

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA5/2014  
[2015] NZCA 122**

BETWEEN DOUG ANDREWS HEATING AND  
VENTILATION LIMITED AND MULTI  
KC LIMITED  
Appellants

AND WAYNE JAMES DIL  
First Respondent

GARY ROY MITCHELL  
Second Respondent

G & W IMPORTS LIMITED  
Third Respondent

Hearing: 11 March 2015

Court: Harrison, Wild and Miller JJ

Counsel: A J Pietras for Appellants  
D L Marriott and C Fry for Respondents

Judgment: 20 April 2015 at 11.00 am

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**JUDGMENT OF THE COURT**

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- A Appeal dismissed.**
  - B Cross-appeal dismissed.**
  - C Costs to lie where they fall.**
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**REASONS OF THE COURT**

(Given by Miller J)

## Introduction

[1] Doug Andrews Heating and Ventilation Ltd (“Andrews”) owns NZ patent No 332466, for portable hangi cookers, with the priority date of 21 October 1998. Its exclusive licensee, Multi KC Ltd, markets a portable two-tier cooker called the Multi Kai Cooker, which is protected by the patent.<sup>1</sup> The cooker is in two parts or tiers which are interengageable via a swage and sleeve arrangement. The lower part comprises a heat source and hot plate, and the upper part comprises a cooking chamber or food housing designed to hold mesh baskets. The user assembles the cooker for use and disassembles it for cleaning and transport.

[2] The third respondent, G & W Imports Ltd (“GWI”),<sup>2</sup> markets a portable cooker called the UFO cooker which comes in two variants, single-tier and two-tier. The two-tier cooker is the subject of the litigation. It comprises interengageable parts connected via a swage and sleeve arrangement. The lower part comprises a heat source, hot plate and cooking chamber. The upper part forms an extension to the cooking chamber.

[3] Andrews brought infringement proceedings in July 2009, under the Patents Act 1953 (the Act).<sup>3</sup> It originally pleaded that both the single and two-tier UFO cookers infringed the patent, but after some considerable time – in March 2012 – it confined the claim to the two-tier cooker, having conceded that single-tier cookers existed before the priority date. GWI met the claim with an affirmative defence and counterclaim in which it pleaded invalidity for obviousness and want of novelty at the priority date.

[4] The hearing was held in October 2013 before Allan J in the High Court at Auckland. The Judge dismissed the claim, holding that on its true construction the patent did not reach the UFO cooker.<sup>4</sup> He also dismissed the counterclaim, holding that the patent protected a novel and truly inventive step. He awarded costs against

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<sup>1</sup> We need not distinguish between the appellants, who are related parties.

<sup>2</sup> The first and second respondents are the directors of G & W Imports.

<sup>3</sup> That Act continues to apply in this appeal under the transitional provision of s 260 of the Patents Act 2013.

<sup>4</sup> *Doug Andrews Heating and Ventilation Ltd v G & W Imports Ltd* [2013] NZHC 3333 [High Court judgment].

Andrews on the claim and GWI on the counterclaim. From this judgment Andrews appeals and GWI cross-appeals.

### **The background**

[5] The appeal turns on the interpretation of the Andrews patent. The patent comprises 20 claims, but the parties agree that this litigation turns on the first and most general of them, claim one, which specifies:

A set of parts for providing a cooking apparatus comprising at least a first part comprising a housing having a lower portion adapted to receive a heating source and an upper portion including plate means adapted to be heated by said heating source, and a second part comprising a housing capable of containing food to be cooked, the two parts having interengageable connection means such that when the parts are assembled together they engage to unite the parts with the lower portion of the second part engaging the upper portion of the first part to define a cooking chambers above the said plate means and to provide the cooking apparatus.

