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

Hearing: 4 July 2007

Appearances: J G Miles QC and P Hunt for the plaintiffs
No appearance for the first defendant
D Gates for the second defendant (leave granted to withdraw)

Judgment: 9 July 2007

JUDGMENT OF POTTER J

In accordance with r 540(4) High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 3 p.m. on 9 July 2007.

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

Copy to: J G Miles QC, P.O. Box 4338, Auckland
V R Siemer, 27 Clansman Terrace, Gulf Harbour, Auckland

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Introduction

[1] The plaintiffs have made application for an order for committal of the first defendant and associated orders, pursuant to leave granted in [170](e) of this Court's judgment dated 16 March 2006 ("the judgment") on the grounds that the first defendant has further breached the terms of the interim injunction issued by this Court on 5 May 2005 and has failed to pay costs ordered by this Court and the Court of Appeal.

[2] The defendants have filed no notice of opposition or affidavits. The first defendant Mr Siemer did not appear. Mr D Gates entered an appearance for the second defendant, Paragon Services Limited, but sought and was granted leave of the Court to withdraw. He advised the Court that he believed Paragon Services Limited is in liquidation, but he had no instructions from the liquidator or any other person involved with the company.

Preliminary matters

[3] Following the filing on 27 April 2007 of the plaintiffs' application dated 26 April 2007, I issued a minute dated 3 May 2007 which set down the application for hearing on Wednesday 4 July 2007 (and if necessary Thursday 5 July 2007) and made timetable orders for the filing of notice of opposition and supporting affidavits, affidavits in reply and submissions by both parties.

[4] The parties were formally notified by the Registry of the hearing date on 3 May 2007 and again on 25 May 2007 (which made a minor correction to the day of hearing, not the date).

[5] Nothing was filed by the defendants in response to that minute. The plaintiffs filed submissions.

[6] Mr Siemer advised the Registry by email that he would be overseas until 13 July 2007 and would not be available for the fixture. The Registry advised Mr

Siemer that any request for an adjournment would need to be made formally with reasons provided.

[7] On 26 June 2007 Mr Siemer sent to the Registry by email an unsigned memorandum in which he advised that he would not return to New Zealand until 11 July 2007 and no counsel was instructed to act on his behalf as first defendant. He advised that the second defendant was in receivership and liquidation. The memorandum also sought that I recuse myself from hearing the plaintiffs' application on the grounds of bias.

[8] In response to a further communication from the Registry, Mr Siemer advised by email dated 29 June 2007 that he refused to file a formal application for adjournment and that neither he nor any lawyer on his behalf would be appearing on 4 July 2007.

[9] At the commencement of the hearing Mr Miles for the plaintiffs properly referred the Court to Mr Siemer's advice that he would not be available for the hearing, which advice had also been conveyed to McElroys, the solicitors for the plaintiffs. On 14 June 2007 McElroys had advised the Court that any application for adjournment would be opposed, and Mr Miles confirmed the plaintiffs' opposition to any application for adjournment which may have been made.

[10] Where no notice of opposition has been filed and served, a party served with the application is not entitled to be heard. Subject to proof of service of the interlocutory application, the Court will invariably hear it (*McGechan on Procedure* HR252.02(3)). This is particularly so when the party's non-appearance is deliberate (*McGechan* HR252.02(2)).

[11] An affidavit of service of the plaintiffs' application on Mr Siemer and Mr Gates as solicitor on the record for the second defendant, sworn on 28 June 2007 by Jennifer Ann Bell, was filed on 2 July 2007. There can be no doubt that service was effected on Mr Siemer and Mr Gates. Mr Siemer has acknowledged this in the communications with the Registry and McElroys, which are exhibited to Ms Bell's affidavit.

[12] The defendants have failed to make formal application for an adjournment or to provide reasons in support, beyond Mr Siemer merely advising his absence overseas. Their non-appearance is clearly deliberate. In the circumstances that they have failed to file any notice of opposition and affidavits in support, the defendants are not entitled to be heard. I therefore determined that I would proceed to hear the plaintiffs' application in the absence of the defendants.

[13] Although no formal application was made for my recusal, since that matter was referred to in Mr Siemer's memorandum dated 26 June 2007, I record that in my view there are no grounds upon which I would be either entitled or required to do so.

