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 LIMITED Third Defendant

Hearing: 13 July 2005

Appearances: J G Miles QC & M A Flynn for Plaintiffs
C S Henry for Defendants

Judgment: 14 July 2005

JUDGMENT OF KEANE J

Solicitors

McElroys, Auckland for Plaintiffs
D Gates, Whangaparaoa, Auckland for Defendants

[1] Vincent Siemer has been enjoined, since 8 April 2005, as has his company, Paragon, and Oggi, an advertising agency, from stating publicly that Michael Stiassny, by implication also his firm, Ferrier Hodgson, acted criminally, unethically, and for improper enrichment in the conduct of the Paragon receivership, and from publicising complaints he has made to the ICANZ and to the Serious Fraud Office.

[2] The interim injunction first granted required Mr Siemer to take down a billboard publicising his website, which contained such statements, as well as to purge his website and to desist more generally. That order was assumed to have been complied with when, after his application to rescind the first order did not succeed, the order in its present more narrow form was made on 5 May. By the date of that second order, however, it is contended, Mr Siemer had defied the order first made and was already defying the second.

[3] The website, it is contended, continued, and continues still, much as before, now owned offshore ostensibly by a Milan Syndicate. Stickers distributed throughout Auckland, it is contended, have replaced the billboard. Forensic investigators, it is contended, acting in Mr Siemer's and Paragon's name, are seeking information from accountants and trustees to mount a prosecution against Mr Siemer, the instant effect of which is to blacken his name.

[4] Mr Stiassny and Ferrier Hodgson seek in their substantive proceedings against Mr Siemer, Paragon and Oggi, exemplary as well as compensatory damages to punish what they contend to be the libels against him compounded, but presently they seek to have Mr Siemer committed for contempt of the Court's interim orders. That application is set down for hearing on 26 July.

[5] Amongst the directions anticipating that hearing, given on 11 May, was leave reserved to either party to apply to cross-examine any deponent on his or her affidavit, and there are cross-applications. Mr Siemer seeks to cross-examine three deponents on whom Mr Stiassny and Ferrier Hodgson rely to sheet home his culpability. They seek to cross-examine Mr Siemer on his two affidavits in which he denies that he is culpable.

[6] There is no issue as to Mr Siemer's ability to cross-examine the three deponents on whom Mr Stiassny and Ferrier Hodgson rely. That is consented to. Mr Siemer opposes being cross-examined on his affidavits. He is at risk of committal, he contends, and cannot be compelled.

[7] Two interests are in tension. One is the need for Court orders to be obeyed, or if not obeyed enforced. The other is to secure those at risk of committal from any possibility of injustice; most specifically to secure for them the right, now guaranteed to those at risk in criminal proceedings by s 25(d) of the New Zealand Bill of Rights Act 1990, not to be compelled to be a witness or to confess guilt.

[8] I have no wish to abdicate striking that balance in this case, but the effect of the authorities appears to me to be that it can only be struck at the committal hearing itself, once it is clear whether Mr Siemer intends to rely on the affidavits he has filed. The Judge presiding will also then be better placed to assess the scope of cross-examination, if it is allowed.

Siemer affidavits

[9] In his first affidavit, dated 10 May, Mr Siemer says that it was never his intention, or that of Paragon, to defy the interim orders. On 8 April, when the interim injunction was given, he says, he ensured, not just that the billboard came down, but that any reference to Mr Stiassny was removed from his website.

[10] When he sold the website to Talayna Group, Milan, on 26 April, equally, he says he was scrupulous to ensure that it was free of offending material, and obtained an undertaking that the website would not be reactivated until his application to rescind the injunction was decided; that was the unsuccessful application, which led to the 5 May more narrowly framed order.

[11] On 3 May, he says, when it became apparent to him that the website might still be active, and contain enjoined material concerning Mr Stiassny, he immediately contacted Talayna Group, and the website ceased to be active on 5 May. But, he

maintains, the material Mr Stiassny now complains of was on the website before interim relief was applied for.

[12] In his second affidavit, dated 15 June 2005, Mr Siemer responds to the three affidavits filed to support his committal. He denies, as before, that he remains behind the website, and that he has been distributing notices and stickers, as he is said to have been identified doing. He maintains that he notified Yahoo of the change of ownership on 1 May 2005. He takes the opportunity to say again that what he said on the website about Mr Stiassny is true.

Proposed cross-examination

[13] At the committal hearing Mr Stiassny wishes to expose Mr Siemer's disposal of his website as a sham; to establish that he remains behind it, and that he has also been active, by distributing notices and stickers, and in other ways, in blackening Mr Stiassny's name around Auckland.

