IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-1808
[2013] NZHC 301

BETWEEN	MICHAEL PETER STIASSNY AND KORDA MENTHA (FORMERLY FERRIER HODGSON) Plaintiffs/Respondents
AND	VINCENT ROSS SIEMER Defendant/Applicant

Hearing: 7 February 2013

Appearances: PJL Hunt for Plaintiffs/Respondents
Defendant/Applicant in person

Judgment: 22 February 2013

JUDGMENT OF TOOGOOD J
[APPLICATION FOR RECALL OF JUDGMENT]

This judgment was delivered by me on 22 February 2013 at 5:00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

PJL Hunt, McElroys, Auckland: peter.hunt@mcelroys.co.nz
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Table of Contents	Paragraph Number
Result	[1]
Introduction – the defamation judgment	[5]
The lengthy history of the litigation	[11]
Mr Siemer's originating application to set the defamation judgment aside	[12]
The issues on this application to recall the judgment	[17]
Jurisdiction to recall or set aside the defamation judgment on the ground that it was obtained by fraud	[20]
Should the judgment be recalled or set aside for fraud?	[25]
Allegations of fraud previously disposed of	[25]
Different ground now relied upon – the over-charging allegation	[26]
Over-charging issue should have been argued on originating application	[31]
Over-charging point does not meet test of conscious and deliberate dishonesty	[32]
Over-charging point not a matter on which the judgment was founded	[34]
Is this application debarred?	[37]
Conclusions	[40]
This litigation should be brought to an end	[41]
Orders	[43]

Result

[1] Mr Siemer has applied for an order recalling or setting aside a judgment of Cooper J dated 23 December 2008,[1] ("the defamation judgment"). The application raises the following issues:

(a) Does the application for recall replicate grounds already argued by Mr Siemer before the Court of Appeal and Supreme Court?

(b) If not, do any new grounds raised by Mr Siemer justifying setting aside the defamation judgment on the grounds of fraud?

(c) Should this proceeding have been struck out without a hearing because Potter J has debarred Mr Siemer from defending the defamation proceedings?

[2] I have determined that:

(a) Mr Siemer's criticisms of Cooper J's findings in the defamation judgment have been addressed and disposed of by the Court of Appeal and the Supreme Court: [10] – [14], [24].

(b) Andrews J heard and dismissed an originating application to set aside the defamation judgment on grounds of alleged fraud identical to those now advanced, except as to one new point: [13], [16] – [18], [25].

(c) The new point - evidence adduced by Mr Siemer on the over-charging issue – could and should have been put to Andrews J in the originating proceeding and it is too late for Mr Siemer to attempt to rely on it now: [30].

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1 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008.

(d) The evidence falls far short of establishing an arguable case of conscious and deliberate dishonesty by the plaintiffs justifying the setting aside of a perfected judgment from which appeals have failed: [31] – [32].

(e) In any event, the evidence on the over-charging issue does not assist Mr Siemer to establish that the judgment was founded on that point. The evidence would not have altered the outcome of the defamation proceeding so it could not have reasonably founded any challenge to it, and Mr Siemer had been debarred from raising such matters in any event: [33] – [35].

(f) Because of these findings, it is unnecessary for me to determine whether this application should have been struck out immediately after it was filed because of Potter J's order debarring Mr Siemer from defending the defamation proceeding until further order of the Court: [36] – [38].

[3] For the reasons given more fully below, I dismiss the application but reserve the issue of costs for further submissions.

[4] I also make an order prohibiting Mr Siemer from filing any further documents in this Court for the purpose of challenging the defamation judgment and this judgment. His right of appeal against this judgment is not affected.

Introduction - the defamation judgment

[5] The plaintiffs sued Mr Siemer for breach of a compromise agreement and in defamation. Mr Siemer was debarred from defending the proceeding by reason of his failure to comply with orders of the Court. After hearing evidence by formal proof, Cooper J made the following orders against Mr Siemer in the defamation judgment:

> [90] In accordance with the foregoing there will be judgment for the first plaintiff in respect of the defamation claim in the sum of $75,000, and in respect of the claim for breach of the settlement agreement, in the sum of

> $20,000.
>
> [91] There will be judgment for the second plaintiff in respect of the defamation claim in the sum of $825,00 being $650,000 general damages, $150,000 aggravated damages and $25,000 exemplary damages.
>
> [92] The plaintiffs are entitled to a permanent injunction against the first defendant in the terms set out in paragraph (e) of the prayer for relief following paragraph 3.16 of the fourth amended statement of claim.
>
> [93] The plaintiffs are also entitled to costs. If the claim for costs is to be pursued, I will receive a memorandum on that subject on or before 12 February 2009.