Second defendant

[14] The second defendant was served by service on Mr Gates on 8 May 2007, but Paragon Services Limited is now in liquidation. Mr Gates had no instructions from the liquidator, nor knew who was appointed. The liquidator has not been served. Mr Miles sought that these proceedings be adjourned in respect of the second defendant, noting that none of the alleged further breaches of this Court's injunction issued on 5 May 2005 which gives rise to the plaintiffs' application, has been committed by the second defendant. I granted that application. The proceedings against the second defendant stand adjourned and may be brought by the plaintiffs on 7 days notice. Accordingly this judgment will relate to the plaintiffs' application in respect of the first defendant, Vincent Ross Siemer ("Mr Siemer").

Background

[15] The factual background is set out in the judgment and need not be repeated here.

The injunction

[16] In a judgment dated 5 May 2005 Ellen France J directed Mr Siemer, Paragon Services Limited and their servants, contractors and agents not to:

(1) 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 Ltd; any claim that the plaintiffs deliberately overcharged Paragon Oil Systems Ltd in the sum of $10,000; together with information as to the facts of complaints made by Mr Siemer and/or Paragon Oil Systems Ltd to ICANZ or to the Serious Fraud Office; and including any information obtained by Mr Siemer or Paragon Oil Systems Ltd in the course of discovery in any proceedings pending further order of the Court; and

(2) Not to reinstate the billboard.

("the injunction")

[17] The plaintiffs subsequently brought proceedings alleging breach by the defendants of the injunction and seeking committal and associated orders on the ground that the defendants were in contempt of Court in breaching the injunction and a previous injunction issued by Winkelmann J in April 2005. Following a four day hearing, I issued the judgment.

The judgment

[18] In the judgment I held that in seriously and deliberately breaching the injunctions as detailed in the judgment, the defendants were in contempt of Court. The evidence of the conduct of the defendants and my findings in relation to it are set out fully in the judgment.

[19] I fined the defendants and ordered them to pay costs on a solicitor-and-client basis. I fixed those costs in a subsequent ruling dated 10 May 2006 ("the costs judgment") and declined the defendants' request for a stay of the judgment pending appeal. An application for stay by the defendants to the Court of Appeal was dismissed and the defendants' appeal against the judgment and costs judgment was dismissed by the Court of Appeal on 4 April 2007. The defendants have sought leave to appeal the decision of the Court of Appeal to the Supreme Court.

[20] Of particular relevance to the plaintiffs' current application are [170](d) and (e) of the judgment which provide:

(d) As to the future, the injunction granted by Ellen France J on 5 May 2005 stands.

(e) The plaintiffs' application for the issue of a writ of arrest for the committal of the first defendant, for a writ of sequestration against the assets of the second defendant, and for an order that the first and second defendants be debarred from defending this proceeding shall lie in Court with liberty reserved to the plaintiffs to apply for such relief, in the event of evidence becoming available that the injunction has again been breached.

Plaintiffs' application

[21] In their application dated 26 April 2007 the plaintiffs seek orders for:

(1) The issue of a writ of arrest for the committal of the first defendant; and/or

(2) That the first and second defendants be debarred from defending the substantive proceedings; and/or that the first and second defendants' defence be struck out and judgment be sealed; and

(3) That the first and second defendants be fined with the fine being payable in whole or in part to the plaintiffs; and

(4) Solicitor-client costs be payable;

(5) Such other order as the Court thinks just in the circumstances.

[22] At the hearing, Mr Miles accepted that because the plaintiffs seek committal of the first defendant, the plaintiffs could not and did not pursue the imposition of a fine. Secondly, the plaintiffs acknowledged in relation to the orders sought in (2) above, that debarring from defending could only be an alternative to striking out the defence. The plaintiffs accepted that the "more flexible" alternative, as Mr Miles described it, was the more appropriate remedy, namely that the first defendant should be debarred from defending the substantive proceedings, which lie in defamation.

[23] The grounds for the application are alleged publication and dissemination by the first defendant of material in breach of the injunction coupled with evidence that the first defendant's breach is contumelious and intentional. This arm of the plaintiffs' case relies on the liberty reserved in [170](e) of the judgment to apply for relief in the event of evidence becoming available that the injunction has again been breached.

[24] Secondly, the plaintiffs say that in failing to pay a number of costs awards made by the High Court and the Court of Appeal which have been sealed, when Mr Siemer has stated (notably in his application for leave to appeal to the Supreme Court) that he has substantial assets off-shore, he is in clear contempt of Court.

