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NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 11/97

IN THE MATTER of proceedings under the Copyright
Act 1984 and the Fair Trading Act 1986

BETWEEN LYNTEC HOLDINGS LIMITED

Plaintiff

AND ANTHONY WILLS

Defendant

Hearing: 29 January 1997

Counsel: C L Elliott and A McDonald for Plaintiff
Defendant in Person

Judgment: 29 January 1997

ORAL JUDGMENT OF ROBERTSON J

Solicitors

Baldwin Son & Carey, DX CP 24055, Auckland for Plaintiff

This is an application for interim relief. It relates to litigation initiated by the plaintiff, the exclusive licensee and distributor of Kawasaki Jet Ski personal watercraft within New Zealand. The company seeks to restrain the defendant from interfering with the integrity of that right.

This is a case of what is sometimes referred to as parallel importation. It is clear from the decision of Prichard J in *Barson Computers (NZ) Ltd v John Gilbert & Co Ltd* [1985] FSR 489, that a parallel importation of copyright works is contrary to the law of New Zealand. As recently as late last year Salmon J noted that the principles applied equally to second-hand and new materials.

There has been a relationship between the plaintiff and Kawasaki over some period. The relief however is sought on the basis of a contractual arrangement which was eventually put in place as recently as December 1996. On this application the defendant does not attempt to go backwards. It wants the Court's intervention to protect the future.

I have been hampered in this matter because Mr Wills is not represented and has appeared in person. He is clearly a man of spirited disposition and determination but when one gets to the heart of the matter there

cannot be the slightest doubt that he has been involved in importations into New Zealand contrary to the provisions of the Copyright Act.

I think on reflection Mr Elliott is correct that the operative provision is s 35, but the important definitional situation which covers the present factual position is in fact clause 12(3).

What is complained of and not denied, is that items have been imported into New Zealand by Mr Wills which if they had been manufactured in New Zealand, would undoubtedly have been a breach of the copyright. I accept Mr Wills' submission that what he has brought in are not copies but originals. That is not the relevant test or the crux of the matter.

In the most simple of terms, the plaintiff has established that it has an exclusive distributorship and it is entitled to seek to maintain the integrity of that position under the provisions of the Copyright Act. What it wants to do about the past is its business. The application before me relates to the future. It seeks to restrain Mr Wills either directly or indirectly with interfering with its contractual rights.

I am not so naive as not to have heard the veiled threats in some of Mr Wills response about his ability to provide information to his mates

so that they would individually do the importing with his knowledge, assistance, counselling and advice. I simply advise him that if he acts in a way which is contrary to the clear spirit and wording of the order then he leaves himself open to proceedings in contempt. It is all very well for people in their backyards over a few beers to become indignant about large operators trying to squeeze out small people, but if he thinks he can use some sort of Kiwi ingenuity and self-help to try and avoid the thrust of the Court's order, then he does so at his peril.

This is an application for interim relief. The principles are well known. They were discussed in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 192. The plaintiff is a substantial commercial organisation. It is well able to meet the undertaking as to damages which it has filed.

It initially concerned me as to whether or not this was a case which could simply be met by an award of damages in the longer term. But I am satisfied on the basis of the evidence currently available that it is not simply a case of the plaintiff not getting its share of the deal in respect of any importations into the country. It is the general effect thereof on the marketing network and servicing operation which the plaintiff is endeavouring to establish.

I have concluded that in fact the balance undoubtedly comes down in favour of the plaintiff. If on a full hearing its position is unsustainable then it will pay for its trouble in damages. But there really is little dispute factually about what is occurring and I am not left with any doubt as to the appropriate legal standards which have application.

I am however concerned that this is not the sort of situation in which a grant of interim relief should be permitted to run on. I am aware of the pressures there are on the Court but if there are genuinely urgent matters which require attention then sitting time can be found. Accordingly I restrict the grant of relief for a period of six months. The plaintiff if it is minded to do so can well and truly have its day in Court within that time. I again stress to Mr Wills the need and desirability for him to get some genuine legal advice (not merely those who will encourage him in his David and Goliath fight) people who can exercise some sensible judgment for him about the realities of the legal system.

It does not appear the granting of the relief will have any irreparable damage to Mr Wills. He has told me of a number of other business ventures. He has described the extent to which he is involved in an ever increasing operation in servicing watercraft including those which are

covered by the plaintiff's distribution agreement. There is nothing which places any impediment on his ability to provide service providing he does that with materials which have been sourced in a lawful and legitimate way.

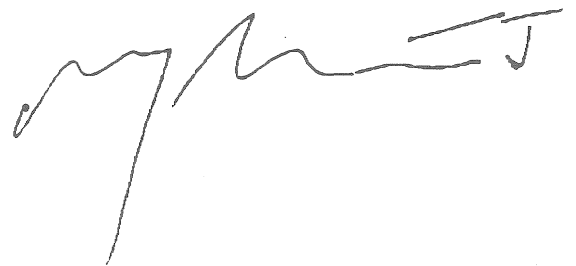
There will accordingly be until 31 July 1997 an interlocutory injunction against the defendant, his servants, contractors, agents, associates or any company with which he is associated or otherwise connected in any way restraining him from :

- 1.1 Directly or indirectly importing or selling or offering for sale in New Zealand any motorcycles, all terrain vehicles, utility vehicles, personal watercraft and parts and accessories thereof manufactured by or on behalf of Kawasaki Heavy Industries Limited including Kawasaki JET SKI personal watercraft and parts thereof or otherwise dealing commercially in the same or encouraging, assisting or authorising other persons or parties from doing so in New Zealand;
- 1.2 Representing that the importation, sale, offering for sale or commercial dealing in Kawasaki JET SKI personal watercraft and parts thereof have been authorised by the plaintiff or Kawasaki

Heavy Industries Limited or, are entitled to the same or similar warranties and support services that would have existed had the goods been supplied by an authorised distributor or retailer.

An application is made for costs. I have explained to Mr Wills that costs normally follow the event. I am frankly of the view that this is a proceeding which should not have had to be brought. On its face it is clear that whatever bush lawyer advice Mr Wills might have been getting, his actions were in contravention of the legal rights of the plaintiff. He tells me about the difficulties in getting lawyers and the expense involved. Although one can have some sympathy on the personal level, he has to recognise this and that he has created the problems.

The purpose of costs is not to punish but to make some reasonable contribution towards the costs which have been incurred by the plaintiff. I make an award in favour of the plaintiff for the sum of \$1470 together with the cost of the filing fee. I am conscious that Mr Wilkins will think that is a somewhat paltry sum when he gets his own lawyer's bill. It is a contribution in accordance with the normal standards.

A handwritten signature in black ink, appearing to be 'M. J. Wilkins', written in a cursive style.