[6] Attempts by Mr Siemer to appeal the judgment failed, but he has been persistent in seeking to have it overturned. He now applies for an order recalling or setting aside the judgment on the grounds stated in the amended application that:

(a) the reasoning used to support the Judge's finding was "factually false or inaccurate"; and

(b) the judgment "was obtained by fraud, as a result of materially misleading submissions" of counsel for the plaintiffs.

[7] The plaintiffs oppose the application on the grounds:

(a) There is limited jurisdiction to recall or vary a judgment once it has been sealed;

(b) The criteria for recall of the judgment have not been met in any event;

(c) The application is an abuse of process being an attempt by the defendant to re-litigate issues which have been dealt with in detail and on numerous prior occasions; and

(d) In any event, the recall application amounts to an attempt to defend the proceedings in which the judgment was given and Mr Siemer is debarred from so defending that proceeding by an order of Potter J[2] which remains in force.

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[2] *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 9 July 2007.

[8] The recall application was initially scheduled to be heard by Andrews J in March 2012 in conjunction with an application by the plaintiffs to strike out a separate proceeding issued by Mr Siemer on the day he filed an amended application to recall. In that separate originating application, Mr Siemer also alleged that Cooper J's judgment was obtained by fraud and he sought to have it set aside.

[9] At the hearing on 19 March 2012 before Andrews J, Mr Siemer was represented by counsel in respect of the originating application but he represented himself on the recall application. It transpired that insufficient time was available that day for Mr Siemer's submissions in person to be heard. The recall application was then adjourned to be considered after judgment had been given on the application to strike out the originating proceeding.

[10] Andrews J's reserved judgment on the strike out of the originating application was delivered on 18 May 2012,[3] ("the strike-out judgment").

The lengthy history of the litigation

[11] The strike-out judgment contains a helpful summary of the multifarious proceedings, hearings and judgments which form the basis for the respondents' submission on this application that the issues raised by Mr Siemer in support of the application have been fully canvassed and dealt with by the courts previously, and that this application amounts to an abuse of the Court's process. Andrews J summarised the earlier proceedings in these terms:[4]

> [6] A dispute arose between Mr Siemer and Mr Stiassny and the firm in which he is a principal, Korda Mentha, formerly Ferrier Hodgson, after Mr Stiassny was appointed receiver of a company, Paragon Oil Systems Ltd (Paragon). Mr Siemer was a shareholder of Paragon, and the appointment of a receiver was sought in proceedings in which he sought relief from oppression by the majority shareholders. That proceeding was resolved in favour of Mr Siemer in 2001, and the receivership of Paragon was terminated.
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> [7] A dispute had arisen between Mr Siemer and Korda Mentha (then called Ferrier Hodgson) as to costs charged during the receivership. The parties subsequently entered into a compromise agreement. The terms of the

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3 *Korda Mentha v Siemer* [2012] NZHC 1074.
4 Ibid.

compromise agreement included that neither party would comment on any matter arising in or from the receivership.

[8] However, Mr Siemer made numerous complaints concerning Mr Stiassny and his firm, and their conduct of the receivership. In April 2005 Mr Siemer published a number of complaints concerning Mr Stiassny and his firm on a website www.stiassny.org, and advertised the existence of the website on a large billboard erected next to a billboard advertising Vector Ltd (of which Mr Stiassny was chairman). The billboard and website gave rise to the 2005 proceeding.

[9] In the 2005 proceeding Mr Stiassny and Korda Mentha alleged that the contents of the website were defamatory. An interim injunction was granted on 8 April 2005, directing that the billboard be removed, that all material relating to Mr Stiassny and Korda Mentha be removed from the website, and restraining publication of any further material.

