

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2005-404-1808

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| 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: 8 September 2006

Counsel: JG Miles QC and P Hunt for Plaintiffs
BP Henry for First and Second Defendants
No appearance for Third and Fourth Defendant

Judgment: 8 September 2006

ORAL JUDGMENT OF RODNEY HANSEN J

Solicitors: McElroys, P O Box 835, Auckland for Plaintiffs
Dennis Gates, P O Box 222, Whangaraoa for First and Second Defendants

Introduction

[1] The plaintiffs have brought this proceeding for breach of contract and defamation arising out of publications by the defendants which are alleged to have been defamatory of the plaintiffs and in breach of contract. An interim injunction issued which restrained publication of the offending words. When that injunction was breached, contempt proceedings were brought which resulted in the first defendant being fined and subjected to an award of indemnity costs.

[2] The first and second defendants (who I will refer to as the defendants as the third and fourth defendants are playing no active role in the proceeding) apply for a range of interlocutory orders which may be summarised as follows:

- a) An application to have an aspect of the first breach of contract cause of action determined as a preliminary issue.
- b) An application to have determined as preliminary issues whether the words complained of are capable of having the meanings attributed to them in the statement of claim and an associated issue as to the meaning of one of the words pleaded.
- c) An application to have the plaintiffs produce documents relied on in their claim.
- d) An application requiring the plaintiffs to provide particulars of the meanings alleged in some paragraphs of the statement of claim.
- e) A application to vary the terms of the interim injunction.

[3] The application referred to in subpara (d) above has been disposed of by means of the plaintiffs' response to the application and I need say no more about it.

Background

[4] The first plaintiff is a firm of chartered accounts, of which the second plaintiff (Mr Stiassny) is a principal. In December 2000 he was appointed receiver of the second defendant, Paragon Services Limited (Paragon), following disputes between shareholders of Paragon, one of whom was the first defendant (Mr Seimer). The receiver was appointed primarily for the purpose of protecting intellectual property. The issues between the shareholders were resolved during 2001 and Mr Seimer became sole shareholder. The receivership then came to an end.

[5] Mr Seimer had complaints over the conduct of the receivership, as a result of which the plaintiffs and the defendants entered into a compromise agreement, dated 9 August 2001, which relevantly provided that the defendants would not comment on any matter arising in or from the receivership, including the fact of the settlement.

[6] In early April 2005, Mr Seimer had a billboard erected in a prominent position in central Auckland which included the name and a picture of Mr Stiassny and referred viewers to a website. The website contained a range of material which, to put it neutrally, was critical of Mr Stiassny. The plaintiffs sought and obtained an *ex parte* injunction which provided for the removal of the objectionable material from the websites and the removal of the billboard. The injunction also restrained the defendants from reinstating the billboard. It is to that aspect of the interim injunction that the application for a variation is directed.

[7] Although the offending material was initially removed from the website as required by the injunction, in the course of 2005 further material was published which prompted a successful application by the plaintiffs to have Mr Seimer held in contempt of Court. Following a hearing before Potter J, he was fined \$15,000 and ordered to pay indemnity costs which, I am told, totalled some \$189,000. He has paid the fine. The costs remain outstanding. There is an appeal to the Court of Appeal against the costs order, which also has before it an application to stay execution of the order.

[8] There are two causes of action pleaded against the defendants. The first alleges a breach of the contract of 9 August 2001 as a result of what was published on the website. The further claim is for defamation. Both causes of actions seek general damages of \$1,250,000, special damages for economic loss, punitive damages and a permanent injunction.

Determination of preliminary issue

[9] The defendants applied for determination before trial of the question, “Was the agreement dated 9 August 2001, referred to in paragraph 2.1 of the third amended statement of claim, terminated by the first and second defendants?” Mr Henry initially argued that this issue could conveniently be dealt with in advance of trial and as a self-contained issue. If the question was determined in the defendants’ favour and the agreement held to have come to an end, the first cause of action would necessarily fail.

[10] However, as argument developed, Mr Henry accepted that what he was seeking in substance was a separate trial on the issue of liability in the first cause of action and not the determination of an issue in advance of trial. Given his stated intention to apply for at least the defamation aspect of the proceeding to be dealt with before a judge and jury, he came to appreciate that any question of the separate disposal of the first cause of action could not be addressed in the context of an application under r 418 for the determination of an issue before trial.