Principles applicable to contempt

[25] The applicable principles are set out in the judgment at [16], [17] and [18]. They of course apply equally to the application before the Court and I repeat them here:

> [16] In *Attorney-General v Times Newspapers Limited* [1974] AC 273 at 294, Lord Reid stated that the law of contempt is:
>
> > … founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.
>
> [17] The contempt jurisdiction exists in the public interest as a sanction to ensure that orders of the Court are complied with: *Taylor Bros Ltd v Taylors Group Ltd* [1991] 1 NZLR 91 at 93.
>
> [18] In *Duff v Communicado Ltd* [1996] 2 NZLR 89 at 98-99 Blanchard J stated there were certain things which are common to all applications for contempt:
>
> > (a) The onus of proving a contempt is on the plaintiff: *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 at 47 (FC);
> >
> > (b) The contempt must be proved beyond reasonable doubt before the criminal sanctions of a fine, sequestration or

imprisonment will be imposed: *Solicitor-General v Wellington Newspapers; Witham v Holloway* (1995) 131 ALR 401 (HCA);

(c) But where the plaintiff has proved, on the balance of probabilities, that the defendant has intentionally breached the terms of the injunction an order for payment of the plaintiff's costs on a solicitor and client basis will be appropriate: *Country Colours Ltd v Resene Paints Ltd* (1992) 6 PRNZ 506 at 508-509.

(d) It is unnecessary to prove an intention to interfere with the administration of justice: *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 232-233 (CA); *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 at 55 (FC).

In every case the Court must ask:

(a) Has there been a contempt at all?

(b) If so, is it sufficiently serious to justify any punishment? (*Times Newspapers* at 298; *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100.)

Alleged further breaches

[26] The evidence in support of the plaintiffs' allegation that there have been further and continuing breaches by Mr Siemer of the injunction is contained in the affidavit of Alan Robert Garrett sworn 26 April 2007.

[27] Mr Garrett states that on 13 April 2007 Mr Siemer uploaded to his website www.stiassny.org an article repeating allegations of criminal or unethical conduct and improper personal enrichment on the part of Mr Stiassny and Ferrier Hodgson. Mr Garrett annexes to his affidavit a copy of the website pages downloaded on 16 April 2007. He refers to material on the website alleging on the part of Mr Stiassny and/or Ferrier Hodgson:

a) Criminal or unethical behaviour;

b) Improper personal enrichment;

c) Overcharge $10,000.

(a) *Criminal or unethical behaviour*

[28] Following a heading "Welcome to Stiassny.org", the website asks the question beside a photograph of Mr Stiassny, "Why is this man's nose growing?" The paragraph that follows includes the comment:

> He was about to be publicly exposed for falsely labelling a company insolvent in order to personally steal its technology and walk away with its substantial cash accounts and, in the process, this single case would expose the systematic and insidious way he has been able to achieve a staggering personal income …
>
> Mr Stiassny's ignominious conduct in the debacle he created with Paragon Oil Systems Ltd …
>
> … due to two billboards being put up in Auckland and a website being launched which both detailed proved his malfeasance.
>
> … an injunction that decreed there was no reasonable defence of truth to allegations against Stiassny despite the incontrovertible evidence of Stiassny's guilt …
>
> Certainly, she rationalized, Mr Stiassny's seemingly criminal malfeasance …
>
> An appeal … revealed incontrovertible evidence that Mr Stiassny lied under oath when he swore an affidavit that, among other things, said he never labelled Paragon insolvent and had inadvertently invoiced Paragon some $11,000 in fees that should have been charged to Paramount.
>
> … leaving the obvious inference that his attempt at fee overcharging was deliberate and criminal … another lie …

(b) Improper personal enrichment

> … falsely labelling a company insolvent in order to personally steal its technology and walk away with its substantial cash accounts and, in the process, this single case would expose the systematic and insidious way he has been able to achieve a staggering personal income …

(c) Overcharge $10,000

> An appeal … revealed incontrovertible evidence that Mr Stiassny lied under oath when he swore an affidavit that, among other things, said he never labelled Paragon insolvent and had inadvertently invoiced Paragon some $11,000 in fees that should have been charged to Paramount.

> … leaving the obvious inference that his attempt at fee overcharging was deliberate and criminal … another lie …

[29] Mr Garrett exhibits to his affidavit an email sent by Mr Siemer to Mr Miles and Messrs Peter Hunt and Matthew Flynn at McElroys on 13 April 2007 in which he states:

> Gentlemen, your boy is in the news again.

It refers to the website from which the above extracts are taken.