[10] Mr Siemer applied to rescind the injunction. The application was granted, but a new interim injunction was granted which directed Mr Siemer and Paragon not to publish specified material. At that time, Mr Stiassny and Korda Mentha's claim had been amended to include a claim of breach of the compromise agreement. The second injunction was upheld on appeal.[5]

[11] In judgments of this Court dated 16 March 2006 and 9 July 2007, Mr Siemer was found to have breached the injunction order. In the latter judgment, the Judge made an order debarring Mr Siemer from defending the 2005 proceeding until further order of the Court (the debarring order). This was on the grounds that Mr Siemer had continued to breach the injunction and had refused to pay costs orders made against him. Mr Siemer did not appeal against the debarring order.

[12] The substantive 2005 proceeding was heard before Cooper J on 8 October 2008. As a consequence of the debarring order, Mr Siemer did not appear, and was not represented. In the 2008 judgment Cooper J held that the claims made by Mr Stiassny and Korda Mentha were made out. He awarded Korda Mentha damages totalling $95,000 for defamation and breach of the compromise agreement. His Honour awarded Mr Stiassny damages totalling $825,000 for defamation (including aggravated and exemplary damages). Cooper J also granted a permanent injunction prohibiting any further defamatory publication.

[13] Mr Siemer appealed to the Court of Appeal on the ground that the Judge erred in fact and law and that the Judge "engaged in what an impartial observer might likely consider an unprincipled and materially-deceptive summary of the facts, resulting in the evidence being materially and improperly changed, consummating in an unsafe Judgment of the Court." Mr Siemer set out ten particulars of the latter ground.

[14] Mr Stiassny and Korda Mentha applied to strike out the appeal. In a judgment delivered on 22 December 2009 the Court of Appeal struck out his appeal, except to the extent that it related to a challenge to the quantum of the damages award made in the High Court. Further, that challenge was

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5 *Siemer v Ferrier Hodgson* CA87/05, 13 December 2005.

limited to an argument based on the facts as found in the High Court.[6] Mr Siemer then applied for leave to appeal to the Supreme Court. The Supreme Court dismissed the application in a judgment delivered on 20 May 2010.[7]

[15] On 28 July 2010 Mr Siemer applied to "[s]et aside or rescind" the permanent injunction ordered by Cooper J in the 2008 judgment. By a Minute dated 29 July 2010, Cooper J struck out Mr Siemer's application on the grounds that it was vexatious and an abuse of process. Mr Siemer applied on 13 October 2010 for an extension of time to appeal against Cooper J's decision to strike out his application to set aside or rescind the judgment. Mr Siemer's application was dismissed by the Court of Appeal in a judgment delivered on 14 December 2010.[8]

[16] On 15 December 2010 (and in an amended application dated 22 December 2010), Mr Siemer applied to the Court of Appeal to recall its judgment of 14 December 2010. In its judgment delivered on 17 February 2011 the Court of Appeal accepted the respondent's submission that the application for recall was plainly an attempt to have the Court reconsider matters it had already considered and dealt with, and declined the application.[9]

[17] Mr Siemer then applied for leave to appeal to the Supreme Court against the Court of Appeal's decision declining him an extension of time to appeal. The Supreme Court dismissed the application in a judgment delivered on 9 May 2011.[10] In doing so, the Court agreed with the view of the Court of Appeal that the proposed appeal was an abuse of process.[11]

[18] On 7 March 2011 Mr Siemer applied to the High Court to vary, set aside, or rescind the permanent injunction ordered by Cooper J. In a Minute dated 17 March 2011, Cooper J ordered that the application be struck out on the grounds that it was vexatious and an abuse of process.

[19] On 30 March 2011, the Court of Appeal delivered its judgment on Mr Siemer's appeal against the quantum of the damages award made in the 2008 judgment, having heard the appeal on 2 November 2010.[12] The appeal was dismissed. Mr Siemer applied for leave to appeal to the Supreme Court. That application was dismissed in a judgment delivered on 3 June 2011.[13]

[20] On 4 April 2011 Mr Siemer filed an appeal in the Court of Appeal against Cooper J's decision of 17 March 2011, striking out his application to vary, set aside, or rescind the permanent injunction. That appeal was struck out by the Court of Appeal in a judgment delivered on 16 September 2011.[14] The Court held that Cooper J was correct in dismissing Mr Siemer's application as vexatious and an abuse of process, and as being a further attempt to re-litigate issues which had been finally determined between the

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6 *Siemer v Stiassny* [2009] NZCA 624 at [69].
7 *Siemer v Stiassny* [2010] NZSC 57.
8 *Siemer v Stiassny* [2010] NZCA 607.
9 *Siemer v Stiassny* [2011] NZCA 19 at [4].
10 *Siemer v Stiassny* [2011] NZSC 47.
11 At [2].
12 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.
13 *Siemer v Stiassny* [2011] NZSC 63.
14 *Siemer v Stiassny* [2011] NZCA 466.