[11] I think Mr Miles QC was right to submit that it is not appropriate to adjourn this aspect of the application. Any further attempt to have separately determined any aspect of the proceeding should be the subject of a fresh application which, desirably, would also address the broader question of how all substantive issues will be disposed of. Accordingly, I dismiss that part of the application.

Determination of defamatory meanings

[12] The defendants ask the Court to rule as a preliminary issue whether the words relied on are capable of bearing the defamatory meanings attributed to them in the third amended statement of claim. I set out the relevant paragraphs omitting references to the words themselves:

3.2 In their natural and ordinary meaning the words used meant and were understood to mean the following:

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.

3.3 In their natural and ordinary meaning the words used meant and were understood to mean the following:

That the second plaintiff's conduct as receiver of Paragon Oil Systems Limited was significantly more scandalous than that of the Enron accounts or financial officers.

3.4 In their natural and ordinary meaning the words used meant and were understood to mean the following:

That the second plaintiff's conduct as receiver of Paragon Oil Systems Limited was grossly unprofessional and unethical.

3.5 In their natural and ordinary meaning the words used meant and were understood to mean the following:

That the second plaintiff gained improper personal enrichment through exploitation of the Paragon receivership.

[13] The meaning attributed to the words which the defendants challenge in each case are:

- Para 3.2. Mr Henry submits the words could not have meant or been understood to mean that Mr Stiassny acted criminally. He accepts that the words are capable of meaning that there are good grounds for believing that Mr Stiassny acted criminally but not that he in fact did so.
- Para 3.3. Objection is taken to the final three words, "all financial officers". It is accepted that the words relied on could appropriately be referable to Enron accountants but not to Enron financial officers.

- Para 3.4. The concern is with the use of the term “grossly”.
- Para 3.5. Issue is taken with the word “improper” and the words “Paragon receivership”. As to the latter, Mr Henry submits that the words cannot appropriately be confined to exploitation of the Paragon receivership. He contends that they support a broader meaning.

[14] Mr Miles accepts that in an appropriate case the r 418 procedure is available and should be adopted to enable such questions to be determined in advance of trial. However, he objects to the procedure being utilised for the purpose of this proceeding. He advances two principle arguments. The first is simply that the arguments relied on by Mr Henry are weak and could readily be disposed of at trial, if they have to be addressed at all. The second is that the application is made for the purpose of delaying a substantive hearing.

[15] As to the first, both counsel referred me to the words relied on in the statement of claim and mounted opposing arguments as to whether or not the meanings attributed by the plaintiffs could be supported. In the context of this hearing, it is simply not feasible for me to undertake an exhaustive review. The plaintiffs rely on 37 separate passages from 11 publications. The words occupy over seven pages of the statement of claim. In the case of para 3.2 alone, 25 extracts from the published material are relied on.

[16] On a cursory review, I am persuaded that at least in some instances there is merit in the defendant’s position. The meanings attributed in paras 3.3 and 3.5 provide convenient examples. In the passages relied on for the purpose of para 3.3, there is no reference to financial officers. At least some of the publications relied on for the purpose of para 3.5 do not refer to exploitation of the Paragon receivership but to exploitation in a wider context.

[17] It does seem to me, therefore, that in some respects at least the application is soundly based. While Mr Miles is right to say that a pre-trial determination of the issues would not be determinative of the substantive issues it is clearly desirable, if it can be practically achieved, for these pleading issues to be cleared out of the way in

advance of trial. Although Mr Henry has suggested that a hearing of two days would be required to dispose of these issues, based on the time it has taken to argue the preliminary question today, I would be surprised if that amount of time were required. I can also see ways and means by which the application could be argued without, as Mr Miles fears might be the case, holding up progress towards a substantive hearing. I also have Mr Henry's assurance that that is neither the intention of the defendants, nor his approach to the way in which further interlocutory matters should be timetabled.

[18] On that basis, I have come to the view that the meanings which the words complained of are capable of bearing should be determined as a preliminary issue. The orders sought in paras 2, 3, 4, 5 and 7 of the application are accordingly made.

