IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-1808

BETWEEN	FERRIER HODGSON First Plaintiff
AND	MICHAEL PETER STIASSNY Second Plaintiff
AND	VINCENT ROSS SIEMER First Defendant
AND	PARAGON SERVICES LIMITED Second Defendant
AND	OGGI ADVERTISING LTD Third Defendant

Hearing: 28 April 2005

Appearances: J G Miles QC and P Hunt for Plaintiffs
C S Henry and A J Witten-Hannah for First and Second Defendants
No appearance for Third Defendant

Judgment: 5 May 2005

JUDGMENT OF ELLEN FRANCE J

Solicitors:
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Counsel:
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Introduction

[1] On 8 April 2005, the High Court made an *ex parte* interim injunction directing that a billboard be taken down and material be removed from a website. The billboard related to the second plaintiff, Michael Stiassny, and read: "Michael Stiassny, a true story www.stiassny.org"

[2] The website referred to, "www.stiassny.org", contained a range of material about Mr Stiassny and in particular his role as Court appointed receiver of a company called Paragon Oil Systems Ltd (now, Paragon Services Limited). Mr Stiassny's firm, Ferrier Hodgson, is the first plaintiff. The first defendant, Vincent Siemer, is the managing director of Paragon and is the author of the material on the website. The company, Paragon, is the second defendant. The third defendant, Oggi Advertising Ltd, is the owner of the billboard.

[3] The plaintiffs commenced proceedings against the defendants alleging, initially, that the material on the website is defamatory. After the *ex parte* interim injunction was granted, the pleadings were amended to include a second cause of action of breach of contract. The contract is a compromise agreement entered into between Ferrier Hodgson, Mr Siemer and Paragon Oil. The agreement includes the following:

> "Paragon will not comment to any party on any matter arising in or from the receivership including the fact of this settlement."

[4] In this context, the plaintiff sought and obtained the *ex parte* interim injunction. Mr Siemer now seeks to rescind that injunction. The application is opposed by the plaintiffs who also seek an amended interim injunction which would expand on the initial order and apply to another website as well, namely, www.paragonoilsystems.com.

Factual background

[5] Michael Stiassny was appointed by the Court as receiver of Paragon Oil on 14 December 2000. The Court ordered the company into receivership by consent in the context of a claim by Mr Siemer of oppressive conduct by the other shareholders. Mr Siemer and the receiver were co-signatories on the company's bank account. Neither could therefore disburse funds without the other's approval. Nor did the receiver have a power of sale. Hence, Mr Stiassny describes the receivership as a "staging post" in Mr Siemer's dispute with the other shareholders in Paragon.

[6] Mr Stiassny made two reports to the Court, one in January 2001, the other in March 2001. Mr Siemer's action for oppressive conduct was successful and in a judgment delivered on 18 July 2001, Hammond J made orders transferring shares held by other shareholders to Mr Siemer. In these circumstances, the receivership was no longer necessary and Mr Stiassny was discharged by the Court.

[7] There were differences between the plaintiffs and the first and second defendants over the receivership. This led, ultimately, to the compromise agreement dated 9 August 2001. The agreement provides:

> We have discussed a settlement of all issues between Ferrier Hodgson and Paragon, such that:
>
> 1. Ferrier Hodgson & Co will release all company records and drawings (which are the only company property remaining in our hands) to you.
>
> 2. Paragon will not comment to any party on any matter arising in or from the receivership including the fact of this settlement.
>
> 3. Ferrier Hodgson & Co will not comment to any parties in relation to the receivership except as required by the Court or otherwise by law.
>
> 4. You will settle any obligation of the Company to Mr Clark such that Mr Clark will have no claim against Ferrier Hodgson & Co, and also settle the invoices attached such that the creditors will have no claim against Ferrier Hodgson & Co.

5. Neither Ferrier Hodgson & Co nor Paragon will have any further claim against each other in relation to any matter arising from the receivership whether known at this time or unknown.