> parties.[15] Mr Siemer applied on 22 September 2011 for leave to appeal to the Supreme Court. The Supreme Court dismissed the application in a judgment delivered on 3 October 2011.[16]
>
> [21] On 7 October 2011, Mr Siemer applied to the Supreme Court to recall its judgment of 3 June 2011 dismissing his application for leave to appeal against the Court of Appeal's decision dismissing his appeal against the quantum of the damages ordered in the 2008 judgment. That application was dismissed in a judgment delivered on 21 October 2011.[17] Mr Siemer further applied on 3 November 2011 for recall of the Supreme Court's judgments of 3 June 2011 and 21 October 2011. In a Minute dated 9 November 2011 the Supreme Court stated that the Court would take no action on that application.[18]

Mr Siemer's originating application to set the defamation judgment aside

[12] Andrews J also recorded, at [38] of the strike-out judgment, the particular allegations of fraud made in the originating application and addressed them more fully, beginning at [83] and ending with the Judge's conclusions at [91] and [92]. Andrews J said:[19]

> [91] I am satisfied that Mr Siemer's allegation that the 2008 judgment was obtained by fraud, whether by evidence fabricated or manufactured by the Judge, or by the way in which extracts from his publications were put to Cooper J by the defendants, has been addressed and determined in judgments of the Court of Appeal and the Supreme Court. ...
>
> [92] ... Mr Siemer has, on many occasions, contended that the evidence was manufactured, or fabricated, or led in a misleading manner. That does not alter the fact that there was a hearing, at which evidence was given, and that Mr Siemer's allegations as to fabrication, manufacture, or misleading representations, have been rejected by the Court of Appeal and the Supreme Court.

[13] Andrews J then addressed the implications of the debarring order made by Potter J on 9 July 2007.[20] The Judge quoted in some detail what the Court of Appeal and the Supreme Court had said about that order, including noting that Mr Siemer had not appealed against it. The basis for the debarring order was that Mr Siemer was in contempt of Court for having deliberately breached an interim injunction and

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15 At [7].
16 *Siemer v Stiassny* [2011] NZSC 119.
17 *Siemer v Stiassny* [2011] NZSC 128.
18 *Siemer v Stiassny*, SC20/2011, 9 November 2011.
19 *Korda Mentha v Siemer* [2012] NZHC 1074.
20 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 9 July 2007.

refusing to pay numerous costs awards against him despite having the means to do so.

[14] So far as is relevant to the present application, Mr Siemer argued before Andrews J that the judgment of Cooper J was fraudulent in respect of a compromise agreement which Mr Siemer said he had entered into with other parties on a fraudulent basis; that Mr Stiassny had falsely labelled Paragon Oil Systems Ltd ("Paragon"), a company in which Mr Siemer was a shareholder, as insolvent and then lied to the Court; and that Cooper J's finding that Mr Siemer had been guilty of "vile racist abuse" of Mr Siemer was based on a misrepresentation as to the effect of several statements made on separate occasions and taken out of context. Andrews J noted that those allegations had been dealt with by the Court of Appeal when the Court of Appeal struck out Mr Siemer's appeal against the defamation judgment except to the extent that it related to the quantum of damages,[21] and also by the Supreme Court when it refused leave to appeal against the Court of Appeal's judgment.[22]

[15] In respect of the application to strike out the originating application, therefore, Andrews J concluded as follows:

> [109] I am satisfied that each of the issues raised in the statement of claim has already been addressed and determined in earlier judgments of this Court, the Court of Appeal, and the Supreme Court. I am also satisfied that the statement of claim is an attempt to re-litigate matters that have already been determined, and is a collateral attack on those determinations. It is, therefore, an abuse of process.

[16] The Judge then directed that the statement of claim be struck out.

The issues on this application to recall the judgment

[17] I have dealt with Andrews J's judgment in some detail so as to explain the contention by the plaintiffs that the present recall application merely replicates, albeit not in identical terms, the submissions previously made on these matters by

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21 *Siemer v Stiassny* [2009] NZCA 624.
22 *Siemer v Stiassny* [2010] NZSC 57.

