

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**CIV 2015-463-00022
[2015] NZHC 1336**

BETWEEN CARL JAMES PETERSON
 Plaintiff

AND ATTORNEY-GENERAL
 Defendant

Hearing: 8 June 2015

Appearances: C J Peterson the Plaintiff in person
 M McKillop for the Defendant

Judgment: 12 June 2015

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

*This judgment was delivered by me on
12.06.15 at 4:30 pm, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

[1] The Attorney-General applies to strike out Mr Peterson's proceeding. That proceeding was filed on 21 January 2015. Mr Peterson's claim is brought under s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA). It asserts "misfeasance and non-feasance" by a High Court Judge. Mr Peterson claims \$3M in damages.

Background

[2] Mr Peterson's issues began in 1998 when he was involved in litigation relating to the manufacture of a log grabber. Mr Peterson and his company were involved in the design, manufacture and sale of portable sawmills. The plaintiffs in that litigation, Rex Lucas and G W Lucas and Sons Limited (collectively "Lucas") claimed Mr Peterson and his company (collectively "Peterson") had infringed their patent.

[3] On the first day of trial on 26 February 2001 Peterson's counsel withdrew. The following day Mr Peterson applied for an adjournment to allow him to instruct new counsel. Over strong objection from counsel for Lucas, Rodney Hansen J granted the adjournment and also made an injunction to restrain Peterson from producing machinery alleged to infringe the Lucas patent. The learned Judge noted:

[11] I have come to the view that the interests of justice require that an adjournment be granted. Among the factors which have persuaded me to this view are the following:

- [a] This is undoubtedly a highly technical area calling for specialist expertise. It is obvious that Mr Peterson does not have the technical expertise or legal skills to represent himself or his company whatever he may have believed in the past. That became evident in the course of yesterday's hearing.
- [b] There have indeed been shortcomings in the conduct of this litigation, notwithstanding the involvement of counsel. It is unnecessary for the purposes of this judgment for me to apportion responsibility for the errors which have occurred but plainly, as a result of either deficiencies in advice or a failure to act on advice, steps were not taken which have been very much to the disadvantage of the defendants.
- [c] I do not see any of the exceptional circumstances contemplated by the authorities which could permit Mr Peterson to represent the first defendant in the conduct of this litigation.

[d] Although there will obviously be some limited prejudice to the plaintiffs as a result of the adjournment, I am of the view that it can be substantially met by appropriate conditions. The plaintiffs will obviously be entitled to an order for costs. I have been informed by Mr Peterson that the defendants have not been manufacturing or selling the machines which is claimed to infringe the plaintiffs' patent and has no intention of doing so pending the resolution of this litigation.

[4] The Lucas claim was heard before Fisher J in 2003. In that outcome Peterson appealed to the Court of Appeal but was unsuccessful. However Peterson succeeded on appeal to the Supreme Court in 2006 when the Lucas patent was invalidated. His company was awarded costs in February 2007.

[5] Lucas discontinued their proceeding in July 2009. On 21 October 2009 Priestley J in the High Court heard Mr Peterson's application for costs and the Lucas application to strike out the Peterson counterclaim.

[6] The costs argument focussed upon whether anything more than disbursements could be awarded because Mr Peterson and his company were not represented by counsel.

[7] The Lucas application for strike out concerned the counterclaim which was filed during the course of the trial heard before Fisher J in April 2003. That counterclaim noted:

The defendants are interested and aggrieved by the existence of the Lucas patent and the conduct of the plaintiffs in threatening and bringing proceedings to enforce the Lucas patent.

[8] Priestley J noted in that respect that the prayer for relief sought an enquiry into damages "for groundless threats of infringement" pursuant to s 74(2)(c) of the Patents Act, plus costs and interest.

[9] In this regard Priestley J noted:

[42] In Mr Gray's submission no threat of the plaintiffs to issue proceedings caused the defendant's damage. Rather it was the making of an injunction by Rodney Hansen J in February 2001 which forced the defendants to alter the nature of their business.