References to Ferrier Hodgson & Co, and to Paragon, include references to their respective directors, employees, servants or agents. To give effect to this settlement, would you kindly execute the attached copy of this letter and return it to us.

[8] After that, on 10 April 2002, Mr Siemer made a complaint to the Institute of Chartered Accountants (ICANZ) about the receivership. ICANZ dismissed the complaint on the basis there had been no breach of the Code of Ethics. That finding was upheld on a review by an independent barrister issued on 18 November 2002.

[9] In September 2004 (10, 13 and 14 respectively), Mr Siemer's complaint to the New Zealand Shareholders Association about the receivership was copied to several parties at the Auckland Electricity Consumer Trust (AECT). AECT is the shareholder in Vector Limited and Michael Stiassny is chairman of Vector.

[10] Mr Siemer made a further complaint about the receivership on 26 October 2004 to the Serious Fraud Office (SFO). He copied the complaint to ICANZ, the Institute of Directors and Hon. Phil Goff. The SFO concluded there was no basis to suspect an investigation may disclose serious or complex fraud.

[11] Mr Siemer made a second complaint about the receivership to ICANZ on 26 January 2005. Consideration of that complaint has not been concluded as yet.

[12] The billboard was erected on the Farmers carpark building in Hobson Street, Auckland, around 8 April 2005.

[13] After the hearing of this matter, on 3 May 2005, the plaintiffs filed an application seeking committal of the first defendant and other remedies. The application was made on the basis Mr Siemer was in contempt of the *ex parte* order and in breach of an undertaking given to the Court because, as at 3 May 2005, the Stiassny website was up and running and, indeed, contained up-dated information.

[14] Mr Siemer's explanation was that he had sold the website to a company in Milan. He said, via counsel, that when he sold the website it was empty but he admitted he had provided the information now on the site to the new owners. (The sale agreement dated 26 April 2005 now before the Court refers to sale of the site and information on it.) Mr Siemer undertook to use his best endeavours to get the material removed from the website. The contempt application has been listed in the Judges' Chambers List for 11 May 2005. Mr Witten-Hannah for Mr Siemer has since advised that as at 7.00am today, the Stiassny website has been deleted of information about Mr Stiassny.

Pleadings

[15] In the breach of contract cause of action, the plaintiffs plead that in commenting on the receivership in the four complaints and on the two websites, the first and second defendants breached the compromise agreement.

[16] The plaintiffs claim that as a result of the comments, they are likely to have suffered economic loss, serious distress and loss of personal and professional reputation. Punitive damages are sought.

[17] The particulars include the allegation that the complaints and the websites levelled "the most serious allegations of criminal conduct and scandalous and outrageous breaches of professional and ethical standards."

[18] Unless an injunction is granted, the plaintiffs say that the first and second defendants are likely to continue to publish the same or similar allegations.

[19] The second cause of action, namely, defamation, claims that the documents on the www.stiassny.org website as a whole are false and defamatory. In particular, the plaintiffs rely on:

a) The whole of the documents on the site headed "Welcome" and "Why Michael Stiassny".

b) The second complaint to ICANZ, particularly, pages 2 and 3.

c) The complaint to the SFO and the supporting affidavit of Mr Siemer published on the website and in particular paragraphs 16, 53 and 54.

[20] In terms of the Paragon website, the plaintiffs say this also includes material which is defamatory.

[21] Again, it is claimed that as a result the plaintiffs' professional and private reputations have been gravely damaged. Aggravated and punitive damages are sought as well as an injunction.

[22] The second defendant is described as a party to each of the actions of Mr Siemer.

[23] I note here that for the purposes of the interim injunction application, the plaintiffs are not relying on the complaints to ICANZ or the SFO. They do rely on publication of the fact of complaint to those two bodies.

[24] As to Oggi, it is said that they granted Mr Siemer and/or Paragon a lease or licence to publish the information and that they are a party to the publications (on the billboard).

