IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-002775
CIV-2014-404-002456
[2019] NZHC 2745

UNDER THE	Copyright Act 1994 and Fair Trading Act 1986
IN THE MATTER OF	Infringement of copyright and breach of the Fair Trading Act 1986
BETWEEN	IAN JAMES BURDEN First Plaintiff
	PGT-RECLAIMED (INTERNATIONAL) LIMITED Second Plaintiff
	PLANTATION GROWN TIMBERS (VIETNAM) LIMITED Third Plaintiff
AND	ESR GROUP (NZ) LIMITED First Defendant
	ELISA NORAH MCLENNAN Second Defendant

Hearing: 25 October 2019

Appearances: A H Brown QC and J R Wach for Plaintiffs
J Miles QC and A Pietras for Defendants

Judgment: 29 October 2019

JUDGMENT OF VENNING J
On applications for leave to appeal

This judgment was delivered by me on 29 October 2019 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: James & Wells, Auckland
AJ Pietras & Co, Lower Hutt in 2456
Counsel: A Brown QC, Auckland
J Miles QC, Auckland in 2456

Introduction

[1] In a judgment delivered on 3 July 2019 the Court declined the application by the plaintiffs in CIV-2014-404-2456 (the 2014 proceedings) for leave to amend the third amended statement of claim in those proceedings and also declined the application by the defendants in CIV-2018-404-2775 (the 2018 proceedings) to strike out the plaintiffs' claim against them in those proceedings.[1]

[2] The unsuccessful applicants in each case now seek leave to appeal to the Court of Appeal.

[3] The relevant background facts are set out in the substantive judgment. It is unnecessary to repeat them.

The 2014 proceedings

[4] Although the application for leave in the 2014 proceedings is said to be advanced on a contingent basis and will only be pursued if the defendants' application for leave to appeal in the 2018 proceedings is granted, it is convenient to deal with that application first as there is a short jurisdictional answer to it.

[5] While s 56(3) of the Senior Courts Act 2016 (SCA) provides leave is required to appeal to the Court of Appeal on any interlocutory decision or order, s 186 also confirms that transitional provisions apply. Schedule 5 and particularly cl 10 of that schedule apply. Clause 10 provides:

> **10 Proceedings, etc, continue under relevant Act**
>
> (1) All proceedings pending or in progress in a court operating under the relevant Act immediately before the commencement of this clause may be continued, completed, and enforced only under the relevant Act (including the relevant rules of court) as if that Act had not been repealed by this Act.
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> (2) All jurisdictions, offices, appointments, Orders in Council, orders, warrants, rules, regulations, seals, forms, books, records, instruments, and generally all acts of authority that originated under the relevant Act or another enactment continued or repealed by this Act, and that are subsisting or in force on the commencement of this clause, have

[1] *Burden v ESR Group (NZ) Ltd* [2019] NZHC 1546.

> full effect as if they had originated under the corresponding provisions of this Act and, where necessary, must be treated as having originated under this Act.
>
> (3) This clause is subject to clause 11.

[6] The Court of Appeal confirmed in *Sutcliffe v Tarr* that a proceeding commenced in this High Court prior to 1 March 2017 will continue under the provisions of the Judicature Act 1908 through all High Court stages of the proceeding, and through any appeals to the Court of Appeal or Supreme Court, to final disposition.[2]

[7] Section 66 of the Judicature Act 1908 therefore applies to the proposed appeal in the 2014 proceedings. An appeal lies to the Court of Appeal against interlocutory decisions of all kinds made in this Court as of right unless the Judicature Act or a rule or order made pursuant to the Act creates a restriction.[3] There is no such relevant rule or restriction.

[8] The short point is that the applicant in the 2014 proceeding does not require leave from this Court to appeal the decision declining them leave to amend.

[9] I raised the above issue with counsel in advance of the hearing and both agreed with it. Mr Brown QC also confirmed that the plaintiffs' position remained the same however, namely that the appeal would only be pursued if the Court granted leave to the defendants to appeal the dismissal of the strike out application.

The 2018 proceeding

[10] The application for leave to appeal in the 2018 proceeding is advanced on the grounds:

(a) the Court failed to take account of the Court of Appeal decision of *Kim Dotcom v District Court at North Shore*;[4]

(b) the Court failed to apply, or properly apply the "could and should" test;

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2 *Sutcliffe v Tarr* [2017] NZCA 360 at [22].
3 *Siemer v Heron* [2011] NZSC 133 at [31].
4 *Kim Dotcom v District Court at North Shore* [2018] NZCA 442.

(c) the decision could narrow the effect of *Henderson v Henderson*[5] in conflict with the principles set out in *Kim Dotcom v District Court at North Shore;*

(d) the Court failed to take account of the prejudice the defendant would suffer if the claim was not struck out;

(e) the Court failed to give proper weight to the oppressive nature of the plaintiffs' claim in the circumstances;

(f) the Court made errors of fact;

(g) the interests of justice support the grant of leave.

[11] In support of the judgment and in opposition to the application for leave the plaintiffs say:

(a) the Court referred to the relevant authorities, including *Henderson v Henderson* and *Johnson v Gore Wood & Co*.[6] *Johnson v Gore Wood & Co* has been repeatedly referred to by this Court and the Court of Appeal as a leading authority in this context;

(b) *Kim Dotcom v District Court at North Shore* did not state any different principle to that contained in *Johnson v Gore Wood*;[7]

(c) the defendants were wrong to say the Court did not address the "could and should" test. The Court expressly referred to the defendants' submission that the plaintiffs could and should have pursued the claim for primary infringement in the 2014 proceedings and to seek to do so in the 2018 proceedings was an abuse;

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5 *Henderson v Henderson* [1843-60] All ER Rep 378.
6 *Henderson v Henderson*, above n 5; and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL).
7 *Kim Dotcom v District Court at North Shore*, above n 4; and *Johnson v Gore Wood*, above n 6.