Mr Siemer to the Court of Appeal and the Supreme Court, and on his behalf before Andrews J.

[18] The amended grounds for the present application are expressed by Mr Siemer in these terms:

> 1. The grounds for recall or set aside of the Judgment, and referral of Plaintiffs' counsel to the New Zealand Law Society Standards Committee for disciplinary action are:
>
> (a) The Judgment reasoning the judge used to support his finding is factually false, and this factual inaccuracy has since been confirmed by the New Zealand Courts.
>
> (b) It now exists that the Judgment was obtained by fraud, as a result of materially misleading submissions of plaintiffs' counsel. Relevantly, this misleading by counsel occurred in a proceeding where the defendant was denied the right to be heard (ex parte) and the plaintiffs sought and obtained an injunction.
>
> (c) In law, a judgment obtained by fraud is a nullity.
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> (d) An elementary breach of the Defendant's statutory right to natural justice has occurred, which particularly compels correction in accordance with the Rule of Law and the Court's obligation to correct such abuses, and this obligation was recently confirmed by the Supreme Court in *Attorney General v Chapman*.
>
> (e) Correction is required in the interests of justice and in the interests of maintaining the integrity of the court.
>
> (f) Recall in this matter is justified under all three of the accepted criteria governing recall, as defined in the established authority *Horowhenua County v Nash (No. 2):*
>
> **PARTICULARS**
>
> 2. The defendants fraudulently misrepresented the plaintiff's publications to the Court and this misrepresentation was designed to lead the court into error and obtain an undue result. These fraudulent misrepresentations were evidentially detailed in the supporting affidavit of Vincent Ross Siemer dated 28 February 2012.
>
> 3. Both the Court of Appeal and Supreme Court have confirmed the fraud in an appeal of this judgment but have refused to correct the resultant injustice and abuse on grounds the appeal scope was limited to quantum of damages.
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> [Footnotes omitted]

[19] Mr Siemer's written and oral submissions refined the broad allegation of fraud by identifying three separate aspects of the findings of Cooper J which led to the award of substantial damages in the defamation judgment. He submits that:

(a) The assertion by Mr Siemer that Mr Stiassny had labelled Paragon as insolvent had been proved to be true and could not form the basis of a defamation damages award.

(b) The Supreme Court had determined that the statements relied upon by Cooper J in finding that Mr Siemer had been guilty of "vile racist abuse" of Mr Stiassny had been taken out of context and were not at all racist.

(c) Mr Stiassny had admitted that he or his firm had over-charged Paragon by some $10,000 and that accordingly an allegation by Mr Siemer of over-charging was correct and could not form the basis for an award of damages in defamation.

Jurisdiction to recall or set aside the defamation judgment on the ground that it was obtained by fraud

[20] The respondents argue that it is uncertain whether the Court has the power to set aside a permanent injunction and that, in any event, there is no jurisdiction to recall a judgment once perfected.

[21] Mr Hunt submits that the Court's jurisdiction under r 11.9 of the High Court Rules to recall a judgment cannot apply in a case such as this where a formal record of the judgment has been drawn up and sealed. That is a correct proposition, but Mr Siemer does not rely upon that rule. As Mr Hunt noted in his written submissions,[23] a plaintiff seeking to set aside a settled decision of the Court on the grounds of new evidence or fraud must issue a separate proceeding.

[22] The Court's jurisdiction to consider such an application was discussed recently by the Supreme Court in *Commissioner of Inland Revenue v Redcliffe*

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[23] Citing *Carson v Fox* [1920] NZLR 3 and *Ongly v Brdjanovic* [1975] 2 NZLR 242.

Forestry Venture Limited.[24] There, the Court considered an appeal which raised the question of when a party to litigation, against whom judgment has been given and whose appeal rights are exhausted, may apply to have the judgment set aside. The Court said:[25]

> The general rule is that, once a court having jurisdiction to hear and determine a proceeding has entered its final judgment, that judgment is binding on the parties unless it is set aside on appeal. There are, however, certain identified exceptions. Under one of them a final judgment may be challenged in separate proceedings which claim that the judgment was procured by fraud.

