

IN THE SUPREME COURT OF NEW ZEALAND

SC 45/2015  
[2015] NZSC 141

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

AND WAYNE JAMES DIL  
First Respondent

GARY ROY MITCHELL  
Second Respondent

G & W IMPORTS LIMITED  
Third Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: C E Elliott QC and A J Pietras for Applicants  
D L Marriott and C M Fry for Respondents

Judgment: 8 October 2015

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**JUDGMENT OF THE COURT**

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- A The applications for leave to appeal and cross-appeal are dismissed.**
- B The applicants are to pay the respondents costs of \$5,000 in respect of both applications.**
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**REASONS**

[1] In issue are a claim by the applicants for infringement of patent and a cross-claim by the respondents for revocation. The patent is in respect of a portable hangi cooker which comes in two parts. The first (or lower) part consists of a housing (a metal cylinder) adapted to receive a heating source, and a "plate means", being a hot plate. The second (or upper) part is a housing capable of containing food

to be cooked. The two parts connect together so as to create a cooking chamber above the plate means.

[2] Although the height of the housing of the first part in relation to the plate means is not defined and in particular not limited, the statement of invention refers to the lower chamber being used separately from the upper chamber as a wok or frying vessel with the food to be cooked placed on the plate means and a lid used if required. An advantage claimed for the invention is ease of cleaning, which implies easy access from the top of the housing of the first part to the plate means.

[3] The respondents' cooker which is said to infringe the applicant's patent is also in two parts. The difference, so far held to be critical, is that the first part can itself be used as a hangi cooker. The cooking chamber is capable of being extended by the use of the second part (which corresponds to the second part of the patented invention). With both parts interconnected, the respondents' cooker is similar to the invention which is the subject of claim 1 of the patent, save that the patented invention would be easier to clean.

[4] The High Court<sup>1</sup> and Court of Appeal<sup>2</sup> have held that the respondents' cooker does not infringe because it provides for a "food housing" in the first part which can be used for hangi-style cooking as compared to the invention described in claim 1 which they construed as a cooker where a hangi-style cooking chamber is created only by the addition of the second part to the first part.<sup>3</sup> Accordingly, both Courts have held that there was no infringement. They also rejected challenges to the patent on the basis of lack of novelty and<sup>4</sup> obviousness.<sup>5</sup>

[5] The applicants wish to appeal against the dismissal of the infringement claim. Should leave to appeal be granted the respondents wish to cross-appeal in relation to the validity of the patent.

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<sup>1</sup> *Doug Andrews Heating and Ventilation Ltd v G & W Imports Ltd* [2013] NZHC 3333 (Allan J) [*Doug Andrews* (HC)].

<sup>2</sup> *Doug Andrews Heating and Ventilation Ltd v Wayne James Dil* [2015] NZCA 122 (Harrison, Wild and Miller JJ) [*Doug Andrews* (CA)].

<sup>3</sup> See *Doug Andrews* (HC), above n 1, at [57] and *Doug Andrews* (CA), above n 2, at [20].

<sup>4</sup> See *Doug Andrews* (HC), above n 1, at [138] and *Doug Andrews* (CA), above n 2, at [23]–[26].

<sup>5</sup> See *Doug Andrews* (HC), above n 1, at [168] and *Doug Andrews* (CA), above n 2, at [27]–[34].

[6] The case involves an invention in respect of which there was a credible, although ultimately unsuccessful, obviousness challenge. The infringement claim turned on what in the end were matters of interpretation and appreciation. The approaches of the High Court and Court of Appeal on this issue were orthodox. We note the complaint that the Court of Appeal at times compared the respondents' cooker not to the invention described in claim 1 of the patent but rather its preferred embodiment (to which it referred by the trade name of the commercial embodiment). This seems to us to have been immaterial. Such comparison was primarily by way of an introductory explanation of the differences between the cookers which was provided by reference to drawings. The Court was plainly cognisant of the principle that embodiments do not limit the scope of an invention claimed more broadly,<sup>6</sup> but it was entitled, as it recognised, to look at the patent as a whole when construing the claims which were made.<sup>7</sup> In this context we do not see the proposed appeal as raising an issue of public or general importance. Nor do we consider that the miscarriage ground is engaged.

[7] Accordingly:

- (a) The applications for leave to appeal and cross-appeal are dismissed.
- (b) The applicants are to pay the respondents costs of \$5,000 in respect of both applications.

Solicitors:  
AJ Pietras & Co Ltd, Lower Hutt for Applicants  
AJ Park, Auckland for Respondents

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<sup>6</sup> See *Doug Andrews* (CA), above n 2, at [15] where this principle is set out [28] of the passage quoted from *Lucas v Peterson Portable Sawing Systems Ltd (in liq)* [2006] NZSC 20, [2006] 3 NZLR 721.

<sup>7</sup> See *Lucas v Peterson Portable Sawing Systems Ltd* [2003] 3 NZLR 361 (HC) at [28](f); Ian Finch (ed) *James & Wells Intellectual Property Law in New Zealand* (2nd ed, Brookers, Wellington, 2012) at 137–144.