[10] In his consideration of the matter Priestley J said:

[53] It would be straining the interpretation and purpose of s 74 to hold that the provision provides an avenue whereby an ultimately successful litigant can achieve compensation for the consequential losses of the litigation.

...

[56] For these reasons I am satisfied that the counterclaim of the second defendant which remains afoot is untenable. There is no basis for the claim. Section 74 is not designed to provide a statutory remedy in this situation. Accordingly it is struck out.

[11] Priestley J ordered the second defendant's disbursements to be paid but refused to award costs because Peterson was unrepresented by counsel.

[12] Shortly after Mr Peterson commenced new proceedings seeking damages for alleged breach of copyright. Those proceedings were settled in 2011. An agreement was signed. Then Mr Peterson advised he did not intend to settle. The matter then came before Associate Judge Bell as to whether or not there had been a settlement. The learned Judge concluded there was a binding agreement and he struck out the copyright proceedings. Mr Peterson's application for review of that decision was dismissed. Mr Peterson's application for leave to appeal to the Court of Appeal was dismissed. He then applied to the Court of Appeal to vacate its judgment refusing the grant of leave. Mr Peterson's purpose had been to continue to press for damages in connection with what Mr Peterson considered were unjustified claims/threats in connection with threats of patent breaches.

[13] In its decision refusing Mr Peterson's application the Court of Appeal noted:

[10] None of the other matters raised by Mr Peterson meets the test for a recall. Ultimately, the matters raised are a "recasting [of] arguments previously given" or putting forward other arguments that "could have been raised at the earlier hearing but were not.

[14] Then in October 2014 Mr Peterson commenced new proceedings against Mr Lucas. The claim referred to the previously considered threats of Mr Lucas to begin new copyright infringement proceedings unless Mr Peterson discontinued all proceedings against Lucas. The claim noted that neither the High Court nor Court of Appeal had seriously considered the Lucas threats were legitimate. Mr Peterson

sought a recall of the judgments of Associate Judge Bell and Gilbert J both of which agreed issues between the parties had been settled by agreement. Significant claims were filed for costs and for alleged damage. In response an application for summary judgment/strike out was filed. In his judgment dated 24 April 2015 upon those applications Fogarty J noted:

[30] ... All of the arguments by all the contentions now pleaded by Mr Peterson either were or could have been argued in the litigation to date. It is not a ground for reopening argument that the litigant has a better understanding of the law and could have improved upon the case. Nor is there any basis for reopening the litigation in the High Court against the submission that previous decisions of the Court of Appeal on the same dispute were wrong.

[31] There is no dispute that the principle of issue estoppel applies as these issues were distinctly put in issue by Mr Peterson and there are decisions against him on it.

[32] One of the deep-seated principles of the law is that parties must bring their whole case before the Court so that all aspects of it may be finally decided once and for all. The leading decision is that of *Henderson v Henderson*. *Henderson v Henderson* has been discussed in many cases. It is sufficient to refer to Asher J's decision in *Rafiq v Secretary of Department of Internal Affairs of New Zealand*. There Asher J adopted a dictum of the United Kingdom Court of Appeal in the case of *Barrow v Bankside Agency Limited*.

A party cannot bring a case relating to a certain party, certain sequences of conduct, and a certain timeframe, and then when it fails bring another case raising another similar complaint relating to the same party, the same sequence and the same timeframe. Parties must bring their whole case to the Court so there can be finality of litigation.

[33] It should be patent from the reasoning of this judgment that Mr Peterson's latest claim arises out of precisely the same events that had been addressed in earlier litigation. It is no argument for Mr Peterson that he might now be formulating his argument in a stronger way. I am not making a finding to that effect at all. But, rather, I am making that point as a justification for not embarking, as invited by Mr Peterson, into an examination of the arguments he is seeking to place before the Court now.

[34] Mr Peterson's latest statement of claim, although genuinely advanced, is misconceived. It is an abuse of the process. This is because there is an important common law principle that there is a community interest in finality of litigation.