[6] The preferred embodiment, which is marketed as the Multi Kai cooker, is depicted as follows:

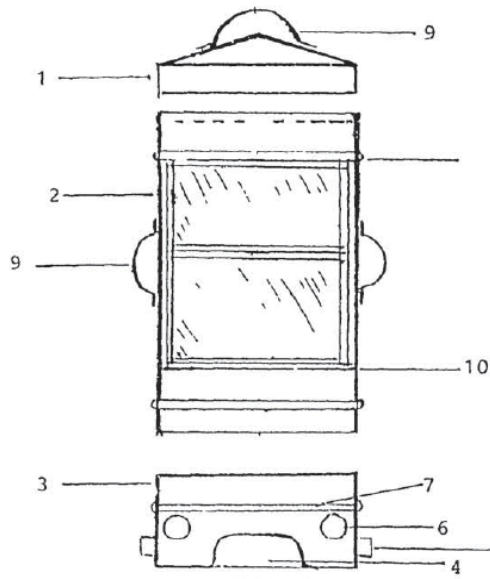


FIG. 1



FIG. 3

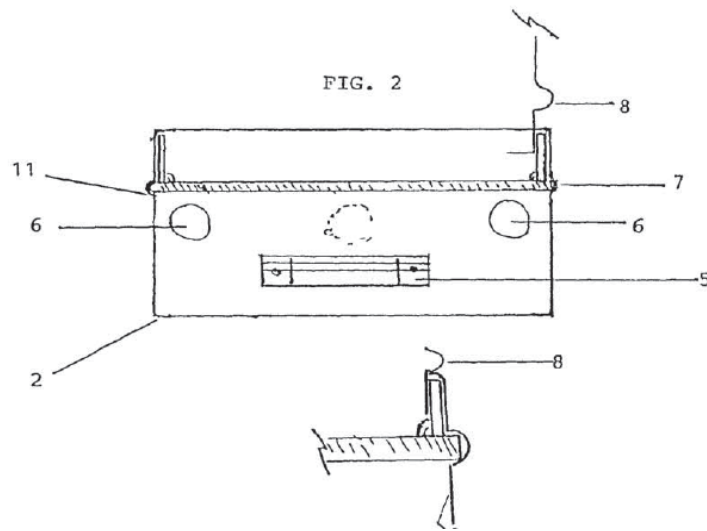


FIG. 2

1. Lid
2. Upper cooking chamber
3. Lower chamber
4. Aperture for inserting heat source
5. Heat source
6. Ventilation holes
7. Plate means
8. Swage
9. Handles
10. Rod/ledge
11. Swage

[7] The invention is said to relate to a multi-purpose portable cooker especially suitable for the preparation of food in the style of the hangi. The description begins with the background, which contrasts the cooker with the traditional in-ground hangi and catalogues the latter's disadvantages: a hangi is not always easy to assemble, the preparation of the pit is laborious and the heating of the stones a skilled and potentially dangerous task, and the cooking is difficult to monitor. The objective of the invention is to provide an alternative method and apparatus for cooking that addresses some of these problems, or at least provides the public with a useful choice.

[8] The statement of the invention replicates claim one. It goes on to explain what is meant by "plate means":

By plate means is meant a plate or dish-shaped structure constructed from a material which is able to be heated by a heating source to a sufficiently high temperature to enable smoke, steam, essence or flavour releasing substance, when placed on the heated plate to release said smoke, steam, essence or flavour, or to enable food placed directly onto the plate means to be cooked.