[30] Mr Garrett then refers to a further website which he says has been set up by Mr Siemer at www.kiwisfirst.com. In attributing this second website to Mr Siemer he refers to the "Contact Us" page of the website downloaded on 18 April 2007. This invites viewers to "phone Editor Vince Siemer at 027 444 1218". It also invites viewers to post information to P.O. Box 539, Silverdale, Auckland or fax to 09 428-2521, which are Mr Siemer's box number and facsimile as recorded in the email set out in [34]. The website is claimed to be that of Spartan News Limited, a New Zealand Registered News Media company. Mr Garrett annexes to his affidavit a company search of Spartan News Limited dated 19 April 2007 which shows the company was incorporated on 27 November 2006, that the previous shareholder was Vincent Siemer of 27 Clansman Terrace, Gulf Harbour owning ten shares and that the current shareholders are Lauren Renee Siemer of the same address and Alan Candy of 5A Ariki Street, Grey Lynn. Mr Garrett refers to the fact that Mr Candy has previously appeared in this Court as the McKenzie friend for Mr Siemer. The registered office and the address for service of Spartan News Limited are given as 27 Clansman Terrace, Gulf Harbour. Vincent Siemer is shown as the sole director appointed on 27 November 2006.

[31] Mr Garrett states that on Monday 16 April 2007 a number of copies of an extract from the website www.kiwisfirst.com were found in the elevators and lobby at the offices of Ferrier Hodgson at Tower Centre, Queen Street. However, no evidence was provided that linked those copies with Mr Siemer, although Mr Garrett stated that Ferrier Hodgson believed the copies would have been distributed by Mr Siemer or at his direction. In the absence of evidence to that effect I place no reliance on this item of evidence.

[32] Mr Garrett further states that on Wednesday 18 April 2007 Mr Siemer himself appeared at the offices of Ferrier Hodgson to distribute further copies of the website material which Mr Garrett annexed to his affidavit.

[33] Although the website appears to be focused on members of the judiciary, the extract from the website and the website itself contains statements similar to those appearing in the www.stiassny.org website:

Criminal or unethical behaviour

> Mr Stiassny falsely labelled Paragon Services Limited of Hamilton insolvent.
>
> Stiassny (falsely) label a cash-rich and debt-free company insolvent.
>
> Stiassny falsely labelled the cash-rich company insolvent.

Mr Siemer's admissions

[34] The most categoric evidence that Mr Siemer has further breached the injunction is provided by admissions he himself has made. On 17 April 2007 he sent an email to Mr Garrett, Mr Miles, Mr Hunt and Mr Flynn under the heading "Stiassny's false insolvent claim" in which he stated:

> Gentlemen, Now that the Court of Appeal has ignored the evidence that your injunction was improperly obtained, I hope you don't mind that I ignore the injunction.
> Check out the latest story on your boy.
> http://www.stiassny.org
> Vince Siemer
> 27 Clansman Terrace
> Gulf Harbour, Auckland
> Phone 64 9 428-2121
> Facsimile 64 9 428-2521

[35] In an email sent on 22 April 2007 to Peter Hunt copied to Mr Garrett, Mr Miles, Mr Flynn and Mr Murray Gilbert at Gilbert Walker under the heading "Stiassny and Fardell", Mr Siemer stated:

> I note Stiassny purportedly spent $200,000 in seeking my committal over allegedly breaching the injunction based upon hearsay evidence two years

> ago but seems totally unprepared to press the issue when it can be proven with certainty that I am now breaching that injunction.

He continued:

> As there will be considerably more promotion of the stories on www.stiassny.org in coming weeks, as well as evidence that demonstrates how your client overcharged and falsely labelled a cash-rich company insolvent … your clients' continued silence on this issue will be presented to the Court …

Conclusions about the evidence

[36] The entries on the websites www.stiassny.org and www.kiwisfirst.com referred to above, evidence clear breaches by Mr Siemer of the injunction. Furthermore it is clear from his two emails referred to in [34] and [35] that Mr Siemer freely admits he is breaching the injunction, deliberately and wilfully. Further, that he proposes to continue to do so. It is clear that Mr Siemer is intentionally acting in direct defiance of Court orders, without reservation or compunction. His conduct is contumacious.

[37] I am satisfied that the further breaches of the injunction referred to above have been proved beyond reasonable doubt and I find Mr Siemer in contempt of Court in relation to the further breaches of the injunction.

Penalty

[38] I turn to consider the issue of penalty in relation to the finding of contempt.