[15] Mr Peterson's new proceeding for consideration at this time upon the Attorney-General's strike out application is founded on a claim that the High Court Rules required the High Court to obtain an undertaking for damages when granting

an interim injunction on 26 February 2001. In that regard Mr Peterson refers to r 7.54 of the High Court Rules which requires an applicant for an interlocutory injunction to sign an undertaking to comply with any order for payment of damages should such damage occur. Mr Peterson's claim is that the Court's failure to require such an undertaking forced his company to cease trading and resulted in significant losses. He claims these losses arise from the failure to require an undertaking for damages and that he only became aware of this failure following the judgment striking out his counterclaim in December 2009.

[16] Mr Peterson claims that Rodney Hansen J as trial judge was in a position of authority and should have known of the affect the order would have on his business, and was "reckless" as to its effects.

[17] Mr Peterson claims the order for interim injunction, in absence of an order requiring an undertaking as to damages, breaches s 27 of the NZBORA. Mr Peterson's position is that the Courts having prevented him from recovering damages from Lucas and "have made the Crown the only existing party liable for my satisfaction".

Strike out application

[18] The Court may strike out all or part of a claim if:

- (a) it discloses no reasonably arguable cause of action¹; or
- (b) is an abuse of the Court's processes.²

No reasonably arguable cause of action:

- (a) Although pleaded facts are assumed to be true the Court may reject allegations which are speculative and without foundation.
- (b) The Court should not strike out a claim unless it is clearly untenable.

¹ High Court Rules 15.1(1)(a).

² High Court Rules 15.1(1)(b)-(d).

- (c) The jurisdiction is to be exercised sparingly.
- (d) The Court may strike out claims even if difficult questions of law are involved, so long as sufficient argument is heard in that regard.
- (e) The Court should be slow to strike out a claim in any developing area of the law and particularly where a novel duty of care is alleged.

Abuse of process

[19] These involve claims of impropriety and misuse of the Court's processes including the filing of prolix, unintelligible or scandalous pleadings³, collateral challenge to concluded proceedings⁴ or improper motive to seek collateral advantage.⁵

The Attorney's case for strike out/dismissal

[20] It is the case for the Attorney-General that no reasonably arguable cause of action exists, that the proceeding is an abuse of process, that there has been no breach of the High Court Rules, no losses been sustained by Mr Peterson, and no reasonable reformulation of his claim is possible.

[21] Counsel submits that the claim in respect of Rodney Hansen J's grant of an interim injunction is barred by the doctrine of judicial immunity and the Supreme Court judgment in *Attorney-General v Chapman*⁶

[22] In *Chapman* the Supreme Court concluded that monetary compensation from the Crown was not available for breach of the Bill of Rights Act by judicial officers.

[23] In respect of Mr Peterson's claim the Attorney-General submits there was no breach of High Court Rules for the judgment granting an adjournment and providing for an interim injunction was not made pursuant to any application from the Lucas

³ *CIR v Chesterfields Preschools Ltd* [2013] NZCA 53.

⁴ *Hunter v Chief Constable of the West Midlands* [1982] AC 529.

⁵ *Air National Corporate Ltd v AIVEO Holdings Limited* [2012] NZHC 602.

⁶ [2011] NZSC 110.

plaintiffs. Rather and for the reasons explained by Rodney Hansen J [earlier referred to in para [3] herein] the adjournment was granted upon Mr Peterson's request and due to his assurance he was not manufacturing the machines that were claimed to be infringing patent rights and because the Court had been assured by Mr Peterson that he nor his company intended doing so pending the resolution of the litigation.

[24] Whilst Mr Peterson's claim is brought under the NZBORA the claim throughout refers to an alleged misfeasance in public office. It is the submission on behalf of the Attorney-General that Mr Peterson's claim is not capable of reformulation as a tort action for misfeasance (even if such an action was technically available against a Judge of the High Court) for such would inevitably be barred due to judicial immunity and the unlimited jurisdiction of the High Court. In any case such a claim would be time barred pursuant to s 4(1)(a) of the Limitation Act 1950.