[23] The Supreme Court held[26] that the rule that a judgment of a court is conclusive as to the legal consequences it decides, unless set aside on further appeal or otherwise according to law, reflects the public interest in there being an end to litigation and the private interest of parties to court processes in not being subjected by their opponents to vexatious relitigation. But the Court observed that the rule recognises that a policy of absolute finality is unsafe, accommodating "exceptional situations by allowing final determinations to be revisited but within prescribed limits." The Court went on to note that in cases brought under the fraud exception there must be conscious and deliberate dishonesty going to the heart of the judgment under scrutiny.[27] Strict requirements as to pleading apply in a case brought under the fraud exception and, significantly for this case, the fraud allegation must be made in a separate proceeding so that the integrity of the determinations of fact in the litigation may be scrutinised.[28]

[24] The Court explained the rationale for allowing a fraud exception to finality in these terms:

> [32] The rationale for allowing a fraud exception to finality is that it is right that a party who can show that his or her ability to mount an effective case was compromised by the fraudulent conduct of the other party, should not be bound by a judgment which was thereby obtained.

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[24] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, (2012) 25 NZTC 20-151.
[25] Ibid at [1].
[26] Ibid at [28]-[34].
[27] Ibid at [29]-[30].
[28] Ibid at [31]. Citing *Sulco Ltd v ES Redit and Co Ltd* [1959] NZLR 45 (CA) at 71 and *Jonesco v Beard* [1930] AC 298 (HL) at 300 – 301.

Should the judgment be recalled or set aside for fraud?

Allegations of fraud previously disposed of

[25] The difficulty faced by Mr Siemer in pursuing this application to recall or set aside Cooper J's defamation judgment is that Andrews J has dealt with the separate proceeding which he brought, following the correct procedure, and which Andrews J had intended to deal with contemporaneously with this application, by striking it out as an abuse of process. The question of whether Cooper J's findings that Mr Siemer had indulged in "vile racist abuse", and whether those findings were justified, were held by Andrews J to have been addressed and disposed of by both the Court of Appeal and the Supreme Court.[29] Further, the allegation that there was fraud in relation to the allegedly defamatory statement that Mr Stiassny had falsely labelled Paragon as insolvent was also considered by the Court of Appeal in striking out the appeal against Cooper J's findings to that effect and by the Supreme Court in refusing leave to appeal. The issue was also addressed by Cooper J in striking out Mr Siemer's subsequent attempts to challenge the permanent injunction,[30] decisions which survived attempts by Mr Siemer to appeal them to the Court of Appeal and the Supreme Court.[31]

Different ground now relied upon – the over-charging allegation

[26] However, it does not appear from the strike-out judgment of Andrews J that counsel for Mr Siemer relied upon the third ground of attack against Cooper J's judgment now advanced by Mr Siemer; namely, the allegedly defamatory allegation made by Mr Siemer that Mr Stiassny or his firm over-charged Paragon, a statement which Mr Siemer says Mr Stiassny has acknowledged to be true.

[27] In his affidavit of 28 February 2012 filed in support of the present application, Mr Siemer exhibited a copy of the second amended statement of claim dated 26 April 2005 which set out the allegations of defamation against him. It was

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29 *Korda Mentha v Siemer* [2012] NZHC 1074 at [85]-[92].
30 In Minutes dated 29 July 2010 and 17 March 2011.
31 See *Siemer v Stiassny* [2012] NZCA 607; *Siemer v Stiassny* [2011] NZSC 47; *Siemer v Stiassny* [2011] NZCA 466; and *Siemer v Stiassny* [2011] NZSC 119.

pleaded that the following statement in a website belonging to Mr Siemer was false and likely to have caused economic loss, serious distress and loss of professional and personal reputation to Mr Stiassny and his accounting firm:

> Mr Stiassny, a chartered accountant, promptly over-charged more than $10,000 for his services and labeled [sic] the company insolvent, accounting actions that must minimally rank as grossly incompetent.

[28] It was alleged by the plaintiffs that, "in their natural and ordinary meaning", the words and others appearing in the website meant and were understood to mean that Mr Stiassny's conduct as receiver of Paragon was grossly unprofessional and unethical.[32]

[29] In submitting before me that the allegation of over-charging could not possibly found an award of defamation damages against him, Mr Siemer referred to a letter dated 3 April 2001 from Ferrier Hodgson in which Mr Stiassny said:

> My staff have referred back to our billing records and discovered two charges to Paragon which were in fact charges on an engagement with a similar name. Our invoice has therefore been reduced to $16,145.31 and we attach a revised invoice and cheque for your attention. We apologise for the error, however we note we have further time accrued since the closing date for the attached fee, and we note for the future that we will bill invoices on the basis of the costs of our time in attendance on the affairs of the subject company.

