

Case commentary: Lucas v Peterson

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For over 11 years, Lucas and Peterson have been locked in a patent dispute over a portable saw mill. Lucas, an Australian company, was involved in the design and manufacture of outdoor machinery. Lucas' principal product was a "grabber", a device for picking up logs. Peterson was a New Zealand company and its principal product was a portable saw mill which it sold mostly in Australia, New Zealand and the Pacific Islands.

Lucas was the owner of a patent and sued Peterson. Peterson counter-claimed for invalidity. Lucas obtained an interim injunction in 2001. Then in 2003 Lucas was successful in the High Court in proving that Peterson infringed claim 7 of the patent at issue. Peterson appealed to the Court of Appeal and lost. Peterson appealed again to the Supreme Court, New Zealand's highest court, and was successful in proving that claim 7 was invalid in 2006. The Supreme Court remitted the proceeding back to the High Court for determination of the remainder of the claims.

Then in 2009 Lucas applied to the High Court to amend the claims of the patent. The High Court declined to deal with the amendment issue and ruled that it was more appropriately dealt with at the substantive hearing for infringement and invalidity.

In July 2009 Lucas withdrew its claim for infringement. By this time Peterson had been in liquidation for some time. Following the Supreme Court ruling, Mr Peterson had been representing himself, being unable to afford counsel. Peterson said he was forced to place all his resources behind the defence and invalidity claim and went without salary or wages for two years, was forced into significant debt and spent considerable amounts of time on the defence and invalidity claim.

After Lucas withdrew, Peterson claimed costs. As a lay litigant, Peterson was entitled to reasonable disbursements only. Although the Attorney General has the ability to appear in patent proceedings, despite Peterson's repeated requests, he declined to do so. Peterson therefore claimed that in the absence of an appearance by the Attorney General, he was forced to defend the allegations and claim for invalidity in the public interest and he was entitled to costs for that reason. While the High Court acknowledged that Peterson's victory in the Supreme Court had turned to ashes and his financial losses were significant, because he had represented himself during the latter stages of the litigation, he was not entitled to costs during that period.

Peterson also sought damages for unjustified threats of infringement by Lucas. Lucas sought to strike out that claim. The High Court ruled that it would be straining the interpretation and purpose of the unjustified threats provision to hold that the provision provides an

avenue whereby an ultimately successful litigant can achieve compensation for the consequential losses of the litigation. The claim for unjustified threats was found to be untenable and struck out.

So while Peterson was ultimately vindicated by the withdrawal of the infringement claim, it came at considerable cost to his business and personal life.

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