ISSUE 5 / 2008

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First Case to Deal with the Validity of Innovation Patents Handed Down

In the first case seeking to challenge an innovation patent for lack of innovative step, Spruson & Ferguson's client, Delnorth successfully defended three innovation patents for elastically bendable roadside posts (such as guide posts) formed of sheet spring steel and successfully sued competitor Dura-Post for infringement of these innovation patents.

The case is very important because it is the first to decide what an innovative step is under the amendments made to the *Patents Act 1990* (Cth) which introduced the innovation patent as a new type of patent in 2001 intended to provide patent protection for "lower level" inventions.

The only difference in the patentability requirements between an innovation patent and a standard patent is that an innovation patent requires an innovative step, whereas a standard patent requires an inventive step. The Australian Federal Parliament intended for an innovative step to require a lower inventive threshold than that required for an inventive step.

In the judgment, the trial judge accepted Delnorth's interpretation of the proper construction of s 7(4) of the *Patents Act 1990* (Cth) which sets out the requirement for innovative step. For the time being, pending the appeal now launched by Dura-Post, the law on innovative step may be summarised as follows:

>> An innovative step will be found if the invention which is claimed differs from the prior art base such that any difference identified in the invention as claimed makes a substantial contribution to the working of that invention. The prior art base includes any single prior publication or public use, no matter how obscure and irrespective of whether or not the prior art formed part of common general knowledge or could be reasonably expected to have been ascertained, understood and regarded as relevant. This means that where a point of differentiation between a claim of the innovation patent and a piece of prior art contributes in a substantial manner to the working of the invention as claimed in the innovation patent, the invention will receive protection even if the difference is obvious to anyone skilled in the field.

>> In assessing whether there is an innovative step the focus is on the contribution to the working of the invention as claimed and not the degree or kind of variation from the prior art. Even though the variation from the prior art might be slight, if a substantial contribution is made to the working of the invention there is an innovative step. The Court was of the view that "substantial" means "real" or "of substance", in contrast to distinctions without a real difference.

In this case, the Court found that the roadside post involved an innovative step over various pieces of prior art. For example, the Court having found that the use of sheet spring steel in the construction of the roadside post made a substantial contribution to the working of the roadside post, all prior art which involved the use of other materials (such as plastic) meant that those plastic guide posts did not impact upon the "innovativeness" of the roadside post claimed in the innovation patents. Similarly, the use of a marker hole, the use of a barb, the use of a taper and the incorporation of longitudinally extending ribs were found to make a substantial contribution to the working of the roadside posts the subject of the innovation patents. Whilst each of these features were found to have been well known and to have been included in roadside posts before the innovation patents were filed, as none of them has been published together with sheet spring steel in one piece of prior art and each made the necessary substantial contribution, claims incorporating one or more of these features involved an innovative step.

In contrast, a surface coating applied to the front and rear faces of the body of the post claimed in one of the innovation patents was not regarded of itself as making a significant contribution, although there were no claims in respect of which validity hinged on this feature. Certain claims were found to be invalid because an old 1960s US patent ("Pellowski") disclosed all the features of those claims, except the post being a roadside post, the Court appearing to find that the difference between a post adjacent to the roadside (i.e. a roadside post) and a device located on (or in) the surface of the roadway was of no real difference and not sufficient to confer an innovative step.

Subject to the appeal, the Court's decision now provides guidance on the previous uncharted territory of what constitutes an innovative step. The Court has made it quite clear that it does not matter how obvious or clear to a skilled addressee certain features defined in an innovation patent were, a piece of prior art must disclose each of the features making a substantial contribution to the working of the invention as claimed in the innovation patent before it will impact on the question of innovative step.

The filing of innovation patents should be considered in circumstances where it is believed that patent protection would not otherwise be available as a result of an invention only differing from prior art by virtue of well known features. Consideration should also be given to filing an innovation patent application in addition to a standard patent application (by way of a divisional application) for commercially important

inventions that may be subject to attack on inventive step.