Principles applicable to application to rescind

[25] The commentary in *McGechan* notes that an application to rescind an *ex parte* order proceeds as a hearing *de novo*. The onus remains on the party who made the *ex parte* application. That is the basis on which the hearing proceeded.

[26] Rules 259 and 261 set out two bases on which an *ex parte* interim injunction may be set aside. The first ground for rescission is if it was wrong to grant the order. The second ground is that the order was fraudulently or improperly obtained. The first and second defendants' application invoked both heads but the focus has been on the correctness of injuncting the defendants.

Basis of application to rescind

[27] The application to rescind is made on two broad grounds, the first of which may be grouped under the claim of an improperly obtained injunction. In particular, it is said that the plaintiffs failed to provide particulars in support of the interim injunction; they have not put the full facts before the Court; and have lied and misled the Court.

[28] Second, there is a grouping of grounds which presumably go to suggest that the making of the injunction was wrong. It is said that the billboard complained of is neither defamatory nor untrue. A similar claim is made regarding the website. Finally, the application states that the interim injunction imposes significant unwarranted financial cost upon Mr Siemer (the cost is that relating to the billboard).

[29] The Notice of Opposition maintains that the interim order was not obtained through improper or fraudulent means and that the Court was not wrong to grant the injunction. The other grounds relate to the correctness of the orders. First, the plaintiffs state that the defendants have no reasonable possibility of establishing a legal defence to the defamatory material. The second ground is that the defendants are bound by the agreement with the plaintiffs not to comment to any party on any matter arising from the receivership of Paragon Oil and placing the material about the receivership on the website is in clear breach of that agreement. Third, the plaintiffs contend that in the absence of an injunction, the first and second defendants will continue to defame the plaintiffs and breach the agreement. Finally, it is said that damages are not an adequate remedy to the serious ongoing harm caused to the plaintiffs' reputation by publication of the material on the website.

Application for an amended injunction

[30] In its present form, the injunction first requires Mr Siemer to direct Oggi to remove the billboard. Second, Mr Siemer is directed to remove "all material from the website .. in any way relating to" Michael Stiassny. Third, Mr Siemer is to refrain from "publicising any information in any way relating to the application

pending further order of the Court." Finally, Oggi is directed to remove the billboard.

[31] The amended application by the plaintiffs for an interim injunction seeks an order that Mr Siemer and Paragon, their servants, contractors or agents:

a) Will not reinstate the billboard;

b) Will remove all material from the two websites "in any way relating to the plaintiffs";

c) Will not publish "any comment or material arising out of the receivership of Paragon Oil Systems Ltd"; and

d) Will not publish any material "relating to the plaintiffs that arises out of the two websites or similar to that material."

Adequacy of disclosure?

[32] As I have noted, this aspect was not developed at the hearing although Mr Siemer in his affidavit points to a number of statements made by Mr Stiassny which he says are untrue.

[33] I have considered Mr Stiassny's affidavit in support of the *ex parte* application in this light. That affidavit focuses on Mr Stiassny's claim the material on the website is defamatory. Obviously, Mr Siemer takes a different view of matters from that of Mr Stiassny but there is nothing before me to support a claim that there was inadequate disclosure on the part of the plaintiffs or to suggest that the injunction was otherwise improperly obtained. Mr Henry, counsel for Mr Siemer, did not press such a claim at the hearing of this matter. The defendants' application for rescission on that ground must fail.

Should an injunction be granted?

(i) The principles

[34] The applications - for rescission on the grounds the order was wrong and for an amended injunction - have been heard together. The issue is then whether injunctive relief is appropriate and, if so, in what form.

[35] The parties are generally agreed on the applicable principles, in particular that the threshold for an injunction to restrain defamatory material is higher than that normally applicable for injunctive relief as set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129. (See, for a recent discussion of the *Klissers'* principles, *Roseneath Holdings Limited v Grieve* [2004] 2 NZLR 168.)