Mr Peterson's case in opposition

[25] In an affidavit filed in opposition Mr Peterson says he only learned in 2009 during the High Court hearing before Priestley J that the Lucas plaintiffs had not signed an undertaking for damages.

[26] Mr Peterson claims the Judge who issued the injunction, Rodney Hansen J, was in a position of authority and should have known the effect the order would have on his business, and was "reckless" as to its affects. He says that only since realising no other avenues of relief are available to him has he realised that under the NZBORA he has, he says, a legitimate claim against the Crown and the Attorney-General for losses sustained from the "unjust injunction imposed in 2001".

[27] Mr Peterson submits that there is a clear argument for damages against the Attorney-General irrespective of the judgment in *Attorney-General v Chapman*.

[28] Mr Peterson says he notes that s 27 of the NZBORA holds the Crown is subject to civil proceedings "in the same way as civil proceedings are brought between individuals". He submits:

My personal understanding of the underlying principle of law in a modern sense is to ensure that underlying natural human rights cannot be easily disposed of or undermined at the whim of a temporary party in the seat of Government. Any Government that defies its own laws and rules does not deserve the support, allegiance and acceptance of those same rules by the people.

[29] Mr Peterson submits, inter alia:

- (a) It is an affront to the intelligence of every thinking citizen that the Crown should rely upon the convention of judicial immunity;
- (b) By those precedents and conventions “our society has entered upon the slippery slope of despotism and dictatorship wherein our rulers take leave of the very laws they have imposed, and flagrantly ignore the matter of high cost to the very people they have taken oath to protect;
- (c) Under natural law embodied in Article 10 of the Universal Declaration of Human Rights enacted by the United Nations in 1948 and ratified by the New Zealand Parliament “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights...”
- (d) Section 3 of the NZBORA ensures that everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights;
- (e) Section 3 enables the rights therein to be actionable against any of the legislative executive or judicial branches of government irrespective of the judicial immunity that attached to individual judges;
- (f) There is no law that provides immunity to the Government for breaches of human rights against individuals and that the Higher Courts have no right to change the law or ignore it at the whim of the Attorney-General;

- (g) Section 27 enables an aggrieved person to bring proceedings against the Crown for abuses by the judicial branch of government and therefore the Attorney-General has a case to answer based on ss 3 and 27 of NZBORA;
- (h) That the Supreme Court minority of judges supported a claim for monetary compensation in the *Attorney-General v Chapman* case;
- (i) Therefore and in light of that minority position it is absurd to claim there is no scope for development of the law needed or required to give teeth to the NZBORA.

[30] Regarding claims that the Lucas interests did not request an interim injunction but rather that that was imposed by Rodney Hansen J as a condition of adjournment he requested, Mr Peterson submits that does not displace or remove the burden of injustice to Mr Peterson. Also he says it ignores the fact that the Lucas interests had not requested an interim injunction in their original pleading, and that Mr Peterson had already compromised in order to obtain an adjournment by promising not to manufacture or sell product the subject of the patent infringement claim. Therefore he says the interim injunction was unnecessary and in the circumstances of the case excessive. Mr Peterson submits that when Fisher J did in 2003 order a permanent injunction in favour of Lucas interests he assumed that an undertaking for damages was already in place and thereby he “further abrogated the [Peterson] rights concerning this matter”.

[31] Mr Peterson says that having heard from the Lucas counsel in 2009 that they had signed no undertaking for damages Priestley J made it clearly known that no claim could be made against those Lucas parties as a result of the injunction originally ordered by Rodney Hansen J and renewed by Fisher J. Therefore he says a damages claim against the Lucas parties relating to the Court enforced injunctions has never been litigated and could never have earlier been brought; that those Lucas claims having been discontinued there can be no issue estoppel or res judicata arising, which is why Mr Peterson pursues this claim presently. Further, he having only learned, with the ruling of Priestley J in December 2009 that no Lucas

undertaking for damages had been provided, that he is therefore within time to file the proceeding he has.

