

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1726-SD/99

**LOW
PRIORITY**

UNDER The Copyright Act 1994

BETWEEN FIBREGLASS
TECHNOLOGIES LTD

Plaintiff

AND FIBREGLASS SOLUTIONS
LTD

First Defendant

AND FURNITURE SOLUTIONS
(1997) LTD

Second Defendant

AND C. MAYNARD

Third Defendant

AND C. JULIAN

Fourth Defendant

AND A. McMURTRIE

Fifth Defendant

AND D.J. BOTHWELL

Sixth Defendant

Hearing: 7 February 2001

Counsel: D. Marriott and I. Finch for Plaintiff
D.P.H. Jones for Defendants

Judgment: 8 February 2001

JUDGMENT OF SALMON J.

Solicitors:

James & Wells, Private Bag 11907, Ellerslie, Auckland

Geoffrey M. Joyce, PO Box 105137, Wyndham Street, Auckland for Defendants

[1] There are two applications before the Court for determination:

1. An application by the first, second and sixth named defendants for security for costs against the plaintiff.
2. An application by the plaintiff for orders for further and better discovery against the first and second defendants.

Background

[2] In October 1999 the plaintiff issued proceedings alleging breach of copyright and misuse of confidential information in relation to table tops and bases manufactured by both the plaintiff and the first defendant. On 14 December 1999 Fisher J. granted an application for an interim injunction against the defendants restraining them -

From manufacturing, advertising, selling, offering for sale or distributing fibreglass table tops and/or fibreglass seat bases which are copies or copies of a substantial part of the plaintiff's table tops and seat bases as embodied in the table top moulds and plugs depicted in Exhibit BJH 26 and the seat base moulds and plugs depicted in Exhibit BJH 26 examples of infringing copies being depicted in Exhibit BJH 19.

[3] Since that time there has been an application for a Mareva injunction against the defendants in respect of which an interim order was made on 21 February 2000. There has also been an order joining the principal shareholder of the first defendant as a defendant.

[4] A major part of the plaintiff's business was the supply of table tops and bases to Burger King restaurants. Employees of the plaintiff went to work for the first defendant and in August/September 1999 the first defendant began supplying table tops and bases of Burger King to the exclusion of the plaintiff. This came about as

the result of Burger King obtaining tenders for the products from each of the plaintiff and the first defendant.

[5] In February 2000 Burger King commissioned the design of new table tops and seat bases and for plugs to be produced from that new design. That design was undertaken by a Mr Richard Raynes, of Marine Creations Ltd. He has filed an affidavit deposing that he designed the new table tops and seat bases without any reference to the fibreglass table tops or seat bases currently in Burger King restaurants. He was supplied with basic overall dimensions and general requirements, a formica table top with an alloy edge rim which had been earlier installed in Burger King restaurants, a two man seat base clad in formica and a fibreglass two man seat. He was also provided with copies of specifications for table tops taken from the Burger King manual for the Asia Pacific region. He was specifically advised that fibreglass table tops and seat bases supplied to Burger King were the subject of litigation and that he was not to go to any Burger King restaurants to view or compare any table tops or seat bases. He was told to liaise with Mr Bothwell. In his affidavit Mr Raynes confirms that he did not at any stage in his design process view fibreglass tables in any Burger King restaurant or indeed, any other fibreglass tables. He deposes that the design of the table tops and seat bases was from scratch and that they were not copied from any existing tables or seats. He says that Mr Bothwell did not have an input in terms of the design, but simply approved the design itself.

[6] The application for further and better discovery relates to the table tops and seats manufactured and supplied to Burger King from Mr Raynes' design.

The Application for Security for Costs

[7] The principles are well established. There is a threshold test. Rule 60 of the High Court Rules provides that the Court must be satisfied that there is "reason to believe" the plaintiff will be unable to pay the defendant's costs if unsuccessful. If this threshold test is met there is a discretion whether or not to grant an application for security. Once the threshold is crossed there is no predisposition one way or the

other. However, as Hammond J. said in *Hamilton v Papakura District Council* (1997) 11 PRNZ 333, 336:

The economic realities of a case must be looked to.

[8] As to the threshold test, the defendants submit that the plaintiff is *prima facie* insolvent, has no on-going business and negligible assets. The defendants further submit that the plaintiff has not been forthcoming about its current financial position and has provided inaccurate, misleading or inadequate information to the Court.

[9] The evidence to which the defendants refer in support of these submissions is contained in affidavits of Mr Bothwell. In the affidavit filed in support of the application he referred to contracts held by the plaintiff which had been terminated. He referred to a contract to supply Burger King with parapets for their restaurants and the fact that a bathroom supplier to which the plaintiff provided product had closed down. The plaintiff acknowledges the correctness of these statements and also points out that it has lost the contract to supply tables and chairs to Burger King.

[10] It also seems clear that the premises in which the plaintiff manufactured its fibreglass products have closed down. The plaintiff says that it has changed the direction of its business to the manufacture of fibreglass boats and that it has three such boats for sale. There is no evidence that any of them have been sold, nor is there any evidence that the plaintiff is currently manufacturing any form of fibreglass product.