[36] The approach to be taken to an injunction in a case like the present was discussed by the Court of Appeal in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4. In that case, Cooke P observed that when justification is to be relied on as a defence, an injunction will not be granted "except in cases where the statement is obviously untruthful and libellous." (at 7). In that case, the Court could not conclude on affidavit evidence that the material was "obviously untruthful and libellous" or that "there is no reasonable foundation for the defence of justification." (at 7). There, a significant opportunity to comment was given and advantage was taken of it. (I do not consider Mr Siemer's offer to allow the plaintiffs to put their side of the story on the website equates to the opportunity to comment in issue in the *New Zealand Mortgage Guarantee* case.)

[37] Similarly, Cooke P in *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 referred to the effect of the principle of freedom of expression, as reinforced by s 14 of the New Zealand Bill of Rights Act 1990. That principle meant that the jurisdiction to grant an injunction in these cases should be "exercised only for clear and compelling reasons." Cooke P continued:

> "It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published." (at 407)

[38] As Cooke P observed, this requires a factual analysis and the assessment in a particular case will turn on the particular facts. Those facts "may be such that the duty of the Court to restrain unlawfulness comes into force." It was envisaged that cases in which either an injunction or an order for production of a script would be justified would be "exceptional" (at 408).

[39] The notion that the circumstances must be exceptional to justify an injunction rather than "leaving the complainant with his or her remedy in damages" was reiterated by the Court of Appeal in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 at 132.

[40] Richardson P in *Fahey* also noted that the same principle, that of requiring clear and compelling reasons, applies also to the case of successive defamations. (See also the discussion of the higher threshold in Todd, *The Law of Torts in New Zealand* (3 ed at 16.6).)

(ii) The alleged defamatory meanings

[41] The alleged defamatory meanings relied on by the plaintiffs in the amended statement of claim in respect of the Stiassny website are as follows:

> (1) That the second plaintiff, in his professional capacity as receiver of Paragon Oil Systems Limited, acted criminally or that there were good grounds for believing that he acted criminally.
>
> (2) That the second plaintiff's conduct as receiver of Paragon Oil Systems Limited was significantly more scandalous than that of the Enron accountants or financial officers.
>
> (3) That the second plaintiff's conduct as receiver of Paragon Oil Systems Limited was grossly unprofessional and unethical.
>
> (4) That the second plaintiff gained improper personal enrichment through exploitation of the Paragon receivership.
>
> (5) That the first plaintiff was a firm that allowed and profited from a partner to act in the manner described above.

[42] As to the Paragon Oil website, it is noted this says:

> (1) Mr Stiassny, a chartered accountant, promptly overcharged more than $10,000 for his services and labelled the company insolvent,

> accounting actions that must minimally rank as grossly incompetent.
>
> (2) The receiver did not return the control of [the second plaintiff] to [the first plaintiff] and worked against [the second plaintiff] recovering the technology.

[43] The plaintiffs say that, in their natural and ordinary meaning, the words meant and were understood to mean that the second plaintiff's conduct as receiver of Paragon Oil Systems Limited was grossly unprofessional and unethical.

[44] The defences relied on by the defendants are truth, honest opinion (fair comment on a matter of public interest) and qualified privilege. The defendants have not filed statements of defence as yet but Mr Siemer has sworn in an affidavit to the truth of what he asserts and that he will be able to prove the website information true at trial. Mr Henry for the defendants advised that the other two defences will also be relied on.

(iii) The defence of truth

[45] As to the defence of truth, the plaintiffs say that at the heart of Mr Siemer's allegations is the complaint that Mr Stiassny labelled the company insolvent. It is clear that is not factually correct from reading Mr Stiassny's two reports to the Court. Indeed, the plaintiffs submit there is no factual basis for any of the defamatory statements on either website.

[46] The other aspects of Mr Siemer's grievance the plaintiffs say are, first, the concern about over-charging. On that, the material before the Court shows that Ferriers, by mistake due to a confusion between Paragon and another company with a similar name, did wrongly charge $10,000. But, when the error was pointed out, it was immediately corrected.