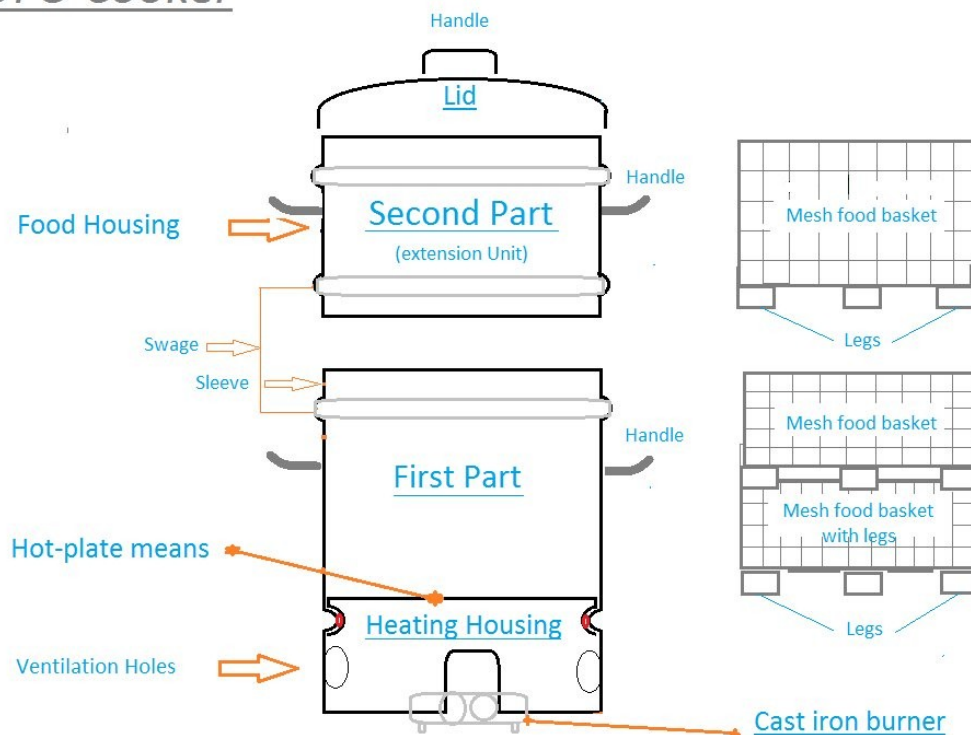
Preferably the plate means is adapted to hold smoke, essence-releasing substances, or water.

[9] The statement adds that preferably the set of parts includes at least one, and preferably two, containers for the food to be cooked; in a preferred option the containers are mesh baskets, the lower one adapted to stand on the plate means and the other to fit onto the lower basket.

[10] The statement further explains that the construction of the cooking apparatus offers three advantages: it improves portability because the apparatus can be moved as two smaller units rather than one larger; it facilitates cleaning because the upper chamber may be separated from the lower; and it allows the lower chamber to be used separately as a wok or frying vessel.

[11] GWI's two-piece UFO cooker is depicted as follows:

## UFO Cooker



[12] It will be seen that the UFO cooker differs from the Andrews preferred embodiment in that their parts separate at different places. In the Multi Kai cooker, the swage and sleeve connection is almost immediately atop the plate means. The first part is contained by a barrel the sides of which are high enough to contain water or smoking or flavouring substances on the plate means, but not, as Mr Marriott conceded, to accommodate a food basket. The basket is held in the second part. In the UFO cooker, the first part accommodates a food basket, so the swage and sleeve connection is higher, and the second part accommodates an additional basket. It is common ground that the UFO cooker lacks three advantages of the Multi Kai cooker, all attributable to the height of the interengageable connection above the plate means; it is less portable, it is less easy to clean, and its plate means cannot easily be used as a wok or frying vessel.

[13] As noted at [4] above, Allan J held that the patent does not reach the UFO cooker and dismissed the invalidity challenge to the patent. The appeal and cross-appeal challenge those decisions. The appeal also addresses damages and personal liability of the first and second respondents, who are the directors of GWI, but we do not find it necessary to deal with those issues. It is necessary to deal with

costs in the High Court. Allan J essentially allowed costs to lie where they fell, by awarding GWI costs on the claim and Andrews costs on the counterclaim and directing that hearing fees be shared equally. Each side complains not only that it should have costs but also that it merits an uplift on scale.