[30] Although the second page of Mr Stiassny's letter and the revised invoice apparently attached to it were inadvertently not attached to Mr Siemer's affidavit in this proceeding, and appear to be missing, it was accepted by Mr Hunt that Paragon had in fact been over-charged by some $10,000 and that the cheque referred to in the letter was by way of repayment of the excess.

Over-charging issue should have been argued on originating application

[31] I am not persuaded that Mr Siemer should now be permitted to rely on this argument, whether it has substance or not. The over-charging point now raised could have been, and should have been, relied upon by Mr Siemer in the originating proceedings before Andrews J at the time he alleged other fraudulent behaviour. It

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[32] For present purposes, the issue having been dealt with previously, including by Andrews J, I do not need to discuss the allegation that Mr Stiassny falsely labelled Paragon as "insolvent".

would be an abuse of the Court's process for Mr Siemer, by this application, to be able to make a second attempt at setting aside the defamation judgment on the ground of an alleged fraud which was available to him but not argued on his behalf when the matter was before Andrews J in the originating application.

Over-charging point does not meet test of conscious and deliberate dishonesty

[32] It is reasonable to infer, on the basis of that evidence and assuming no other incident of alleged over-charging was relied upon, that the plaintiffs' allegation in the defamation proceedings that the statement in the website about over-charging was false could not have been sustained had Mr Stiassny's letter of acknowledgement and apology dated 3 April 2001 been placed in evidence before Cooper J. Mr Siemer's point, however, is that Mr Stiassny and Ferrier Hodgson must be taken to have deliberately withheld that evidence in the defamation proceeding; that doing so amounted to fraud; and that the judgment should be recalled on that basis.

[33] However, for the purposes of the fraud exception to the finality rule, the evidence adduced by Mr Siemer falls far short of proving that the failure to bring to Cooper J's attention, in a formal proof trial in October 2008, a letter on administrative matters written some seven-and-a-half years earlier was sufficient to meet the Supreme Court's test of conscious and deliberate dishonesty upon which the impugned judgment was based.[33]

Over-charging point not a matter on which the judgment was founded

[34] Nor do I think the point meets the requirement of being a matter upon which the impugned judgment was founded. The pleaded statement on the website attributed to Mr Siemer went no further than stating that Mr Stiassny's accounting actions in over-charging Paragon and labelling the company insolvent "must minimally rank as grossly incompetent". Counsel for the plaintiffs submitted to Cooper J in the defamation proceedings, however, that the allegation of over-

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[33] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*, above n 24 at [29], citing the speech of Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547 at 571 (HL).

charging was one of a lengthy list of defamatory allegations said to have been made by Mr Siemer which meant and were understood to mean that:

(a) Mr Stiassny, in his professional capacity as receiver of Paragon, acted criminally or that there were good grounds for believing that he acted criminally;

(b) his conduct as receiver of Paragon was significantly more scandalous than that of the Enron accountants or financial officers;

(c) his conduct as receiver of Paragon was grossly unprofessional and unethical; and

(d) Mr Stiassny gained improper personal enrichment through exploitation of the Paragon receivership.

[35] Having regard to all of the pleadings and the totality of the evidence as summarised by Cooper J, I consider it to be highly improbable that the Judge would have regarded proof that Mr Stiassny had in fact acknowledged an error in over-charging Paragon, for which he had apologised, as justifying the Court's reaching a different view from the one expressed; namely, that looked at all overall Mr Siemer's conduct amounted to actionable defamation for which substantial damages should properly be awarded.

[36] This aspect of the test may be looked at another way. Apart from the over-charging point, there may have been a number of other matters Mr Siemer might have raised in defence of the defamation proceeding, along with the letter of 3 April 2001, but he was prevented from running any defence by reason of his failure to comply with court orders. The Court of Appeal and Supreme Court decided the defamation judgment should stand, first on the issue of liability and subsequently as to the awards of damages, notwithstanding that any defences Mr Siemer might have argued were debarred. Allowing Mr Siemer to argue the over-charging point now would amount to ignoring the fact that he was not permitted to run a defence and

allowing him to re-open a case which has been well and truly disposed of by the judicial process.