[32] Regarding the submission for the Attorney-General that the ruling by Rodney Hansen J (to adjourn and to grant an interim injunction meanwhile) was not a ruling upon the Lucas interim injunction application but rather to enable Mr Peterson time to engage the services of other counsel Mr Peterson submits it should not detract from the availability of remedy. He says to that end s 3(2)(c) of the Crown Proceeding Act 1950 provides that any person:

...may enforce as of right... any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown, and for which there is not another equally convenient or more convenient remedy against the Crown.

[33] Regarding attempts to impeach his credibility Mr Peterson says a careful and in-depth reading of his legislation history will show that he has been victimised by the Court system which has caused him the loss of a multimillion dollar business due to a groundless patent infringement proceeding.

[34] Mr Peterson submits his situation stands distinctly apart from that endorsed by the majority in the *Attorney-General v Chapman*, because his devolves from a civil dispute rather than a criminal one; and where he has been fully and completely exonerated from the patent infringement claim, and who desperately pleads for compensatory remedy equal to the losses visited upon him by two separate High Court Judges.

Conclusions

[35] Priestley's J's judgment refusing an order for costs and for striking out the Peterson counterclaim has no connection with Rodney Hansen J's reasons for granting an adjournment eight years earlier.

[36] It appears the original Lucas proceeding did not apply for an interim injunction.

[37] It is uncertain what parts of Priestley J's judgment gave rise to Mr Peterson's proclaimed newly found knowledge that no undertaking for payment of damages by Lucas had been filed with the Court at the time the adjournment was granted and an interim restraining order was imposed.

[38] It is not sufficient for Mr Peterson to claim he is within time to bring a new proceeding because he has only recently become aware of factors which occurred in 2001 in respect of which there has been a written record ever since.

[39] The claim is a breach of the six year limitation period contained within the Limitation Act 1950 s 4(1)(a).

[40] Also, the claim is an abuse of process. Mr Peterson has recast his claim 14 years after an interim injunction was ordered and five years after his proceeding settled. The present action is a collateral challenge to the outcome of the litigation and is an abuse of process. Mr Peterson's case is that the NZBORA preserves a right to justice and the requirement for those in authority to observe natural justice principles; that this applies to our judges as much as it does the legislative and executive branches of government.

[41] Mr Peterson cannot understand how the Supreme Court in *Chapman* could endorse a process that does not provide a remedy in line with ss 3 and 27 of the NZBORA.

[42] Mr Peterson was very critical about the majority judgment of the Supreme Court in *Chapman*. In the result the provisions of the NZBORA cannot provide any assistance to Mr Peterson. Whether such claims could reasonably be reformulated as a tort action from misfeasance or abuse of public office, it makes no difference. Such claims will almost inevitably be barred due to judicial immunity and the unlimited jurisdiction of the High Court.

[43] The clear evidence in this case is that the interim injunction granted by Rodney Hansen J was made within jurisdiction and was a bona fide exercise of judicial powers.

[44] In the particular circumstances of the case there was no rule requiring an undertaking to be provided where it had not been sought and where Mr Peterson had agreed he would comply with its terms anyway.

[45] In that context of matters it is questionable whether claims of loss could subsist. He was not and had no intention he says to manufacture the product which it was alleged breached patent rights. There is a distinct lack of pleading about how his losses have occurred or the extent of those or how they have connection to the circumstances when his proceeding was adjourned at his request in 2001.

Result

[46] The claim is barred by judicial immunity. There is no reasonably arguable cause of action. The proceeding could not reasonably be reformulated as a claim in tort for misfeasance in public office.

Judgment

[47] The proceeding is struck out. Further and because no viable alternative proceeding is capable of succeeding, the claim shall be dismissed.

Costs

[48] These are fixed on a scale 2B basis and are payable to the defendant.

Associate Judge Christiansen