### **The appeal: scope of the patent**

[14] Section 10 specifies what a patent registered under the Act must contain:

#### **10 Contents of specification**

- (1) Every specification, whether complete or provisional, shall describe the invention, and shall begin with a title indicating the subject to which the invention relates.
- (2) Subject to any regulations made under this Act, drawings may, and shall if the Commissioner so requires, be supplied for the purposes of any specification, whether complete or provisional; and any drawings so supplied shall, unless the Commissioner otherwise directs, be deemed to form part of the specification, and references in this Act to a specification shall be construed accordingly.
- (3) Every complete specification—
  - (a) shall particularly describe the invention and the method by which it is to be performed; and
  - (b) shall disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; and
  - (c) shall end with a claim or claims defining the scope of the invention claimed.
- (4) The claim or claims of a complete specification must relate to a single invention, must be clear and succinct, and must be fairly based on the matter disclosed in the specification.

....

[15] The correct approach to interpretation of the patent is not in dispute. The leading authority is *Lucas v Peterson Portable Sawing Systems Ltd.*<sup>5</sup> For the Supreme Court, Gault J held:<sup>6</sup>

[25] The first and essential step ... is to construe the claim. Construction is a matter of law for the Court.

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<sup>5</sup> *Lucas v Peterson Portable Sawing Systems Ltd (in liq)* [2006] NZSC 20, [2006] 3 NZLR 721.

<sup>6</sup> Footnotes omitted.

[26] A patent specification is to be read as a whole and given a purposive construction. It must be construed as it would be understood by the appropriate addressee – a person skilled in the relevant art.

[27] Each part of the specification is to be read objectively in its overall context and in light of the function of that part. The claims are to be interpreted by reference to the object and description in the body of the specification.

[28] The claims define the scope of the monopoly conferred by the patent. They limit what others may do. They must clearly define the protected field so others may fairly know where they cannot go. The description in the body of the specification may assist interpretation, but it cannot modify the monopoly the inventor has clearly marked out. If his claim is formulated too narrowly so that imitators do not infringe, that cannot be rectified by reference to the description. If it is too wide, consequent invalidity cannot be saved by reading in limitations appearing in the description. The description of a preferred embodiment of the invention is just that and plainly will not confine the scope of an invention claimed more broadly. All of this is well established.

[16] Construction is purposive, meaning that it is informed by an understanding of the invention, or aspect of the invention, that the patentee intended to protect.<sup>7</sup> The element of inventiveness about the Andrews cooker is its separation into parts which, as the Judge found, separate the cooking chamber in the upper part from the heat source and plate means in the lower part, with the associated advantages set out in the specification.

[17] Although put in diverse ways, Andrews' argument comes down to this: the claim states that when the first and second parts are engaged "a" cooking chamber is defined; it is the act of assembly that defines the chamber; that being so, the two-tier UFO cooker must infringe, for it defines a single, albeit larger, cooking chamber when its parts are engaged and so meets the language of claim one "perfectly".

[18] Allan J dismissed this argument. He observed that the parties agreed that interengageability is the key feature of the invention, and noted that the claim does not cover single-tier cookers; only when an extension is added does the possibility of infringement arise. That being so, it is irrelevant that the first or base part of the invention may be adapted for cooking; when used in that manner the parts are not engaged, so the cooker is not being used in the manner for which patent protection has been secured. He emphasised that no claim based on use of the hot plate for

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<sup>7</sup> *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] RPC 9 at [33].



direct cooking has found its way into claim one. Once the upper part is added a cooking chamber is created to permit cooking of hangi-style food, usually by steaming; that is the only cooking chamber defined by the claim. He concluded that claim one extends protection to a hangi cooker in which only the second part comprises a cooking chamber. It follows that the UFO cooker does not infringe: its first part contains a cooking chamber, and the second part merely extends it. He added that the UFO cooker enjoys none of the advantages of the Multi Kai cooker; it cannot be broken down for portability and cleaning, nor can it be used as a barbeque.

