

IN THE MATTER OF LETTERS PATENT NO. 21410/35 GRANTED TO
KENNETH FRASER AND THE YORKSHIRE COPPER WORKS LIMITED

JUDGMENT (ORAL)

KITTO J.

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HIS HONOUR: This is an application for an extension of Letters Patent. The original term expired on 20th February, 1950. On 14th March, 1951 I heard an application for an extension of the term on the ground of loss sustained by reason of hostilities. I granted the extension for 4½ years, and that period expired on 20th August, 1954.

An application now comes before me for a further extension on the same grounds, that is to say, war loss.

The circumstances which were before me in 1951 satisfied me that there had been a loss due to hostilities which, as far as I was able to see on the evidence I had, could be adequately compensated if the patentee were granted an addition of 4½ years to the term of his patent, which was an addition equal to that which had been granted in England. It is now said that difficulties of several kinds have occurred since the date of that hearing which have absorbed a good deal of the time covered by the extension which I granted, and that having regard to these difficulties it would be right to increase the period of extension.

The difficulties were of two kinds. One arose out of the requirement of the Capital Issues Regulations for the consent of the Capital Issues Board before a company could be formed with the necessary capital to enable manufacture in Australia in accordance with the patent to be commenced. The other kind of difficulties concerned the shortage of experienced and qualified men and the difficulty of obtaining the requisite machinery for the commencement of the manufacturing business.

Now these two classes of difficulties were put to me by Mr. Thomas as each calling for an extension of the period of the patent. The first, that which arose out of the Capital Issues Regulations, was put to me as having occupied a period of 18 or 19 months which otherwise could have been used in proceeding with the exploitation of the invention.

Mr. Dawes pointed out that, on the evidence, even if those difficulties had not existed the applicant would still not have been able to commence production until a date after those difficulties in fact came to an end. On that being pointed out, I asked Mr. Thomas whether a conclusion to that effect would be in accordance with a correct reading of the evidence. He was not prepared to admit that it would; neither was he prepared to make any submission to support the view that it would not.

Being thus told, with somewhat less candour than I think I was entitled to expect, that if I wanted to know what was the effect of the evidence I had better find out for myself, I reserved judgment in order that I might carefully read the evidence so as to be sure that if I accepted the view Mr. Dawes had put I was not inadvertently doing any injustice to Mr. Thomas' client.

A perusal of the evidence satisfies me that Mr. Dawes was right and that the ground relating to the time occupied by obtaining Capital Issues consent ought never to have been put as a separate ground. It was rightly included, of course, in the evidence, because the deponents to the affidavits were concerned to demonstrate to the Court that in all respects, in respect of capital issues and in every other, the company was pressing on with all reasonable expedition towards the due exploitation of its patent. The evidence was therefore rightly before me, but it did not show, and should not have been put as showing, that a separate

period of 18 or 19 months had been absorbed in obtaining Capital Issues consent, which otherwise would have been available for manufacture.

I turn then to the other class of difficulties which the company experienced. It is clear upon the evidence that there was very great difficulty in obtaining the necessary staff. Men of specialised experience and training were required for the establishment of the business, and machinery of a very special kind was also required. Both were available in England, but they were there fully absorbed in making good the arrears of demand which had built up in England owing to the war, and it was not until 1952 that these difficulties began to be overcome. As a result, production was not commenced in Australia until July 1953.

I am satisfied that the company made every endeavour which could reasonably be expected in order to get into full production, and that the troubles arising from the shortage of trained persons to engage in the manufacture and the shortage of machinery were the cause of so belated a commencement of productive operations.

Now, when I granted the 4½ years' extension in 1951 it must have been obvious, though I profess to no actual recollection of the factors which operated upon my mind, that some delay would occur before manufacture in Australia could be commenced. From the very nature of the invention, production could not have been commenced at once; some delay had to occur. I very much doubt whether I thought that anything like the delay which has occurred would be at all probable. If I had then known that production would not be possible until another 2½ years had expired, that is to say until July 1953, I think I probably would not have regarded 4½ years as a sufficient extension.

Now I pause to say that Mr. Dawes made one submission with which I find myself unable to agree. He contended, both in regard to the capital issues matter and in regard, I think, to the shortage of men and machinery, that in so far as delay in production resulted from economic conditions they could not be taken into account, even though in an indirect but real sense these economic conditions themselves had their origin in the dislocation of the whole economy of the country and of the world during the war. I quite agree that in determining what loss an extension should compensate for, attention must be confined to loss actually caused by hostilities, which includes, of course, loss arising from the direct aftermath of war. But the matters now relied upon are not relied upon in order to show that I underestimated the amount of loss which the applicant had suffered. They are relied upon to show that the loss which I then was satisfied had been incurred could not, in the circumstances which turned out to exist, be adequately made good by an extension of only 4½ years. I should be prepared to hold that in determining the length of the extension which would suffice to make good a given amount of war loss it is right, and indeed it is necessary, to attend to the conditions which may be expected to operate during the period of the extension in order that an opinion may be formed as to when the war loss is likely to be recouped.

Accordingly I should be prepared to grant a further extension in this case if I were satisfied that the conditions which the company actually found itself attempting to cope with in the period after I made my order were so much more disadvantageous to it than I had expected that a further extension is required in order to offset the disappointment of my expectations as to what the future held.

When I look at the evidence, however, I find, as I have said, that production proved to be possible as from July 1953. What period of delay I would have thought was

likely when I was considering the matter in March 1951 if I had been concerned to fix upon a particular period I find it, of course, impossible to say at this stage, but I imagine it would have been a matter of a few months.

That means that for some period, several months less than 2 years and 4 months, the company experienced greater obstacles to commencing production than I could have allowed for when I fixed upon 4½ years. But if I had had the gift of prophecy sufficiently to see what would in fact occur, I find it very difficult to suppose that I would have granted an extension of more than 6 years; that would have allowed an additional 18 months for the unexpected difficulties as distinguished from the difficulties that I must have thought, in the general way, would probably be encountered.

Now almost 18 months have expired since the 4½ years came to its end. If I had granted the 6 years' extension the patent would have run out on the 20th February, 1956 and we are already in the middle of December 1955. It seems to me useless to grant an extension with only a very few weeks to run, especially as the invention with which I am concerned is of a so special character that any competitors who might wish to set up in business in opposition to the applicant could not do so without an extensive period of preparation and much expenditure of capital; and, of course, any extension that I gave would have to be on the terms which were laid down in the Celotex case and the Gillette case, so that the period which has already expired of the extension I might have granted would not be a period of protection to the applicant.

In these circumstances it seems to me that there is no case made out for a further extension and I therefore refuse the application. The applicant must, of course, pay the Commissioner's costs.

MR. HOLT: Would your Honour include an order as to the interlocutory costs which were reserved?

HIS HONOUR: Are there some reserved costs, Mr. Holt?

MR. HOLT: Yes, your Honour.

HIS HONOUR: I did not realize that. Well, if there are they will have to be included.

MR. HOLT: If your Honour pleases. There was an application for directions, I think, in August of this year.

HIS HONOUR: Well then the application is refused. The applicant is to pay the Commissioner's costs, including reserved costs.