A curious result, clearly not contemplated by the Parliament at the time of the inception of innovation patents, is that an invention claimed in an innovation patent may be found to lack innovative step because of an "obscure" piece of prior art but still involve an inventive step because that "obscure" piece of prior art did not form part of the common general knowledge or could not be to be reasonably expected to have been ascertained understood and regarded as relevant by the skilled addressee as required of any prior art relied on for an attack based on lack of inventive step. In fact, this could very well be the case in the Delnorth matter in which the Australian Patent Office's determination on a pre-grant opposition to a related standard patent, also handled by our firm, may have claims found to be valid as involving an inventive step, even though those claims were found, in the divisional innovation patents the subject of the Federal Court's decision, to lack an innovative step.

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Sleeping Easy

Chiropedic Bedding Pty Ltd v Radburg Pty Ltd

Chiropedic exhibited their Microcoil Pillowtop Plus mattress at an industry exhibition six days before filing an Australian Design application. The novel feature of the application being the 'posture top' of the mattress exhibited.

Following registration, Chiropedic sued Radburg for infringement of the registered Design under the *Designs Act 1906* (Cth). Radburg brought a cross-claim that the posture top lacked novelty on the basis that the industry exhibition was not 'an official or officially recognised international exhibition' within the exception provided under s 47 of the 1906 Act.

The industry exhibition was partially funded by the Victorian State Government on various conditions, including that it be open to the general public for at least one day. There were 257 exhibitors, 250 were Australian manufacturers and the balance were from New Zealand.

At first instance, the trial judge found that the exhibition was not sufficiently 'international' in character, considering the question qualitatively and quantitatively, and therefore that the exhibition deprived the registered Design of novelty.

The Full Court overturned the decision, holding that it was incorrect to introduce questions of degree when there was no reason not to adopt the dictionary definition of 'international'. Therefore, the registered Design was found to be novel as the exhibition was an officially recognised international exhibition, but not an official exhibition, within the meaning of s 47 of the 1906 Act.

Section 17 of the *Designs Act 2003* (Cth) (which substantially mirrors s 24 of the *Patents Act 1990* (Cth)) is the approximate equivalent to s 47 of the 1906 Act. However, there are critical differences between those provisions and it is implicit in the decision that this should not automatically be considered indicative of the current law. Nonetheless, with this

decision the Full Court of the Federal Court (comprising the new Chief Justice of the High Court) clearly indicates that the plain words of the statute reign supreme.

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Accept No Imitations

Caroma Industries Ltd v Technicon Industries Pty Ltd

Spruson & Ferguson Lawyers represented Caroma Industries Limited ("**Caroma**") in a recent successful design and copyright infringement action against Technicon Industries Pty Ltd ("**Technicon**") in respect of Caroma's well known Trident toilet pan. The Court found that the toilet pan sold by Technicon was a fraudulent imitation of Caroma's design Trident toilet pan and that it had infringed Caroma's copyright in its technical drawing of the Trident Sovereign toilet suite.

A. Infringement of a Registered Design

(a) Under the old *Designs Act 1906* which applied to this proceeding (now replaced by the *Design Act 2003*), it is an infringement of the monopoly in a registered design to:

i. apply the design;

ii. apply an obvious imitation of the design; or

iii. apply a fraudulent imitation of the design.

(b) It is the Court's responsibility to determine whether infringement has taken place. For this purpose, appearance to the eye is the critical issue to examine by reference to the essential features of the design. The scope of the registered design is determined by reference to the prior art at the date of filing the design and will depend upon the extent to which the features of the registered design are seen to be novel or original compared to what was available and known before the design's filing date.