[39] In *Savill v Roberts* HC Chch CP9/86 10 December 1986, Holland J said at p 8:

> It is important that Courts ensure that injunctions are meticulously observed and show no reluctance to punish those who wilfully disobey. The fact that these injunctions are merely interlocutory makes no difference. They are orders of the Court and if orders of the Court are not observed according to the letter anarchy or chaos may ultimately prevail. The fact that a defendant considers the injunction should not have been granted or cannot be legally justified likewise makes no difference. It must be obeyed until it is

> overturned or amended by due legal process either by way of review or on appeal.

[40] It is quite clear in the circumstances of this case that far from meticulously observing the injunction, Mr Siemer has defiantly breached it. He has made little secret of the fact that he considers the injunction should not have been made. But as Holland J observed, that makes no difference. It must be obeyed until it is overturned by due legal process (in respect of which Mr Siemer has failed).

[41] Lord Reid observed in *Attorney-General v Times Newspapers Ltd* (refer [25]), that freedom of speech must be limited when there is real prejudice to the administration of justice.

[42] In the judgment I stated at [159] that the Court's response to any failure to comply with the terms of an injunction is a matter of discretion but when the defendant's conduct shows deliberate defiance of Court orders, a mere declaration that the defendant has acted in contempt of Court will not be sufficient. In such cases a fine will usually be the minimum response.

[43] I went on to observe that while Mr Siemer had not closed down the website in issue at that stage (www.stiassny.org), he had cleared the website of the offensive material that gave rise to the injunctions. I stated at [161]:

> Mr Siemer has not closed down the website but he has cleared the website of the offensive material that gave rise to the injunctions (subject to a possible issue with the letter to the Commerce Commission). In those circumstances I consider that the more serious responses of an order for committal of the first defendant, a writ of sequestration against the assets of the second defendant, or an order debarring the defendants from defending the proceeding, are not required at this stage. However, it is necessary that a punishment be imposed which will reflect the Court's outrage when its orders are deliberately disregarded. Further, that the penalty will deter Mr Siemer and Paragon from any future breaches of the May injunction.

[44] I made a declaration that the conduct of the defendants in breaching the April and May injunctions was a contempt of Court. I fined the defendants $15,000 with one-half of that fine to be paid to the plaintiffs. I ordered that the defendants pay the plaintiffs' costs on a solicitor-and-client basis.

[45] I further ordered that the plaintiffs' application for the issue of a writ of arrest for the committal of the first defendant, for a writ of sequestration against the assets of the second defendant and for an order debarring the defendants from defending the proceeding should lie in Court. I made that order because as I stated at [169], I was:

> … far from satisfied that the likelihood of any future non-compliance with the injunctions has been eliminated.

[46] My concerns expressed in the judgment about future non-compliance have unfortunately been realised by continuing total disregard by the first defendant for the Court's injunction. Mr Siemer appears to have returned to a course of deliberate and systematic breach of the injunction, following the judgment of the Court of Appeal which dismissed his appeal against the judgment.

[47] In considering the penalty that must follow my finding of contempt in relation to the further and continuing breaches of the injunction, I take into account the following factors:

a) Mr Siemer's conduct which has prompted the plaintiffs' application is a second raft of serious offending, deliberately undertaken following and notwithstanding the judgment and the dismissal of the appeal. The judgment gave clear and ample notice to Mr Siemer of the likely consequences of any continuation or resumption of his campaign of vilification of Mr Stiassny in breach of the injunction.

b) The breaches of the injunction are wilful and deliberate and directly challenge the authority of the Court. That this is patently so is evidenced by Mr Siemer's email stating to the plaintiffs' advisers:

> I hope you don't mind that I ignore the injunction.

c) Mr Siemer's conduct in breach of the injunction is not only repetitive but appears to exhibit a progression in the nature of his offending. I refer to the admissions he has made that his conduct is in breach of the injunction, his flaunting of his offending conduct to the plaintiffs

and their advisers, his challenge to the plaintiffs in relation to their pursuit of this proceeding, the development of the new website www.kiwisfirst.com as a vehicle to launch (inter alia) further attacks against Mr Stiassny and his appearance in person at the offices of Ferrier Hodgson to disseminate material which he knew to be in breach of the injunction. It is understandable that these aspects cause concern to the plaintiffs.

d) Mr Siemer has given no indication that his contempt of the Court orders will cease, notwithstanding that he has a very clear appreciation that he has been acting seriously in breach of the injunction. Certainly he has shown no remorse; rather a determination to pursue his campaign to harm Mr Stiassny's reputation.