Is this application debarred?

[37] Because of the views reached above, it is unnecessary for me to decide whether this application ought to have been struck out immediately upon filing because it amounts to a step taken by Mr Siemer contrary to the order of Potter J on 9 July 2007 that Mr Siemer be debarred from defending the defamation proceeding until further order of the Court. The plaintiffs' submission was that, although this application is not a strictly a defence to the defamation claim, it is at the least a pre-cursor to running a defence and the purpose and effect of the debarment order was to prevent Mr Siemer from resisting the plaintiffs' claim.

[38] I am inclined to think it could not be reasonably suggested that the debarment order would have the effect of excluding a proper consideration of a proceeding seeking to have the judgment recalled or set-aside on the grounds of fraud. The fact that Mr Siemer's defences were debarred and the plaintiffs' case then heard by formal proof did not provide the plaintiffs with a licence to deliberately mislead the Court or act fraudulently. And I note that Andrews J did not rely on the debarment order as a ground for striking out the statement of claim in the originating application.

[39] However, I leave the point undecided.

Conclusions

[40] To summarise, I have reached these conclusions:

(a) Mr Siemer's criticisms of Cooper J's findings in the defamation judgment have been addressed and disposed of by the Court of Appeal and the Supreme Court.

(b) Andrews J heard and dismissed an originating application to set aside the defamation judgment on grounds of alleged fraud identical to those now advanced, except as to one new point.

(c) The new point - evidence adduced by Mr Siemer on the over-charging issue – could and should have been put to Andrews J in the originating proceeding and it is too late for Mr Siemer to attempt to rely on it now.

(d) The evidence falls far short of establishing an arguable case of conscious and deliberate dishonesty by the plaintiffs justifying the setting aside of a perfected judgment from which appeals have failed.

(e) In any event, the evidence on the over-charging issue does not assist Mr Siemer to establish that the judgment was founded on that point. The evidence would not have altered the outcome of the defamation proceeding so it could not have reasonably justified any challenge to it, and Mr Siemer had been debarred from raising such matters in any event.

(f) Because of these findings, it is unnecessary for me to determine whether this application should have been struck out immediately after it was filed because of Potter J's order debarring Mr Siemer from defending the defamation proceeding until further order of the Court.

This litigation should be brought to an end

[41] I return to Andrews J's recital, at [13] – [21] of the strike-out judgment, of the history of this litigation following the defamation judgment.[34] By my count, including all of the separate unsuccessful applications to this Court; the various applications and appeals to the Court of Appeal on both liability and quantum; and the several failed applications to the Supreme Court for leave to appeal or to recall judgments, this judgment records the 15th unsuccessful attempt by Mr Siemer to

[34] Cited above at [11].

mount a challenge to the defamation judgment. An inordinate amount of judicial resource has been expended on proceedings which are devoid of merit and the plaintiffs have suffered an unconscionable level of legal costs in resisting them, without any realistic prospect of recovery from Mr Siemer. Enough is enough.

[42] I consider it appropriate to make an order, in the exercise of the Court's inherent power to prevent abuses of its process, the purpose of which will be to prevent Mr Siemer from continuing to waste the time and resources of this Court and the plaintiffs in respect of this proceeding.

Orders

[43] For the reasons set out above, I conclude that the application amounts to an abuse of process and it is dismissed.

[44] Futile though the gesture might be, I reserve the issue of costs for further submissions. If the plaintiffs wish to apply, they shall do so by memorandum filed and served by **20 March** 2013. Mr Siemer shall file and serve any memorandum in response by **17 April** 2013. Unless I consider further submissions to be appropriate, I shall then deal with costs on the papers.

[45] I order that the Registrar of this Court shall refuse to receive for filing, except with the leave of a Judge, any document which Mr Siemer may attempt to file in this Court, in this proceeding or any other, the purpose of which is to challenge any aspect of the judgment of Cooper J in this proceeding dated 23 December 2008, or any subsequent judgment, order, or direction of any court related to it, whether under file number CIV-2005-404-1808 or not. To avoid doubt, this order precludes any attempt by Mr Siemer to apply for a recall or the setting aside of this judgment, but it does not limit any right of appeal he may have against it and does not extend to preventing him from filing any memorandum relating to costs on this application.

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Toogood J