(c) The tests for infringement of a registered design under the old Act may be summarised as follows:

i. for direct infringement, what must be applied to the alleged infringing article is the same design; that is an exact copy. In this case Caroma accepted that the Technicon pan was not an application of the registered design;

ii. for an article to be an obvious imitation, it must be a copy apparent to the eye, notwithstanding slight differences. To establish obvious imitation the question must be looked at as one of substance by examining the essential features of the design which must differ from the prior art. Caroma contended that the Technicon pan was an obvious imitation of the registered design. As set out below, however, this argument did not succeed;

iii. for an article to be a fraudulent imitation:

» the application of the design by the alleged infringer must be with the knowledge of the existence of the registration and of the absence of consent to its use, or with reason to suspect those matters; and

» the use of the design may produce an imitation which is less apparent than an obvious imitation (i.e. there may be greater differences between the registered design and the offending design than between the registered design and what could be held to be an obvious imitation). In this case, the Court found that the Technicon pan was a fraudulent imitation.

B. Design Infringement Findings

In brief the Court decided:

(a) The similarities between the registered design and the Technicon pan could not be explained by reference to the prior art. The Technicon pan incorporated significant visual features of the registered design, namely the overall curvilinear design, the outline of the shroud and throat and the same configuration of bolt holes. It was acknowledged by Technicon's expert, that the overall outline of the Technicon pan and the Trident pan were virtually the same from a distance.

(b) The principal visual detail which distinguished the Technicon pan from the registered design was the absence of the "scalloping feature", being a feature designed to assist in distribution of water to the front of the toilet pan upon flushing.

(c) Despite the concessions of Technicon's expert regarding overall appearance, the absence of the "scalloping feature" meant the Technicon pan did not possess such a close resemblance to the registered design that was "almost unmistakable" and was therefore not an obvious imitation of the registered design.

(d) The Technicon pan was a fraudulent imitation of the registered design. In the Court's view, Technicon "had reason to believe or strongly suspect" that the design of the Trident pan may have been registered for the reasons outlined below:

i. Technicon obtained, read and relied upon a Caroma brochure in the development of its Technicon pan. The Caroma brochure contained the following warning:

> "Warning: Products in this leaflet are the subject of registered designs and patents"

ii. The CEO of Technicon claimed he had no recollection of having seen such warnings. The Court rejected this and inferred the brochure was read by Technicon, and that the warnings contained in them would have come to his attention.

iii. The CEO of Technicon gave evidence that in January 2003 he was aware of Technicon registering the new design of a tap, but in the same month did not turn his mind to the possibility that the design of the toilet pan could have been protected by registration. This evidence was found to be implausible.

iv. There was documentation provided to the CEO by Technicon's proposed exclusive distributor highlighting the danger of written references to the similarity of the Technicon pan to Caroma products. Such communication would have alerted Technicon to the possibility that Caroma's design in the Trident pan could have been protected by registration.

C. Copyright Infringement Findings

Technicon was also found to have infringed Caroma's copyright in the Caroma drawing as the Technicon drawing substantially reproduced the Caroma drawing which, in fact, depicted the Trident pan (that is it included the "scalloping feature") not the Technicon pan.

D. Conclusion

The case provides an important warning to potential design infringers that even if there are differences between a registered design and a product, documents revealing deliberate attempts to copy "as closely as possible" may lead to a finding of fraudulent imitation even if the infringer was not actually aware of the registered design. In this case, there were no relevant markings on the product or the packaging to assist in establishing actual knowledge of the registered design but sufficient documents to establish to the Court's satisfaction that there was a strong likelihood of this and a reckless disregard to consider a search for such registered rights.

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The Power of the Patent

Federal Court clarifies patent non-infringement declaration provisions

Provisions have existed for many years in the Australian patents legislation whereby a person can apply to a court for a declaration that some commercial act which the person intends (such as the manufacture of a particular product or the adoption of a particular process) does not infringe the claims of a specified patent or patent application. If a non-infringement declaration is made but subsequently revoked, its holder is not liable for damages or an account of profits in respect of infringement of the specified patent before the date of revocation of the declaration.