[19] We agree with the Judge, and for the same reasons. As Mr Marriott submitted, the description of the first part of the cooker in claim one does not include a food “housing”, as the second part does; rather, the first part is confined to the heat source and plate means, with the sides or barrel being just high enough to connect the second part and hold liquid for steaming, or smoking essences. The cooking chamber and cooking apparatus are created only when the two parts are engaged. To interpret the claim in this way is not to introduce a limitation, as Mr Pietras contended; it is to interpret the claim objectively and purposively, and by reference to the patent specification as a whole.

[20] We further agree with the Judge that the UFO cooker does not infringe. It is a hangi-style cooker in which the second part merely extends the cooking chamber formed by the first, increasing the quantity of food that can be cooked. Hangi-style cooking is the object of the Andrews invention, according to the patent; it is designed to address problems associated with the traditional hangi. But the Andrews cooker does not allow hangi-style cooking until the two parts are engaged, and the claim is drafted accordingly.

[21] We acknowledge that the Andrews cooker is inventive in a modest way, and useful, and the patent might have been drafted so as to extend to the GWI’s variant upon its central idea. But a patent must clearly mark out its monopoly so that others know where they may not go, and we agree with the Judge that this patent marks its claim in a particular manner that does not extend to the UFO cooker.

## The cross-appeal: invalidity of the patent

[22] The challenge is advanced on two grounds: lack of novelty, and obviousness.<sup>8</sup> We record that we suggested to Mr Marriott the cross-appeal would become academic if the UFO cooker were found not to infringe. He did not dispute that, maintaining that GWI does not intend to copy the Multi Kai cooker. But he insisted on pursuing the cross-appeal nonetheless.

### *Novelty*

[23] Section 41(1)(e) of the 1953 Act provides that a patent may be revoked, on the application of any person interested, on the following grounds:

#### **41 Revocation of patent by court**

- (1) Subject to the provisions of this Act, a patent may, on the application of any person interested, be revoked by the court on any of the following grounds, that is to say,—
  - (e) That the invention, so far as claimed in any claim of the complete specification, is not new having regard to what was known or used before the priority date of the claim in New Zealand:

[24] In *Lucas v Peterson* the Supreme Court emphasised that the test is strict.<sup>9</sup>

[3] The test for lack of novelty is a strict one. Any use or disclosure relied upon as anticipating the claimed invention must incorporate all of the features of the claimed invention. At the conclusion of a summary of the relevant principles the English Court of Appeal in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* said:

To anticipate the patentee's claim the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented: *Flour Oxidizing Co. Ltd. v. Carr & Co. Ltd.* ((1908) 25 R.P.C. 428 at 457, line 34, approved in *B.T.H. Co. Ltd. v. Metropolitan Vickers Electrical Co. Ltd.* (1928) 45 R.P.C. 1 at 24, line 1). A signpost, however clear, upon the road to the patentee's invention will not suffice. The prior inventor must be clearly shown to have planted his flag at the precise destination before the patentee.

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<sup>8</sup> Sections 41(1)(e) and (f) of the Patents Act 1953 respectively.

<sup>9</sup> *Lucas v Peterson Portable Sawing Systems Ltd (in liq)*, above n 5 (footnotes omitted).

[25] The challenge on novelty grounds rested on evidence that other two-tier cookers existed at the priority date. GWI identified four such prior art cookers, known (after the witnesses associated with them) as the Hartwell, Hakaraia, Richardson and Dil cookers. In the first three cases Andrews had examined the cooker. Expert evidence was called. Allan J reviewed the evidence at length before rejecting GWI's claims. In two cases (the Hartwell and Hakaraia cookers) there was reason to doubt the veracity and reliability of the witnesses, though the Judge was not prepared to go so far as to infer that an attempt had been made to mislead the Court. He did not accept the alleged provenance of those cookers. He found that the Richardson and Hakaraia cookers did not exhibit all of the features of claim one and the date on which the Hakaraia cooker was first used in some public setting was not adequately proved. Evidence about the fourth cooker, that of Mr Dil, was so unsatisfactory as to have negligible value, and Andrews had not been able to inspect it. The Judge concluded that the onus of proof had not been discharged.