[47] The second aspect relates to the claim of failure to return Paragon's records. Mr Miles submits the evidence shows two categories of documents. The first category comprises some documents which were overlooked and ultimately returned. The second category involves some documents which, having taken legal advice,

Ferriers considered were receivership documents. These documents have not been returned.

[48] Hence, it is submitted there can be no reasonable possibility of this defence (or any others) succeeding.

[49] On the insolvency aspect, Mr Siemer says he now does not rely on the statement in the Receiver's March report but on Mr Stiassny's comments to Mr and Mrs Siemer at a meeting in February 2001 at which Robert Fardell QC was present. Mr Fardell was representing the Siemers at that time.

[50] The defendants then point to a number of illustrations of what they say, at best, amounts to a level of carelessness and sloppiness on the plaintiffs' behalf. Further, they say the evidence discloses instances where Ferrier has relied on semantics in its dealings with Mr Siemer post the receivership. From that sort of material, they say, Mr Siemer can advance his defence.

[51] The thrust of the defendants' submissions is that in any event, these matters raise issues of credibility which cannot be resolved at this point. Further, by reference to cases such as *Greene v Associated Newspapers Ltd* [2005] 1 All ER 30, the defendants emphasise the importance of freedom of expression.

[52] The plaintiffs are correct that one of the underpinnings of Mr Siemer's grievance is the claim that Mr Stiassny said Paragon was insolvent and that this claim was based on the March 2001 report to the Court. However, Mr Siemer's complaint about this has, as Mr Miles put it, now "morphed" into a claim about what he says Mr Stiassny said at a meeting in February 2001. One can be justifiably sceptical about the lateness at which this has emerged, appearing in Mr Siemer's affidavit of 26 April 2005. However, I am not convinced it is appropriate for me to take the mettle as Mr Miles urged me to do and effectively decide this issue now.

[53] Further, while the issue about solvency is a key one there are other issues which emerge in the voluminous documentation, such as Mr Stiassny's approach to the injection of capital. It is clear there was no deliberate over-charging in respect of

the $10,000 but Mr Siemer does appear to raise other issues of claimed over-charging independent of that. Also, there may well be a legitimate issue about the return of the documents Ferrier Hodgson says are receivership documents.

[54] One of the difficulties for the Court in assessing whether the threshold is met is that the language used by Mr Siemer is a mixture of the extreme, the vituperative, and the rather more anodyne. Further, his complaints have become more extreme over time. However, some of the documents on the website in fact put Mr Stiassny's side of events, as the material includes letters from Ferrier Hodgson.

[55] Having assessed the evidence, I conclude this is one of those exceptional cases where the Court can say that there is no reasonable possibility of a defence of truth succeeding in relation to any allegations of criminal or unethical conduct or as to improper personal enrichment. (For clarity, in the absence of any submissions by the defendants about the alleged defamatory meanings, I see the defendants' comparison with Enron as fitting within the category of alleged criminal or unethical conduct.) Specifically, there is also no reasonable possibility of a defence to claim the $10,000 was deliberate over-charging. Nor should the fact of complaint to the SFO and ICANZ be publicised.

[56] The plaintiffs rely on the examination and rejection of the defendants' complaints by these two regulatory bodies. The plaintiffs submit that while the Courts are protective of the rights of individuals there are limits on those rights where complainants go outside the avenues for such complaints (like the SFO or professional bodies).

[57] The opinions of the two regulatory bodies, ICANZ and the SFO, are not directly admissible. The conclusions of both (one dismissing the first complaint of unethical conduct, the other stating that there was no reason to suspect an investigation may disclose "serious or complex" fraud) do, however, give some comfort in the discretionary exercise involved. I put it no higher than that because, apart from the admissibility issue, as Mr Henry submits, neither can be conclusive in the present context.