The wording of the statutory provisions dealing with non-infringement declarations underwent a significant change between the current Patents Act and its predecessor but it has not been until very recently that the meaning of the current provisions has been considered by a court.

In the case referred to, *Occupational and Medical Innovations Ltd v Retractable Technologies Inc* [2008] FCA 1102, Dowsett J considered the relevant provisions of the *Patents Act 1990* and interpreted them to mean that when a person applies to the court for a non-infringement declaration in respect of a specified patent or patent application ("patent A"), it is a pre-condition that the applicant's proposed act (that is, the act which the applicant asserts does not infringe patent A) itself be the subject of a patent or a patent application ("patent B"). Furthermore, the court cannot make the declaration applied for unless a patent has been granted on patent B.

It is unclear why the Parliament chose to express the relevant statutory provision the way it did. The way it has been construed by Dowsett J appears to mean that it is not possible for a non-infringement declaration to be obtained in respect of some proposed commercial activity that is not the subject of a patent or patent application.

Other aspects of the statutory provisions remain to be clarified. In particular, it is not clear whether patent B (as identified above)

must be in force when the applicant seeks the non-infringement declaration. It is also unclear whether patent B must be owned by the person applying for the non-infringement declaration; it would seem not, but at the least it would appear that the applicant must be a licensee in respect of patent B if that patent is still in force.

The possibility of relying on the existence of a patent at some time in the future so as to obtain the benefits of holding a non-infringement declaration are additional to the more obvious benefits flowing from the protection of rights over an invention by virtue of patent ownership. This recent judgment of the Federal Court therefore provides a further reason for persons in possession of patentable subject matter to consider obtaining a patent to protect the subject matter, rather than attempting to keep it confidential.

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“Contrary to Law” May Reach Beyond Australian Shores

Neumann v Sons of the Desert SL [2008] FCA 1183

A recent decision of the Federal Court appears to expand the scope of issues the Trade Marks Registrar may properly consider when deciding whether use of an opposed trade mark is “contrary to law”.

The generally accepted view has been that an opposition under the *Trade Marks Act 1995* (Cth) section 42(b) contemplates the rejection of a trade mark application on the basis that its use would breach some aspect of **Australian** law. However, in *Neumann v Sons of the Desert SL* [2008] FCA 1183 Justice Ryan expressed the view that an agreement made under Spanish law would be breached if registration in the name of one of the co-owners of the mark, to the exclusion of the other, were allowed to proceed. Consequently, although the opposition was successful on the issue of ownership under section 58, his Honour took the view that a ground for rejection under section 42(b) was also established.

In 1998 Neumann (the appellant) set up a company in Spain with two other shareholders. The three agreed that the trade marks of the company would be owned in equal shares, commensurate with their share of ownership in the company. They also orally agreed that, if the company’s activities expanded beyond Europe, the trade mark registrations in other countries would be obtained in the names of the joint owners. As joint owners they registered several trade marks in Spain, the European Community, the United States, China and Japan.

Various changes in the co-owners occurred until only the appellant and Galdeano, one of the other original co-owners, remained. In 2002 the appellant and Galdeano made two agreements for licensing use of the co-owned trade marks to a third party. Subsequently, the relationship between the appellant and Galdeano deteriorated and Galdeano applied for registration of a new trade mark in Australia nominating himself as sole owner.

The appellant’s opposition to registration of the new mark before the Trade Marks Registrar was rejected. The Registrar’s Delegate decided the appellant’s evidence of the oral or implied agreements between the various shareholders in relation to registration of trade marks worldwide was inadmissible. In addition, he took the view that the 2002 agreements were “entire contracts” intended to govern the ownership of the trade marks by the parties and these did not extend beyond the joint ownership of the marks in Spain and the European Community.

Justice Ryan disagreed. In his opinion, the 2002 agreements were evidence of a pre-existing agreement that the trade marks would be co-owned by the appellant and Galdeano. In addition, they referred to the use of the trade marks in Spain and the European Community as well as other countries where registration might be obtained. As a result, Galdeano was not the true owner of the applied for mark so that the opposition to registration under section 58 succeeded.