[26] Mr Marriott confronted the Judge's findings about each of the four prior art cookers. This was no small task. The Judge's findings were well grounded in the evidence, as Mr Pietras detailed in his submissions, and we find them convincing. Indeed, our review of the findings leads us to think the Judge was generous toward the respondents, because there was clear evidence that claims advanced for some of the cookers were false or not reliable. No purpose would be served by rehearsing all the evidence. We will illustrate the point using examples:

- (a) The two-tier cooker which Mr Hartwell presented, saying it had been made in 1996 and used many times, lacked heat staining, which occurs, according to the evidence of a metallurgist, when stainless steel is heated in the presence of air. He sought to explain this away, saying - contrary to his brief of evidence - that he had only used the cooker for steaming. He also said that he had used buffing tools and pickling acid to clean it. The Judge could see no reason why Mr Hartwell would go to the trouble of polishing areas that were not visible, and he commented on the absence of evidence of abrasion from buffing devices. There was also striking evidence that welds on the upper tier of the cooker were made relatively recently. And

Mr Hartwell, who admitted to having memory problems, could not give satisfactory details of other two-tier cookers that he claimed to have seen before the priority date.

- (b) Mr Richardson explained that he had made his cooker in 1986 using an old washing machine base, but the base actually came from a Fisher & Paykel SmartDrive washing machine, a model that was not sold until 1991. The cooker produced in court as an example was said to have been made in 1986, but it showed signs of recent fabrication, in the form of felt pen marks made during construction. Counsel demonstrated that the marks could easily be rubbed off. It too lacked heat staining, which the expert evidence suggested should have been obvious after only a few uses.
- (c) Mr Hakaraia could not verify the date on which his cooker was first used. He claimed to remember events where it was used, such as weddings and funerals, but not where or when they took place, or any of the people centrally involved. He frankly acknowledged that he had relied on other, hearsay, accounts when formulating his evidence.
- (d) Mr Dil's cooker was never produced for inspection. He said that he had given one to a friend, but he could not identify that person. The evidence about its prior use was very general and the appellants were unable to investigate the claim. As the Judge observed, one would have expected corroborating evidence that it had existed. We do not understand it to be in dispute that Rule 22.20 was never complied with, despite a direction to that effect.

We are not persuaded that the Judge was wrong.

### *Obviousness*

[27] Recognising the difficulty he faced in challenging the Judge's findings on novelty, Mr Marriott focused his oral argument on obviousness. Section 41(1)(f) of the Act provides that a patent may be revoked on the ground that:

... the invention, so far as claimed in any claim of the complete specification, is obvious and does not involve any inventive step having regard to what was known or used before the priority date of the claim in New Zealand:

[28] The test is found in *Ancare New Zealand Ltd v Cyanamid*:<sup>10</sup>

[43] That aside, the test is well established. It postulates a person (or, where appropriate, a team) skilled in the field but not inventive, invested with the common general knowledge available in the field at the priority date, presented with the prior knowledge or prior use relied upon. Prior documents may be looked at together if that is what the skilled person or team would do. It asks whether to that person or team the alleged inventive step would be obvious and would be recognised, without bringing to bear any inventiveness, as something that could be done or is at least worth trying. That is a question of fact. If any embodiment within the scope of the claim is obvious the claim is invalid. These propositions are helpfully expanded upon in the recent English cases which are still applicable though under the 1977 Act; see the *Windsurfing International* case, *Hallen Co v Brabantia (UK) Ltd* [1991] RPC 195 at p 211, and *Mölnlycke AB v Procter & Gamble Ltd* [1994] RPC 49 at p 112.