[58] There is another aspect which does support the maintenance of some ongoing constraint on Mr Siemer's freedom of expression. It is clear, and accepted by Mr Siemer, that the material on the website included material obtained through discovery in other proceedings and which is improperly publicised. (The Court of Appeal in *Wilson v White* (CA107/03, 21 April 2005), has recently discussed this issue.) Mr Henry advised that Mr Siemer does not wish to be in contempt in that way and this material has been removed from the website. I consider an injunction would be an appropriate means of restraining any ongoing contempt in that respect.

[59] The plaintiffs also rely on what they say are contraventions of the *ex parte* order. The first breach relied on is the delay in complying with the original order. The second is the existence of the other, Paragon Oil, website. On these matters, Mr Siemer says there was a delay in serving the *ex parte* order. He also says (via counsel) that he was not aware until the hearing last week of the existence of the contents of the Paragon Oil website. I was initially willing to give Mr Siemer the benefit of the doubt on these two matters given that matters have proceeded with some urgency. Further, on a strict reading of the *ex parte* order, it is directed to the Stiassny website. However, Mr Siemer's acknowledgement that he passed on material covered by the *ex parte* injunction to the new website owner and the timing of the agreement for sale of the website cause me to doubt his earlier explanation.

[60] I am, however, concerned that the injunction as now sought is broad. There is some force in Mr Miles' submission that this is an "all or nothing" case, especially given the limited genesis of the complaint. Mr Miles also makes the point adumbrated by Cooke P in *Auckland Area Health Board* (at 407), albeit in a slightly different context, that the Court is not to act as a censor.

[61] But, I am asked to determine at this interlocutory stage the reasonable possibility of a defence to a constraint against publication of all material "in any way" relating to the plaintiffs. Such an order would restrain Mr Siemer from making public a concern that Mr Stiassny, putting the matter baldly, did not "do a good job" or was not competent in some way in the receivership, did not return all of the company's documents, and that Ferrier Hodgson over-charged Paragon (but not by any reference to the $10,000). I cannot say there is no reasonable possibility of a

defence to any defamatory aspect of these matters. Nor I do not see any basis for restraining comments to the effect that Mr Stiassny has "a dark side" or is a "bully", however ill-chosen those words may be.

[62] Given the exigencies of the circumstances in which the *ex parte* order was obtained, it was appropriate then to adopt an all-encompassing approach. However, on a full hearing of the matter, the plaintiffs have not shown the need to maintain the constraint in those terms.

(iv) The defence of honest opinion

[63] The same approach would apply to the defence of honest opinion. That is because, as Mr Miles submits, the defendants must have their facts right to establish this defence. In addition, some of the material is fact not opinion and so the defence would not be available at all to that material. Finally, as to the public interest aspect of this defence, this is some overlap with the defence of qualified privilege.

(v) The defence of qualified privilege

[64] As to qualified privilege, Mr Miles is correct when he questions how this defence could apply. That is particularly the case insofar as the allegations relate to serious criminal offending. This point was addressed by the Court of Appeal in *Vickery v McLean* (CA125/00, 20 November 2000) which is, in turn, discussed in *Gatley on Libel and Slander* (10 ed, 2004, at para 14.98).

[65] Mr Vickery publicised the fact he had made complaints about the respondents to the SFO via the news media. The respondents brought defamation proceedings and were successful. The High Court Judge had rejected Mr Vickery's defence of qualified privilege, which formed the subject of the appeal.

[66] There was an issue on the appeal about the extension of *Lange v Atkinson* (*(No. 2)*) [2000] 3 NZLR 385 to cover political discussion in the context of local government. For present purposes, the relevant passage in the Court of Appeal's judgment is as follows:

> [18] **..** More specifically he must show that it is in the public interest for people to be able to make allegations of serious criminal offending, albeit in a bona fide way, to or through the news media.
>
> [19] Even if such allegations were responsibly made, it would be contrary both to settled law and to the public interest to allow such communications to be made under qualified privilege. **..** It is, in our view, demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made, ventilated through the news media. That could only encourage trial by media and associated developments which would be inimical to criminal justice processes. Society has mechanisms for investigating crime and determining guilt or innocence. It is not in the public interest that these mechanisms be bypassed or subverted. Parliament's view, in the context of Serious Fraud Office matters, and it is a view of which the common law should take notice, can be found in ss 36 to 44 of the Serious Fraud Office Act 1990. These provisions are, broadly speaking, designed to prevent or limit disclosure of matters under investigation by the Office, and specified aspects of such investigations. Parliament has thereby recognised that the very fact that a Serious Fraud Office investigation is taking place can, of itself, cause serious damage to reputations and possible subversion of criminal justice processes. Thus, freedom of expression in this area has been curtailed to reflect Parliament's assessment of how to balance the competing interests.

[67] Accordingly, while as the Court of Appeal observed in *Fahey*, (at 135) there may "in particular circumstances" be a legitimate public interest in the exposure of misconduct, I do not see this as one such case.

[68] Counsel for both parties submit that there is no place for an assessment of the balance of convenience when the higher threshold is applied. The logic of the balance of convenience, Mr Miles submits, arises because of the low initial threshold required for liability. By contrast here, the plaintiffs argue, once a court is satisfied that there can be no reasonable likelihood of a defence, then the issue of balance of convenience becomes irrelevant. Even if that is not the case, I consider the balance of convenience favours the grant of some injunctive relief to the plaintiffs. Apart from the money already expended on the billboard, there is no particular damage to the defendants in constraints on publication prior to the substantive hearing.

(vi) Breach of contract

[69] The discussion so far has proceeded on the basis of a consideration of the defamation cause of action alone. It is necessary now to "factor in" the second cause of action, of breach of contract.

[70] Two issues arise, namely:

a) What is the threshold to apply?

b) Have the plaintiffs met the threshold?

[71] The first issue arises because the defendants argue that as the injunction sought in relation to the breach of contract would muzzle speech, the higher threshold should apply. The defendants rely on the first instance decision in *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No. 2)* [1989] 3 NZLR 520 for this proposition.

[72] Smellie J in *Ron West* was dealing with two causes of action. One in defamation and the other, breach of the Fair Trading Act 1986. His Honour concluded that the plaintiff's "primary and dominant" cause of action was defamation. Hence, the decision was as follows:

> Weighing the right of free speech (liberty of the Press) against the public interest aspect in the cause of action under the Fair Trading Act and taking into account in that balancing process my conclusion that the plaintiff's principal purpose is to seek damages for defamation; I am led to the conclusion (despite the fact that there are grounds for granting interim relief in respect of the second and third causes of action) that the injunction should be rescinded. (at 537)

[73] Mr Miles' submission is that the present case is quite different from that in *Ron West*. There the causes of action arose out of the same set of facts. Here, by contrast, the causes of action arise out of discrete facts. Mr Miles submits it is relevant that the plaintiffs here could have brought two sets of proceedings and would have been entitled to injunctive relief on the lesser threshold in the proceedings relating to the breach of contract.

[74] This aspect was not considered by the Court of Appeal in *Ron West* because the Court did not agree with Smellie J's finding that the plaintiff had established an arguable case on the fair trading cause of action.

[75] I consider some cognisance has to be given to the effect of the injunction sought in this case. It would otherwise be artificial and would ignore the gravamen

of the plaintiffs' complaint in the breach of contract claim. I say that because although Mr Miles is right that this claim arises from the agreement, the particulars of the claim are linked very much to the alleged defamation. However, it is difficult to see how the higher threshold can be directly applied.

[76] The proper way of analysing this aspect is to give weight to the impact on free speech in assessing the balance of convenience.

[77] I turn then to the second issue. The plaintiffs say the breach of the agreement is blatant. They have clearly shown there is a serious question to be argued. Given the blatant nature of the breach, it is hard to see how the balance of convenience assists. But, in any event, the relevant factors favour the plaintiffs.