(d) the decision to decline to strike out was the exercise of a discretion based on the particular procedural background and facts of the case;

(e) the defendants' argument would replace the established broad merits-based judgment with a narrower test;

(f) the decision did not extend the consideration of access to justice beyond its proper scope.

Approach

[12] The following considerations on an application for leave can be derived from the cases of *A v Minister of Internal Affairs* and *Finewood Upholstery Ltd v Vaughan*:[8]

(a) the requirement for leave to appeal should serve as a filtering mechanism to ensure that unmeritorious appeals of interlocutory orders, or appeals of interlocutory orders of no great significance to either the parties or more generally, do not unnecessarily delay the proceedings in which the orders were made;

(b) a high threshold exists. An applicant should raise an arguable error;

(c) the alleged error should be of such general or public importance to require determination or otherwise be of sufficient importance to the applicant to outweigh the lack of any general or precedential importance;

(d) leave should only be granted where the circumstances warrant the further delay;

(e) the Court should assess, in a pragmatic and realistic way, whether the interests of justice are served by granting leave.

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8 *A v Minister of Internal Affairs* [2017] NZHC 887; and *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679.

Analysis

[13] Mr Miles QC is correct, the Court did not expressly refer to the decision of *Kim Dotcom v District Court at North Shore* in its judgment.[9] The case was referred to during argument, but in my judgment it did not take the development of the law in this area any further.

[14] The context in which the relevant issue arose in the *Kim Dotcom* case is important. The discussion of abuse of process was in relation to Mr Dotcom's second cause of action in judicial review proceedings. The proposed claim sought to engage judicial review collateral to a statutory right of appeal. The Court held that that was impermissible where the basis of the review claim was capable of being advanced on the appeal and that form of recourse was more appropriate. The points that Mr Dotcom sought to raise on the judicial review could and should have been raised in the eligibility proceeding and the appeals from that proceeding. The Court's position was summarised in the concluding portion of [34] of the judgment:

> … the raising of further grounds as an afterthought — particularly in circumstances where parallel statutory rights of appeal have been pursued — renders the current applications for review an attempt to reopen the earlier litigation.

[15] The Court also observed that there were other judicial review proceedings in which the point could have been taken. It was in that context that the Court referred to a prohibition against a litigant mounting challenges by instalments.

[16] The Court of Appeal in *Kim Dotcom* did not advance the law on abuse of process as previously stated in *Beattie v Premier Events Group Ltd* and *Bhanabhai v Commissioner of Inland Revenue*.[10] While the Court did refer to *Henderson v Henderson* the Court did not discuss it in any particular detail. In summary, I do not accept that the failure to refer to the *Kim Dotcom* case is an error which supports grant of leave.

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9 *Kim Dotcom v District Court at North Shore*, above n 4.

10 *Beattie v Premier Events Group Ltd* [2014] NZCA 184; and *Bhanabhai v Commissioner of Inland Revenue* [2007] 2 NZLR 478 (CA).

[17] I note the submission that the Court failed to apply the "could and should" test in the present case. Mr Brown noted the "could and should" test is referred to in the *Johnson v Gore Wood* case which the Court cited from extensively. The issue is however, the application of the test in this case.

[18] Mr Miles submitted that the factors the Court had taken into account in declining the application for leave to amend were just as relevant to the application to strike out. He emphasised that before the hearing the plaintiffs were aware of the sales by the defendants which they now seek to rely on but chose not to proceed with a claim for primary infringement at the time. If the Court's judgment stood it would effectively "gut" the *Henderson v Henderson* principle.

[19] Mr Brown responded by submitting the situation was somewhat more nuanced than that as was apparent from [71] of the judgment. That paragraph noted that the focus of the pleading was on the ownership of the copyright and on the importation and secondary infringement. He argued the Court's decision was consistent with the approach of the Court in *Johnson v Gore Wood*.[11]

[20] However, I do consider it arguable that, as the ESR defendants submit, the plaintiffs had their right to access the Court, but failed to take advantage of it, and that in rejecting the strike out the Court effectively treated the right of access as determinative. I accept it is arguable that the Court may have been wrong and arguably in error to potentially confine the application of the *Henderson v Henderson* principle by over emphasising the right of the plaintiffs to access the Court.

[21] There is another relevant factor. This was an application to strike out. If the ESR defendants succeed on the application to strike out then that will be an end of the proceeding. A more permissive approach to leave may be available where the outcome of the application will determine the proceeding. I note that where strike out has been granted bringing a proceeding to an end leave is not required: s 56(4). That also bears on the importance of the appeal to the applicant.

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11 *Johnson v Gore Wood*, above n 6.

[22] I do not consider the possible delay in the progress of the plaintiffs' claim which may be occasioned by an appeal to be a material factor in this case. As Mr Miles pointed out, these proceedings were not commenced until 17 December 2018 in relation to events going back to 2013.

[23] Finally, it is also relevant that the plaintiffs in the 2014 proceedings may appeal without leave, albeit that as noted such appeal will only be pursued if this application for leave is granted.

Result

[24] For the above reasons I am satisfied that overall the intents of justice support the grant of leave to the applicants in the 2018 proceedings to appeal. Order accordingly.

Costs

[25] Each party has effectively achieved what they sought to achieve. Costs are to lie where they fall.

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Venning J