[14] The eight areas as to which Mr Stiassny wishes to see Mr Siemer cross-examined, as they have been given to me, are these:

1. the basis of the sale of the website and issues of ownership and control;
2. the negotiations and communications surrounding the sale of the website;
3. the reactivation of the website;
4. the transfer of the proceeds of sale said to have been given for the sale of the website;
5. the subsequent updates of the website;
6. the dissemination of stickers and signs around Auckland;
7. the change of ownership of the website with Yahoo;
8. the letters to accountants and trustees around New Zealand and the trustees of the AECT;
9. any other issues that the trial Judge might allow.

[15] Apart from trenching on his right not to place himself in jeopardy, Mr Siemer contends, these issues trench on the issues to be decided at trial, and go particularly to the exemplary damages claimed. They are doubly objectionable. But the application itself, he contends, is fatally deficient.

Application - sufficiency

[16] The evidence on the committal, as is invariable for interlocutory matters, is in affidavit form. Oral evidence can only be admitted, as R 253(1) says, and a deponent can only be cross-examined on his or her affidavit, as R 253(2) says, if there are 'special circumstances'.

[17] Mr Siemer contends that Mr Stiassny's application does not accord with R 253(2); indeed is radically inadequate. It does not invoke 'special circumstances' either particularly or even generally. That deficiency is more than formal, he contends. In committal proceedings, the one at risk needs to know, as in criminal proceedings, what allegation he or she faces.

[18] I agree that the application could and should have been more particular, but I do not consider that its generality is fatal. It may not invoke 'special circumstances', particularly or generally, but it does invoke R 253, which speaks for itself, and it was from the first supported by affidavits identifying clearly what its intent and basis is. As is also apparent, Mr Siemer has been able to exercise his ability to reply. He is unprejudiced.

[19] The larger threshold issue for Mr Stiassny is whether, in invoking R 253, he can establish circumstances that are sufficiently special.

Special circumstances – necessity

[20] 'Special circumstances' is not defined in R 253, or elsewhere in the rules. In *Kidd v Van Heeren* (1997) 11 PRNZ 422, CA at 424 the Court considered these words to be:

> … wide, comprehensive and flexible words indicating something abnormal, uncommon or out of the ordinary but less than extraordinary or unique.

[21] As that case illustrates, the fact that a, perhaps the, central issue on committal will be whether the disposal of the website to an offshore syndicate was a true sale or a sham may not amount to 'special circumstances'. The Court said at 425:

> Issues of authenticity and validity of documents can be and are the subject-matter of competing affidavits. Conflicts between the deponents will not of themselves create special circumstances justifying cross-examination. Issues of interpretation do not lead to a need for cross-examination. Rule 254 requires special circumstances in respect of the proper determination of the interlocutory application before the Court before cross-examination will be permitted.

[22] The fact that committal is sought can amount to 'special circumstances', but that assists the one at risk of committal, not the one who seeks it. In *Pickering v Attorney-General* [2001] 2 NZLR 324, CA, the Court of Appeal held that a person at risk of committal was under the then rule (R 249), by virtue of that circumstance free of any duty to make an affidavit before the hearing, and entitled to postpone deciding whether to give oral evidence until the applicant's case for committal was closed.

[23] Speaking for the Court, McGechan J said at 327:

> We consider the fact that the application is for a writ of arrest, carrying with it potential for deprivation of liberty, is a 'special' circumstance. It has a potential virtually unique in a civil context. That special character gains added emphasis from the rarity of the procedure. It is certainly not common place. We consider, on the same basis, that 'justice …. requires' the Court to afford appropriate procedural protections. As noted, those can be drawn very appropriately by analogy with some protections afforded in the criminal field. One clearly appropriate analogy is the right not to give evidence (if evidence is to be given at all) until completion of the respondent's case. That should not be a requirement which could lead to filling gaps or repairing weaknesses.

[24] In the preceding passage McGechan J made it clear that the protections to which he was referring extended beyond the common law to those given by the New Zealand Bill of Rights Act 1990. The right in point has to be s 25(d).

Discretion - principle

[25] Just how this application is to be approached is more nearly assisted by *Comet Productions UK Ltd v Hawkex Plastics Ltd* [1971] 1 All ER 1141, a case not referred to in *Pickering*, where the issue was, as it is here, whether a defendant in jeopardy of committal, who had made an affidavit, and indeed relied on it, could be compelled to subject himself to cross-examination.

[26] In that case the English Court of Appeal considered that the defendant ought not to be compelled to answer questions going to the ultimate issues at trial. But the Court also founded its decision on the principle identified by McGechan J in *Pickering*, that there is a close analogy between committal and criminal proceedings and that a like balance needs to be preserved.