[78] The plaintiffs further submit that the orthodox approach of the Courts when enforcing a negative covenant is injunctive relief (*Radley Bros Ltd v Reilly's Central Produce Mart, Ltd* [1935] NZLR s 38, 40; see also *McBean and Pope (Manawatu) Limited v Coley* [1966] NZLR 309; and *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538).

[79] The defendants' response is that the threshold is not met because they have a real argument that the agreement was breached by Ferrier's failure to return all of the documents as envisaged by the agreement.

[80] I am not convinced this is one of those "traditional" cases referred to in *Radley Bros* to which the court would usually respond with an injunction. But, in any event, I am satisfied the appropriate balance is struck by the form of the orders made in relation to the defamation cause of action. Damages are an adequate remedy in terms of this cause of action for any publication outside of the injunction I am granting.

Result

[81] The events which took place after the hearing of this matter have meant the amended interim injunction has to be framed as a prohibition on publication by the first and second defendants, ie, against any form of publication by them.

[82] I should also explain that Mr Siemer's explanation that he has sold the website makes it appropriate to retain the restriction on the erection of the billboard. That is because the billboard directs attention to the Stiassny website. The website up until this morning, at least, contained information which would conflict with the interim injunction I am making in a situation where it appears that Mr Siemer may have lost control over it.

[83] Orders are made rescinding the *ex parte* interim injunction made on 8 April 2005 and granting in its place an interim injunction directing Mr Siemer, Paragon Services Limited, and their servants, contractors or agents not to:

a) Publish in any form any information containing allegations of criminal or unethical conduct or as to improper personal enrichment on the part of the plaintiffs in relation to their conduct of the receivership of Paragon Oil Systems Limited; any claim that the plaintiffs deliberately over-charged Paragon Oil Systems Limited in the sum of $10,000; together with information as to the fact of complaints made by Mr Siemer and/or Paragon Oil Systems Limited to ICANZ or to the Serious Fraud Office; and including any information obtained by Mr Siemer or Paragon Oil Systems Limited in the course of discovery in any proceedings pending further order of the Court; and

b) Not to reinstate the billboard.

[84] I note here that, for the purposes of the hearing on injunctive relief, the defendants took no issue with the plaintiffs' submission that both the first and second

defendants are jointly liable for publishing the statements which are in issue. I have accordingly proceeded on that basis.

[85] Following the hearing, Mr Miles for the plaintiffs filed a memorandum requesting that, if the *ex parte* order was altered in any material way, the order lie in the Court for seven days pending any further application that might be made by the plaintiffs. The defendants responded with a memorandum objecting to this course. The objection is two-fold. First, they say the plaintiffs should have raised this at the hearing so that they could respond. Second, it is not reasonable to effectively extend the *ex parte* order in these circumstances.

[86] Given that some changes have been made to the original order, it is appropriate to preserve the plaintiffs' appeal rights. That course is not unusual in cases like the present. Nor do I consider a stay for 7 days is unreasonable. The first defendant's conduct with respect to the website is a factor in assessing the reasonableness of a stay and the overall effect of this further, short, delay. The orders made in this decision are accordingly stayed until 5pm on Thursday 12 May 2005.

Costs

[87] The parties agreed costs should be on a 3C basis to reflect both the complexity and the urgency involved. The parties are also agreed costs should follow the event. However, Mr Henry submitted that if some modification was made to the *ex parte* injunction, that raised a question about which party had succeeded. The defendants ought not then be saddled with the burden of costs.

[88] The matter is best resolved by a direction that costs lie where they fall on the *ex parte* application and by awarding costs to the plaintiffs on the matters I have dealt with on a 3C basis. However, some reduction is necessary to reflect the fact the plaintiffs have not obtained as broad an injunction as they sought. Accordingly, the plaintiffs are entitled to 80 percent of their costs on a 3C basis on the application for rescission of the *ex parte* order and on the application for an amended interim

injunction together with reasonable disbursements, the latter to be determined by the Registrar if necessary.

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Ellen France J

Delivered at 2.15pm on 5 May 2005