c) Did the 2003 agreement provide, as they contend, for transfer of the intellectual property and confidential information of PPSSL to PGSL?

The argument to that effect is weak.

- (d) Was Jake Peterson subject to a restraint of trade covenant preventing him from using confidential information claimed by P&B but used by Carl and Jake in their mill?

The argument on which the question depends, that the appellants were entitled to confidential information of such a kind, has been disposed of in earlier comments.

- (e) Did other items of intellectual property and confidential information used by Carl and Jake in their mill belong to PGSL?

The argument to that effect raises questions of fact which this Court lacks jurisdiction to consider.

- (f) Did Carl and Jake breach their duty of fidelity and good faith to their respective employers PGSL and P&B?

The argument to that effect raises questions of fact which this Court lacks jurisdiction to consider.

[20] It follows that both the application for leave to appeal and therefore the application for interim relief fails and must be dismissed.

Right to be heard

[21] The question whether the applicant companies might appear without counsel was also raised.

[22] In the Employment Court Mrs Browne, like her father, was complimented by the Chief Judge for the manner of their conduct of the case before him, as is permissible in that Court (s 236).

[23] At the present hearing Mrs Browne acknowledged having read this Court's judgment in *Re GJ Mannix Ltd*⁵ which states the rule that a company, being incapable in law of appearing in person, must necessarily be represented by counsel, subject to the Court's residual discretion to allow unqualified advocates to appear

⁵ *Re GJ Mannix Ltd* [1984] 1 NZLR 309.

before them.⁶ In *Honda v Boilermakers' Union*, when dealing with lay advocates in an employment law context, this Court added:⁷

Perhaps the most important reason that applies to appeals from the Labour Court lies in the fact that those appeals may be brought only on points of law, and in such matters persons unqualified in law are unlikely to be of great assistance either to this Court or to their own cause.

The rule is not absolute. The Court has a discretion to allow lay representation, but it is a discretion that will be exercised sparingly, only for good reason, such as in an emergency situation where counsel is not available, or in particularly straightforward matters where the assistance of counsel is not needed by the Court, or where it would be unduly technical, burdensome or costly to insist on counsel.

The practice in this Court in respect of appeals from the Labour Court has been to require written application for consent to lay representation, made in sufficient time before the hearing to enable other arrangements to be made if consent is not given, and with particularisation of the reasons for the request.

[24] That policy remains in force.

Costs

[25] As was their right the respondents also elected to appear in person rather than by counsel. That means that they are not entitled to costs but may receive their usual disbursements.

⁶ At 314.

⁷ *Honda New Zealand Ltd v New Zealand Boilermakers' Union* [1991] 1 NZLR 392 at 397.