Copies of documents

[19] The defendants sought an order for the plaintiffs provide them with copies of all documents referred to in the third amended statement of claim. The plaintiffs resisted the application as unnecessary and vexatious, as the great majority of documents referred to have in fact been generated by and are in the possession of the defendants.

[20] Mr Henry pointed out, however, that particularly in relation to publications on the website, which may change from day to day and even from hour to hour, it is essential that the plaintiffs furnish a hard copy of the publications they rely on. I am sympathetic to that aspect of the application at least. I am not asked, however, to make final orders because discovery and inspection has still be to completed and counsel are resolved to work constructively together to assemble an agreed volume of the relevant documents by the time that the discovery and inspection process has been completed. That aspect of the application is adjourned.

Variation of injunction

[21] Mr Seimer seeks deletion from the interim injunction of the restraint on the reinstatement of the billboard. His wife has deposed that he has decided to participate in forthcoming local body elections and proposes to campaign for candidates who are prepared to oppose Mr Stiassny's continued appointment as the Chairman of Vecta. As part of this campaign he wishes to use the fabric known as the "skin" of the billboard display that was used as the vehicle for publication of the allegedly defamatory material.

[22] Mr Henry submits, and it is not in issue, that there is jurisdiction to vary the terms of the injunction and there is no reason why I should not do so. He points out that the billboard simply provided a means of reference to the website on which the material was published. As there is no longer any defamatory material on the website, he argues that there is no reason why the restraint on the use of the billboard should continue.

[23] For the plaintiffs, Mr Miles strenuously opposes variation of the injunction. He submits the Court can have no confidence that the billboard would not again be misused. He reminds me that Mr Seimer continued to publish objectionable material in breach of the injunction even while the contempt proceedings were being dealt with. He also relies on the failure of Mr Seimer to purge his contempt. As mentioned earlier, he has paid the fine but the substantive order for costs, which was an integral part of the Court's response to the contempt, remains outstanding.

[24] Mr Miles argues that until Mr Seimer has purged his contempt by fully satisfying the terms of the Court order, he should not be granted an indulgence. He refers me to *Arlidge, Eady & Smith on Contempt* (3rd ed) p 913 which notes a softening in the traditionally rigid proscription against permitting a party in contempt to be heard or take proceedings in the same cause until the contempt has been purged. The principle now is that the Court should have regard to the circumstances of each individual case and to determine how the interests of justice are best served.

[25] Mr Henry points out that the general rule against not permitting a party in contempt to take active proceedings is not universally applied and does not mean that the party should be prevented from defending proceedings. It is clear, however, that when it comes to the granting of an indulgence or the exercise of a discretion, the fact that a party is in contempt and has not purged his contempt is a relevant factor.

[26] I have reached the clear view that it would not be appropriate to amend the terms of the injunction. Based on Mr Seimer's conduct and expressed attitude to date, I can have no confidence that he would not use the billboard for improper purposes. I do not see a refusal to allow him to use the billboard as seriously interfering with his right to participate in local body elections as he sees fit and I am satisfied it is not appropriate to grant him the indulgence he seeks, at least while the costs ordered in relation to the contempt remain outstanding. This aspect of the application is accordingly dismissed.

Timetable orders

[27] Counsel are agreed that the following timetable orders may be made:

- a) The plaintiffs and the defendants are to file and serve lists of documents by 6 October.
- b) Inspection is to take place by 12 October.
- c) Any outstanding interlocutory applications, including any application as to the mode of trial, to be filed and served by 10 November.
- d) A directions conference, which may take place by telephone, to be arranged on the earliest date convenient to counsel after 10 November for the purpose of making directions for the hearing of any outstanding interlocutory applications, including the defendants' application to have determined the preliminary issues of whether the words pleaded are capable of bearing the meanings attributed to them.

Costs

[28] Although the defendants have achieved limited success, they have been unsuccessful on two key aspects of the application. The first order sought, in particular, was the subject of extensive written submissions by the plaintiffs. In my judgment, the plaintiffs are entitled to an award of costs but limited to 50% to take into account the limited success enjoyed by the defendants.

[29] The proceeding has previously been categorised as 3C. The defendants are to pay 50% of the application in today's hearing. If necessary, I certify for second counsel.