[44] As Mr Henry emphasised, the element of inventiveness necessary to resist attack is not high. He referred to the need only for a “scintilla” of invention (*Samuel Parkes & Co Ltd v Cocker Brothers Ltd* (1929) 46 RPC 241 at p 248, but see *Mölnlycke AB v Procter & Gamble Ltd* at p 112). He referred also to the need to avoid the influence of hindsight and stressed the secondary consideration indicative of invention – the commercial success of the patented invention.

[29] Allan J cited this passage. He directed himself that he must identify the inventive concept, assume the mantle of the normally skilled but unimaginative addressee, identify the differences between what the patent claimed and the prior use relied on, and determine whether the differences would have been obvious to the addressee.<sup>11</sup> He was not persuaded by the counterclaim. He emphasised that:

[150] In the present case, G & W has not led any expert evidence as to what common general knowledge existed, or as to what the skilled addressee would have thought or done. The Court therefore has no expert assistance as to what might be regarded as novel and inventive. Against that background, the Court must undertake the four step assessment outlined in *Windsurfing International* without the expert evidence which is almost always available.

[30] The Judge identified the inventive concept as “the element of interengageability which separates the cooking chamber in the upper part from the

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<sup>10</sup> *Ancare New Zealand Ltd v Cyanamid of NZ Ltd* [2000] 3 NZLR 299 (CA).

<sup>11</sup> This is the test found in *Windsurfing International Inc v Tabur Marine (Great Britain) Ltd* [1985] RPC 59 (CA) at 73–74.

heat source and plate means in the lower part, with the consequential practical advantages set out in the complete specification”.<sup>12</sup> It was common ground that a range of one-piece cookers existed before the priority date, but there was no reliable evidence that it was common knowledge that cookers could have stacks or tiers that could be assembled and disassembled. There was no evidence that any of the witnesses had seen any need to redesign his cooker. For this reason, and given the absence of expert evidence, he was not persuaded that an unimaginative addressee in the art as at the priority date would have contemplated what Andrews did. Rather, he was satisfied that the inventive element comprised steps that would not have been obvious to the skilled addressee. He found that the appellants’ principal, Mr Andrews, took “a truly inventive step” when he designed the multi-purpose cooker described in the specification. He took into account, lastly, the commercial success of Multi Kai cooker.

[31] Mr Marriott argued that the Judge erred in two respects: he did not identify the notional skilled addressee and the extent of that person’s knowledge; and he mistakenly equated obviousness with a requirement that the invention had been known, used or considered before the priority date.

[32] With respect to the first of these submissions, Mr Marriott contended that GWI need not call expert evidence about the skilled addressee; rather, it was for the Judge to draw his own conclusions. He argued that the evidence the Judge did hear adequately described the skilled addressee. We reject these submissions. It was for GWI to prove its claim, establishing what was used in a public manner before the priority date, what was common general knowledge, and what were the attributes of the skilled addressee. The Judge found (contrary to Mr Marriott’s submissions) that those persons who were called to give evidence about their cookers did not establish that the invention was obvious. None of them deposed to what was common general knowledge among skilled addressees. The Judge did not say that expert evidence is invariably needed; he observed rather, that it is almost always available.

[33] Nor is it correct that the Judge equated obviousness with novelty. We accept Mr Marriott’s submission that the two concepts are different; something may be

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<sup>12</sup> High Court judgment, above n 4, at [151].

obvious although it has never been done before. But the Judge did not confuse the two. He referred to the existence of single-tier cookers before the priority date and the absence of evidence of two-tier cookers, but these references were mere context for the conclusions that we have summarised at [30] above.

[34] Finally, we reject Mr Marriott’s submission that the Judge erred by treating commercial success of the Andrews cooker as evidence of inventiveness. We accept that such evidence must be considered with care, for reasons given in *Lucas*.<sup>13</sup> But Allan J explicitly treated commercial success as a secondary consideration.<sup>14</sup>

### **Costs in the High Court**

[35] Counsel addressed the Judge briefly on costs at the end of the hearing, but it was agreed that further submissions might be made once the judgment had been delivered. The Judge evidently overlooked that understanding, because he dealt with costs in the substantive judgment, awarding each side scale costs (band 2B) on the other’s claim and sharing the hearing fees. Having regard to the oversight, we approach the issue afresh, without attaching significant weight to the Judge’s exercise of discretion.