Whilst not obliged to do so, his Honour went on to consider the opposition under section 42(b). Allowing the application to proceed to registration in Galdeano’s name alone would be in breach of the agreements between the parties and thus be contrary to **Spanish** law. Thus, the opposition under section 42 (b), whereby an application for registration must be rejected if “its use would be contrary to law” was, in his Honour’s view, also established.

This case apparently broadens the scope of an opposition under the *Trade Marks Act 1995* (Cth) section 42(b) beyond possible breaches of Australian legislation and common law to a consideration of extra-territorial law, in this case, Spanish law. Theoretically, it could expand to the law of any land. It is probably significant, however, that there was no appearance on behalf of Galdeano at the hearing of the appeal. It will be interesting to see how the Australian Trade Marks Office applies this decision to similar section 42(b) opposition cases in the future, at least, until the Federal Court speaks again on the issue.

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Nothing but the Truth

Federal Court underscores the importance of candour in dealings with the Patent Office

A Full Court of the Federal Court has recently ordered that a patent should be revoked on the ground that it was obtained by fraud, false suggestion or misrepresentation. In so doing, the Court has issued an important reminder to patent applicants to ensure that statements made in a patent specification or to the Patent Office are true and are not misleading.

One of the available grounds for revocation of a patent is that it was obtained by "fraud, false suggestion or misrepresentation." In order for a patent to be liable for revocation under this ground - leaving aside circumstances when there has been fraud involved – there must have been a false suggestion or misrepresentation made by the patent applicant that was a material factor leading to a decision to grant the patent. The false suggestion or misrepresentation may have been made in the patent specification, or in a communication to the Patent Office.

In the case recently on appeal before the Full Federal Court (*Ranbaxy Australia Pty Ltd v Warner-Lambert Company LLC* [2008] FCAFC 82) the patentee (Warner-Lambert) had sued Ranbaxy for infringement of two patents, one of which claimed a group of substances of which the anti-cholesterol drug atorvastatin is a member, and disclosed the racemate of atorvastatin. The other patent claimed a specific enantiomer of atorvastatin. Ranbaxy asserted that it had not infringed the broader patent and also counter-claimed for revocation of the enantiomer patent on various grounds. At first instance, Young J ordered that Ranbaxy be restrained from infringing the broader patent but ordered that the enantiomer patent be revoked on the ground (among others) that it had been obtained by false suggestion or misrepresentation.

There were two false or misleading statements made. One was in the patent specification of the enantiomer patent and the other was made to a patent examiner during the examination of the corresponding application.

The specification of the enantiomer patent stated that one enantiomer of atorvastatin provides surprising inhibition of the biosynthesis of cholesterol and asserted that "an ordinarily skilled artisan may not predict the unexpected and surprising inhibition of cholesterol biosynthesis of the present invention". The statement that was crucial to the case, however, was one that had been made to a patent examiner in response to an objection by the examiner that the claims were not novel or inventive in the light of the broader patent. In its response, Warner-Lambert stated (among other things) that it had found that the claimed enantiomer is 100 times more active than the other enantiomer and 10 times more active than its racemic mixture. Warner-Lambert drew attention to a table of test results in the specification which appeared to support this claim.

Crucial to these assertions, therefore, were the test data contained in the specification. Evidence presented to the court, however, showed that Warner-Lambert had possessed more test data than those shown in the patent specification. The primary judge was satisfied that the whole of the data available to Warner-Lambert established that the claimed enantiomer had an activity level that is in fact only approximately twice that of the racemate, and that this kind of difference was not unexpected. The Full Court accepted this finding and concluded, as had Young J, that Warner-Lambert's statements about surprising and unexpected activity were false or misleading.