[27] Four principles emerge from the judgment of Lord Denning MR, with whom the other members of the Court largely concurred, the first of which is, as he said, at 73, that criminal and civil contempt, while not identical, are very nearly aligned:

> … a civil contempt, partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding.

[28] The second, as he expressed it at 74, is correlative:

> … a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him provide his guilt.

[29] The third, as he made clear at 74, is that this immunity is not absolute. Intentionally or unintentionally, and subject always to the Court's discretion, a defendant at risk of committal can waive the immunity by giving, filing and using affidavit evidence:

> If he has filed an affidavit, and, in addition, if he has gone on to use it in the court, then he is liable to be cross-examined on it if the court thinks it right so to order. I would not say that the mere filing is sufficient but I do say that when it is not only filed but used, the defendant does expose himself to a liability to be cross-examined if the judge so rules.

[30] The immunity is, conversely, less than absolute in a second sense. A defendant who relies on his or her affidavit, but refuses to be cross-examined, and is not compelled by order, is at the risk, as Lord Denning said at 75, that '… the judge might to disregard the affidavit, or give it very little weight.'

[31] The fourth principle is most pertinent here. If there is to be cross-examination, Lord Denning said at 74 (see also Megaw LJ, Cross LJ, 77), it must be confined to the circumstances of the contempt. Should questions range rather to what will be in issue at the substantive hearing that can be unfair in the contempt proceeding, the object of which is to punish. It can be objectionable, equally, as directed to a collateral purpose – a wish to secure admissions, before the ultimate hearing, going to liability.

[32] These considerations, together, resulted in the defendant in that case avoiding cross-examination even though he had not merely filed an affidavit, he had relied on it. But they are not absolutes. The cross-examination there proposed touched barely on the contempt and went much more widely to the ultimate issues.

[33] Beginning then with unfairness: a defendant at risk of committal, who seeks to rely on his or her affidavit evidence, but not be tested on it, in my view wishes to have it both ways. He or she takes a position that is self contradictory and without apparent fairness. And I cannot begin to see how that could be assured him or her by s 25(d) of the New Zealand Bill of Rights Act 1990.

[34] Even where the right to silence is relied on in criminal proceedings, and not waived, it is not absolute. Adverse inferences can be taken from a failure to give an explanation or give evidence, notwithstanding s 25(d): *R v Drain* (CA 249/94, 11 October 1994). The corollary surely also applies. Where a defendant at risk of committal elects to waive the right of silence to answer by affidavit any adverse inference, perhaps to achieve more, he or she must be open to be tested. That is the risk that any accused person takes, who elects to give evidence at trial.

[35] As to any question of collateral purpose: that cannot begin to arise, I consider, if the issues put to a defendant on committal are directly relevant to the

contempt alleged and denied. That they may also be relevant to ultimate issues seems to me to be secondary. That may raise issues about the admissibility at the trial of evidence taken on the committal. But that is for another day. It cannot preclude issues proper to the committal being ventilated then.

[36] It would be a different thing, of course, as was the case in *Comet Products,* if all or most of the issues were only relevant to the contempt. Any issues with that tendency would have to be excised, or the right to cross-examine denied altogether.

Conclusion

[37] As I said at the outset, this application, I consider, can only be advanced and resolved at the hearing itself. Mr Siemer's two affidavits are on the record, and cannot be withdrawn. But he has not yet, as appears necessary, adopted them to advance his case. He retains until Mr Stiassny's case closes the right to contend then, without referring to his affidavits, that there is no case to answer. Then the Judge would, I consider, be obliged to disregard his affidavits, and Mr Stiassny could not rely on them either.

[38] Should, conversely, Mr Siemer rely on his affidavits, but refuse to be cross-examined, the Judge would have to decide whether to accept that and accord the affidavits no weight; or some weight, and if the latter, permit cross-examination and define its scope. That decision cannot be anticipated.

[39] Scope, if it does arise, will be a matter for the Judge. For present purposes I wish only to say that, at first impression, the eight issues Mr Stiassny wishes to see put to Mr Siemer do go to the contempts he alleges, and do not, so far as I can see, go beyond them. They may go also to the ultimate issues, but I would not myself place this case in the category of *Comet Projects*.

[40] Mr Siemer's application to cross-examine the three deponents relied on by Mr Stiassny is granted by consent. Mr Stiassny's application to cross-examine Mr Siemer must necessarily be declined, but that does not and ought not preclude Mr Stiassny applying at the committal hearing itself should Mr Siemer nail then his

colours to the mast. Costs will be reserved.

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P.J. Keane J