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	
AND	YAHOO! INC	
	Fourth Defendant	

Hearing: 19 December 2005

Counsel: *J G Miles Q.C and M Flynn* for plaintiffs
G M Illingworth Q.C. (leave to withdraw)
Mr Siemer in Person (with A Kennedy as McKenzie friend)

Judgment: 19 December 2005

(ORAL) JUDGMENT OF POTTER J
on first defendant's applications re:
(1) representation of second defendant and
(2) cross-examination of Sabrina Vai

Solicitors: McElroys, P.O. Box 835, Auckland

Copy to: J G Miles Q.C, P.O. Box 4338, Auckland
V R Siemer, Paragon Oil Systems, P.O. Box 335, Silverdale, Auckland

Application that second defendant be represented by Mr Siemer

[1] The first application is by Mr Siemer that he be permitted to represent the second defendant Paragon Services Limited.

[2] At the commencement of the proceedings today Mr Grant Illingworth Q.C. sought and was granted leave to withdraw as counsel for the defendants. Mr Siemer represents himself with the assistance of a McKenzie Friend Mr Alan Kennedy. Mr Siemer is the first defendant and he, of course, is at liberty to represent himself in the proceedings. He claims the indulgence of the Court to represent Paragon Services Limited, the second defendant. That application is opposed by the plaintiff.

[3] The position in respect of such an application has been frequently the subject of consideration by the Court. In *Re G J Mannix* [1984] 1 NZLR 309 the Court of Appeal stated:

> A body corporate has no right of audience in the superior courts. It is not a natural person and cannot appear in person ... Apart from statutory exceptions no-one has a right to present a case in any Court unless in person or by a qualified lawyer.

[4] The Court of Appeal recognised that the Court exercises a discretion in the matter and went on to state that while not laying down any hard-and-fast rules, the discretion should be exercised rarely and reserved as an occasional expedient for use in emergency situations or in straightforward matters where the assistance of counsel is not needed by the Court.

[5] More recently in *Churchill Group Holdings Ltd v Aral Property Holdings Ltd & Anor* HC AK CIV 2001 404 2302 17 August 2004, Williams J reviewed the various authorities which have concerned this issue and concluded at [22]:

> In the light of those authorities, there can be no doubt as to the continuing applicability of the general principles: companies which are not litigants must be represented in all aspects of the litigation including filing documents and appearing in court by solicitors and counsel unless there are exceptional circumstances which rarely warrant a court granting leave to a director to represent that company.

He commented that the authorities show the rarity with which leave is granted.

[6] Mr Siemer has submitted that there is good reason for the Court to exercise in favour of Paragon Services Limited's representation, the discretion it has. He says that this is primarily because the issue of his liberty is at stake. Mr Siemer can of course only be referring to his own liberty. The liberty of Paragon Services Limited cannot be at stake.

[7] In addition this is not a situation of emergency. Since 13 December 2005, when I was obliged to adjourn these proceedings at the request of Mr Siemer who dismissed his previous counsel Mr Henry, Mr Siemer has known that the adjourned proceeding would go ahead today whether or not he and the second defendant were represented by counsel. It was up to him to ensure that the second defendant was represented by counsel if he wished to ensure its representation before the Court, and there was full opportunity for him to do so.

[8] The next aspect is that this is far from a straightforward proceeding. That being the case the Court is entitled to expect the representation of a corporate party by counsel.

[9] I am satisfied that this is not a situation where the discretion of the Court should be exercised. To the contrary, none of the criteria is fulfilled. The application is dismissed.

Application by first defendant to cross-examine Sabrina Vai

[10] The second application on which I must rule is also by the first defendant, to cross-examine the plaintiff's witness Sabrina Vai. The application is dated 7 July 2005 and applies to Sabrina Vai and two other witnesses. The plaintiff consented to the cross-examination of Messrs Thompson and Rose. They have given evidence and have been cross-examined. However, the plaintiff opposes the application in respect of Ms Vai in a notice of opposition dated 22 July 2005.

[11] In judgments issued on 14 and 17 July 2005, Keane J considered the various applications and in relation to the application to cross-examine Sabrina Vai, adjourned the application to this hearing. He concluded that it was for the Judge presiding to decide whether Ms Vai must be cross-examined before the affidavit she has filed, which is sworn on 17 June 2005, should be accorded any weight.

[12] Rule 253 of the High Court Rules provides:

…

> (2) The Court may in special circumstances on the application of a party order the attendance for cross-examination of a person who has made an affidavit in support of or in opposition to an interlocutory application.

[13] Keane J in his judgment of 14 July examined the meaning of "special circumstances". Special circumstances normally concern the position of a defendant in respect of whom an application is brought for cross-examination. Here the evidence in issue is that of a witness for the plaintiff who has filed an affidavit, that being the normal way in interlocutory applications of placing evidence before the Court.

[14] Mr Siemer submits that the issue at stake is the plaintiff's contention that the assignment of his website is a "ruse". He says that Ms Vai's evidence supports that. Further, her evidence goes to prove that Mr Edmundo Tunney does not exist which Mr Siemer submits is false, and he says that was known to the plaintiff and the plaintiff's counsel. He says he is troubled that in these circumstances an argument of inconvenience or cost should outweigh the merits of his application.