[11] The plaintiff maintains that it continues to be solvent and to conduct a profitable business. In affidavits sworn by Mr Hellyer, the principal of the plaintiff company, accounts as at 31 March 1999 are annexed. These, of course, cover the period prior to the loss of the supply contracts with Burger King and prior to the bathroom supply company ceasing business. Mr Hellyer, in an affidavit of 9 October 2000 explains the absence of any later accounts to the failure of his accountant to complete them. No further affidavit has been filed to update that situation nor is there any evidence as to the business of the company since March 1999 other than reference to the three fibreglass boats which are said to have a combined value of \$59,000.

[12] Mr Hellyer's affidavit states that his company's financial worth is as follows:

Three boats in stock	\$59,000.00
Accounts receivable	\$38,400.10
Stock of moulds, plugs, plant etc.	\$49,267.00
Stock of finished product	\$18,000.00

He then states that the company currently has accounts payable of approximately \$15,000 giving a net worth of around \$150,000.

[13] For the defendants, Mr Jones points out:

1. That there is no evidence that any of the boats have been sold.
2. That the accounts receivable item is that contained in the 1999 accounts, as is the value of the moulds, plugs and plant. He points out that it seems highly unlikely that 18 months later these two items would remain the same, let alone, almost two years later. He notes that the 1999 accounts provide a depreciation rate of 50 to 60 per cent for plugs and moulds.

[14] On the basis of the evidence I conclude that the plaintiff's business has ceased. The 1999 accounts also indicated a substantial working capital deficiency. On the basis of the matters referred to above, I have no doubt that the threshold test is met.

[15] As to the exercise of discretion, there is in my view, only one factor of significance to be weighed in the plaintiff's favour. That is, the question as to whether the plaintiff's impecuniosity is caused in significant part by the defendants' actions.

[16] In his judgment granting the interim injunction Fisher J. concluded that the evidence of copyright infringement was strong. There seems to be little doubt that the loss of the Burger King contracts is a major factor in the change of fortunes of the plaintiff company. It has been properly said that the question as to whether the plaintiff's impecuniosity has been caused by the acts of the defendant is very

difficult to assess without a full hearing. Mere assertion that that is the case is insufficient. Persuasive evidence is required.

[17] In this case I consider that the finding of Fisher J. provides the necessary foundation for a finding in the plaintiff's favour. This, however, is just one of the factors which must be weighed in the exercise of the Court's discretion. I am mindful of the cautionary note sounded by Hammond J. in *Hamilton v Papakura District Council* to which reference has already been made. As Hammond J. said:

In contemporary circumstances, it really will not do for Courts to approach these sorts of issues on a simplistic "the plaintiff is entitled to a day in Court thesis".

A defendant like a plaintiff is entitled "to be made whole if successful".

[18] I acknowledge the commercial commonsense of these comments, but in the present case I conclude that such considerations are outweighed by the other factors referred to.

[19] Given the finding of Fisher J. it would, in my view, be quite wrong to create difficulties for the plaintiff in bringing its case to Court in circumstances where there is strong evidence of copyright infringement which, it seems, at least on a *prima facie* basis, has led to the circumstances in which the plaintiff has lost a principal contract.

[20] Accordingly, the application for security for costs is declined.

The Application for Further and Better Discovery

[21] As already indicated, the plaintiff seeks discovery in relation to the tables and seats now being manufactured by the first defendant and supplied to Burger King by the second defendant.

[22] Mr Hellyer, in an affidavit in reply on this application, states that the tables and seats are "exceedingly similar" to the plaintiff's products in all design

parameters and he expresses the view that he does not see how Mr Raynes could have come up with a design so similar by reference solely to the material which he says he worked with. There is thus a question of Mr Raynes' credibility raised by Mr Hellyer. It is not appropriate on this interlocutory application to determine questions of credibility.

[23] Mr Marriott, for the plaintiff, submits that the existing pleadings are sufficient to found the requirement for further and better discovery. He refers to paragraph 12 of the amended statement of claim which is in the following terms:

12. THE First and/or Second Defendant(s) separately or jointly have reproduced the Copyright Works in a material form and have offered to supply or sell and have supplied or sold copies of the Copyright Works in New Zealand.

Particulars

12.1 THE First and/or Second Defendant(s) have, separately or jointly, manufactured and/or offered for sale and/or sold fibreglass table tops and fibreglass seat bases ("the Defendants' Table Tops and Bases") which are copies, or copies of a substantial part, of the Copyright Works.

12.2 IN particular in or about August/September 1999 the First and/or Second Defendant supplied TPF with the Defendants' Table Tops and Bases for use in the fit out of a BURGER KING restaurant located at Carlton, Christchurch.

[24] It will be noted that the particulars refer to the supply of table tops and bases to Burger King in August/September 1999 and the statement of claim itself, of course, refers to supplies which occurred prior to the supply of product designed by Mr Raynes.

[25] In my view the fact that the table tops and seats are now being manufactured to a design independently commissioned by Burger King requires an amendment to the statement of claim specifically directed at that product if discovery relating to that product is to be justified.

[26] Accordingly, I decline to grant the application on the basis of the present statement of claim.

Costs

[27] As each of the applications have failed, there will be no order for costs.

Delivered at 3-15 a.m./p.m. on 8/2/ 2001.

A handwritten signature in cursive script, appearing to read "D. J. [unclear]".