The Full Court observed that Warner-Lambert's statement to the examiner about the activity of the enantiomer was made in an attempt to overcome the examiner's objection, and concluded that it should be inferred that the grant of the enantiomer patent was made because the examiner accepted the truth of that statement. Accordingly, the Full Court agreed with the conclusion of the primary judge that the patent had been obtained by false suggestion or misrepresentation.

It is not clear whether the assertion of "unexpected" activity contained in the specification of the enantiomer patent would have been sufficient, in the absence of any similar statement to that effect made directly to the examiner, to render the patent liable to revocation. The Full Court did not need to determine that question.

The Full Court also did not need to consider whether the enantiomer patent was novel in the light of the disclosure of the broader patent, or did not involve an inventive step: Ranbaxy had abandoned an attack on the basis of lack of novelty or lack of inventive step. These issues were not relevant to the question of the patent having been obtained on a false suggestion or misrepresentation. It follows that it was irrelevant to this issue whether or not it was necessary for the false or misleading statement to the examiner to have been made. It was also irrelevant whether the examiner's objection, in response to which the false or misleading statement was made, was a valid one. Of sole relevance to the ground of false suggestion is the materiality or otherwise of any statement that is made, in a specification or otherwise, to influence the decision by an examiner whether or not to grant a patent on an application that is under examination.

This case highlights the importance of ensuring that any statement made in a patent specification which might have a bearing on whether a patent should be granted on the application, and any statement made to a patent examiner, be true and not deceptive. If not, the consequence is that the patent, once granted, is liable to be revoked as a whole regardless of whether any of the claims might have been otherwise valid.

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4th Edition of *Shanahan's Australian Law of Trade Marks* Released

Originally written by Dan Shanahan, Principal of Spruson & Ferguson from 1967-1999, the fourth edition of this seminal work describes the significant changes in trade mark law in recent years. The 4th edition, co authored by current Spruson and Ferguson Principals Annette Freeman and Tracey Berger, as well as Professor Davison, builds on the success of the previous edition authored by Kate Johnston and Patricia Kennedy, past Principals of Spruson & Ferguson. The work will be offered in both online and hard copy formats

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Spruson & Ferguson welcomes the publication of *Patent Law in Australia*

Spruson & Ferguson is pleased to announce the recent publication of the text *Patent Law in Australia* written by Colin Bodkin, former Principal and now consultant to Spruson & Ferguson.

Colin joined Spruson & Ferguson in 1991 after a career in the management of research and development in industrial chemistry and biotechnology. He became a Principal of Spruson & Ferguson in 1996, practicing mainly in the area of chemical patents. Colin retired from Spruson & Ferguson at the end of 2002 and directed his activities to researching and writing *Patent Law in Australia*.

Along with many others in the patent profession in recent years, Colin noted the absence of a text that provided a detailed description of the law of patents in Australia or of the key practical aspects of obtaining, maintaining and enforcing patent rights in Australia. Colin considered that the development of Australian patent law had reached a point where it was sufficiently distinguished from the law of the United Kingdom so as to make such a text a necessity.

Patent Law in Australia focuses on the relevant statute and case law whilst also providing a valuable guide to practices in the Australian Patent Office and essential steps involved in applying for, obtaining, maintaining and enforcing patents in Australia. It is primarily directed to patent attorneys, those studying to become patent attorneys, and to legal practitioners in the patent field, however it would be a valuable resource for anyone with a need for familiarity with Australian patent law and practice.

Patent Law in Australia is published in Australia by Lawbook Co. An online version of the text, including annotations of key features of the legislation, is also available. Further information about online access or how to purchase the book can be obtained from Thomson Reuters at www.thomson.com.au.

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Spruson & Ferguson produces two electronic bi-monthly newsletters:

Trade Marks E-news – a breakdown of important issues for trade marks and branding in Australia

Biotech E-news – a review of important issues in the Australian biotechnology industry

If you would like to receive either of the these electronic newsletters, please email us at trademarksenews@sprusons.com.au or biotechenews@sprusons.com.au

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