[15] Mr Miles referred to the plaintiff's notice of opposition which states the grounds that Sabrina Vai is resident in Milan, that the Court has no jurisdiction to compel her to attend in this country, that there are no special circumstances which justify the expense of bringing her here or of taking her evidence elsewhere, and further that the Court has not jurisdiction to order that the evidence be taken elsewhere in a matter of an interlocutory application. The notice of opposition also states that the application is out of time, but I did not hear Mr Miles to take that technical point.

[16] In submissions Mr Miles importantly confirmed a number of matters:

> [a] The plaintiff relies on the evidence of Ms Vai.
>
> [b] The plaintiff accepts that this is a case in which special circumstances exist, given the nature of the proceeding.
>
> [c] The plaintiff accepts that such a person as Edmundo Tunney exists, is resident in the United States and is an old friend of Mr Siemer.

[d] The plaintiff does not oppose the admission to evidence of the affidavit of Mr Tunney sworn 12 December 2005, presented to the Court today by Mr Siemer, although it is considerably out of time.

[e] The plaintiff accepts that if the application is declined, given that Ms Vai will not have been the subject of cross-examination, it will be for the Court to decide what weight should be attached to the evidence of Ms Vai.

[17] Mr Miles, however, raises as a key issue: what assistance could Ms Vai offer to the Court? He submits that her evidence is purely factual and limited to the steps she took to carry out her instructions, which he says can be discerned by reference to her affidavit sworn 17 June 2005.

[18] I do not propose to detail the contents of Ms Vai's affidavit. Suffice to say that she states she was instructed by Warden Consulting Limited from Auckland to make inquiries to verify whether an entity named Talayna Group and its address, existed. If so, to make inquiries regarding the sale of a website said to be connected to that company. She also says that at the request of Warden Consulting Limited she made further inquiries about an individual called Edmundo Tunney, said to be administering the website. In the rest of her affidavit, which is not particularly lengthy, she details the inquiries she made. She concludes that she has been unable to find any record or address of a company, group or organisation with the name Talayna or of the person Edmundo Tunney.

[19] Mr Tunney's affidavit of 12 December 2005 states that he has known Mr Siemer for ten years. He refers to Mr Siemer's website www.stiassny.org and says he bought the website from Mr Siemer in May 2005 and took certain steps regarding the removal of "legally sensitive documents", as he so described them. He gives evidence as to his primary residence at the relevant time being at 19 Filippino Lippi, Milano Italia and says he is well known at that address. He refers to communications addressed to him by counsel for the plaintiff.

[20] As I have observed, the plaintiff does not take issue with the existence of Mr Edmundo Tunney. It is relevant to note that in paragraph 8 of Ms Vai's affidavit she refers to inquiries she made at Filippino Lippi, No 19. She says that she asked the caretaker of the building about an organisation with the name Talayna, but she did

not receive positive information in response to that request. It appears she did not ask about Mr Tunney.

[21] The key issue in relation to Talayna and Mr Tunney is whether there was a genuine assignment of the website to the Talayna Group by Mr Siemer or whether it was a "sham". The plaintiff contends that it was a sham. Mr Siemer says it was not a sham but a genuine assignment.

[22] That appears to prompt two sub-issues:

[a] Does Mr Tunney exist? Mr Siemer submitted that the sole purpose of the Vai affidavit was to show that he does not. I doubt that is the sole purpose of the Vai affidavit, but in any event the plaintiff accepts that Mr Tunney does exist. So that does not remain a significant issue.

[b] Whether the assignment was genuine? That issue, of course, is not addressed by the affidavit of Ms Vai. It is an ultimate issue in the case. Ms Vai simply attests to what she did in response to the instructions she received from Warden Consultants Limited. Appropriately she deposes on a purely factual basis as to how she carried out her inquiries.

[23] Mr Tunney's affidavit of 12 December 2005, which will be admitted to evidence, serves to confirm his address at the relevant time, being the address at which Ms Vai made inquiry for Talayna.

[24] Conflicting evidence (if that is what this is), of itself is not a basis for the Court to make an order for cross-examination of a reluctant deponent (*Garry Denning Ltd v Wright* [1989] 1 NZLR 45). But the Court will take into account that the Court has not had the benefit of cross-examination in such a case and will determine what weight can be properly given to the evidence of the witness who has filed an affidavit but has not been cross-examined on it. Counsel are free to make submissions to the Court in that respect and to draw to the attention of the Court matters they consider are relevant to the weight which the Court should or should not attach to the evidence.

[25] I have reached the conclusion that there is little that could be added to the affidavit of Ms Vai by cross-examination, which would assist the Court in

determination of the issue, whether the assignment was a sham or was genuine. To the extent that the detail of her evidence is contested, the evidence of Mr Tunney in his affidavit of 12 December 2005 will be before the Court.

[26] I accept the plaintiff's submission that it would be disproportionate in relation to both cost and inconvenience to require the attendance of Ms Vai whether in person or by video link, for the purposes of cross-examination. The application to cross-examine Ms Vai is therefore declined.