[36] Each side took the position before us, as in the High Court, that it should have costs with an uplift to reflect the manner in which the other had conducted itself.

[37] For the appellant, Mr Pietras complained that most of the eight days required for trial were concerned with the counterclaim, that much of the evidence for the counterclaim was spurious, and that Andrews was forced to go to much time and trouble to have the cookers analysed. He emphasised that a series of alleged prior art cookers was presented before trial only to be abandoned when GWI was “caught out”. We observe that the chronology of pleadings provided by counsel identifies six cookers that were abandoned. One was pleaded as prior art only a few weeks before trial, resulting in an 18-month adjournment.

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<sup>13</sup> *Lucas v v Peterson Portable Sawing Systems Ltd (in liq)*, above n 5, at [63].

<sup>14</sup> At 159.

[38] For GWI, Mr Marriott complained that Andrews sued for infringement by single-tier UFO cookers although it knew that such cookers existed before the priority date and did not abandon that claim until 2012. It was that untenable stance, he submitted, that caused the proceeding to take as long as it did. He sought an uplift for all steps taken before the pleadings were amended.

[39] The starting point is that costs follow the result. As the Judge found, each side lost its claim. Mr Marriott disputed this, pointing out that the counterclaim was also pleaded as a defence and arguing that the “Gillette defence”, in which an infringement action is met by a claim for revocation, is a normal and reasonable step to take. The short answer to this submission is that GWI chose to mount a counterclaim and the Judge dismissed it. Perhaps the Gillette defence is a reasonable strategy, but it is elementary that reasonableness does not excuse a losing party from liability for scale costs. Mr Marriott also contended that, the infringement action having been lost, GWI is the victor overall. That submission too is without merit. GWI took it upon itself to enlarge the scope of the litigation by trying to invalidate the patent entirely. Finally, counsel contended that Andrews’ amendment to focus on two-tier cookers changed the nature of the proceeding. We agree with the Judge, who rejected that submission and added that GWI chose nonetheless to call a number of makers of single-tier cookers. We are not prepared to increase costs in the High Court for the respondents.

[40] We turn to Mr Pietras’s argument that the counterclaim accounted for the bulk of the trial and rested on spurious evidence. This argument has initial attraction, having regard to the number of witnesses and prior art cookers, the convincing manner in which GWI’s evidence was despatched, and the late amendment which necessitated a long adjournment. But the argument was also made to the Judge, who was in the best position to assess it, and it was rejected. He held that:

[198] I am not persuaded that costs should be awarded on anything other than a scale basis. I accept of course that various iterations in the list of prior art examples relied upon by the defendants must have caused difficulties for the plaintiffs, but I am not convinced that it follows that the defendants have acted unreasonably. In a case like this where the relevant industry appears to operate chiefly at a grass roots level, it is not surprising that the defendants happened upon instances of prior art over time, no doubt referred to them by



word of mouth or on the grapevine. I would not feel justified in inferring unreasonable behaviour simply because the defendants relied upon particular instances of prior art for a time, and then abandoned them prior to trial. Inspection and testing, along with the need to obtain details of the history of the various cookers, would have taken time and investigation.

The Judge repeated that he was not prepared to draw the inference that the respondents had conspired with others to mislead the Court. We are not persuaded that he was wrong. We are not prepared to increase costs in the High Court for the appellants.

### **Decision**

[41] The appeal and cross-appeal are both dismissed. Costs in this Court will lie where they fall.

Solicitors:  
A J Pietras & Co Ltd, Lower Hutt for Appellant  
AJ Park, Auckland for Respondent