Writ of arrest

[48] Rule 608 of the High Court Rules provides:

> **Power to issue writ of arrest**
>
> Where in any proceeding a party is ordered by the Court to do or abstain from doing any act (not being the payment of a sum of money) and fails to obey the order, the party entitled to the benefit of the order may, by leave of the Court, obtained on notice to the defaulting party, issue a writ for the arrest of that party.

[49] Rule 609 provides:

> **Power to commit to prison for disobedience**
>
> Where any person has been brought before the Court upon a writ of arrest, the Court may commit him to prison for such term as to the Court appears necessary and as may be by law allowed, unless he sooner complies with the order of the Court for non-performance or non-observance of which he has been committed.

[50] The applicant must establish beyond reasonable doubt, breach of a clear and unequivocal order of the Court: *Burslem Holdings Ltd v G B & J M Bockett Ltd* (1989) 4 PRNZ 618 (CA).

[51] The plaintiff must also establish that the defendant has had proper notice of the terms of the Court order and that those terms have been broken.

[52] I am satisfied beyond reasonable doubt that those requirements are satisfied on the facts of this case. Not only has Mr Siemer had clear and unambiguous notice of the terms of the injunction but he has acknowledged and admitted that his conduct breaches the injunction, and deliberately so.

[53] A writ of arrest may not be issued for failure to obey an order of the Court directing payment of a sum of money: r 608; *Summer & Winter Fuels Ltd v Pickens* (1990) 4 PRNZ 621. The plaintiffs rely on the conduct of Mr Siemer in continuing to publish material in breach of the injunction, which I have found to be in contempt and not on his failure to pay Court costs, in seeking a writ of arrest. The plaintiffs also rely on his previous conduct which gave rise to the finding of contempt in the judgment.

[54] A writ of arrest may issue in respect of an interlocutory order or judgment as well as a final judgment: *Soljan v Spencer* [1984] 1 NZLR 618 (CA), *NZ Guardian Trust Co Limited v Parker* (1992) 6 PRNZ 30.

[55] In *The Attorney-General v Pickering* HC Hamilton CP24/98 21 September 2001, the defendant had deliberately breached an injunction over an extended period between October 1998 and March 2000 and was brought before the Court on a writ of arrest. Paterson J stated at [16]:

> Imprisonment for contempt is a last resort. No Judge takes pleasure in imprisoning for contempt in what is in some ways disobeying a civil injunction, albeit that it is based on a breach of law. However, in some cases and in my view this was one, the administration of justice does require that a term of imprisonment be imposed. There should be a warning to others.

[56] In that case the Judge considered the option of providing a final opportunity for the defendant to obey the order of the Court by adopting the common course of directing that the writ of arrest lie in the office of the Court for a defined number of days, to be issued forthwith on further breach by the defendant. This procedure was approved by the Court of Appeal in *Soljan v Spencer* at 623-624:

> In the present case the Judge allowed time to Mr Soljan to purge his disobedience of the injunction by converting the building back to the state it was in on 22 December 1983. That course accorded with that adopted in a number of previous cases. As Stephens in *Supreme Court Forms* (1932) at p 305 states, in order to give the person against whom the writ of [arrest] is sought a final opportunity to obey the order of the Court, it was a common course for the Court to direct that the writ of [arrest] lie in the office for a defined number of days and, on further failure, to be forthwith issued, and sometimes this direction is contained in the order. See the cases cited there, and see also *Cook v Doyle* [1946] NZLR 398 at p 402 where an order was made by Fair J in these terms.

[57] I have considered the course of action approved in *Soljan v Spencer*. However, as Paterson J found in the case of *Pickering*, I do not consider that alternative is available in this case for the following reasons:

- The breaches of the injunction in issue here are serious breaches which are repetitive and continuing.

- There is a limited amount Mr Siemer could do to purge his contempt were the order to lie in Court for a given period, given the extensive past breaches. He has previously cleared the website www.stiassny.org of offending material only to resume conduct in breach of the injunction by restoring offending material to that website and launching a further website www.kiwisfirst.com, as a vehicle for material damaging to the reputation of Mr Stiassny.

- Mr Siemer is well aware of the plaintiffs' application and the consequences that could follow. He has shown no inclination to desist from his offending behaviour. He elected not to file a notice of opposition to the plaintiffs' application nor to be present or represented at the hearing on 4 July 2007.

[58] In those circumstances I consider there is no alternative but to grant leave to the plaintiffs to issue a writ of arrest to bring Mr Siemer before this Court so the consequences of his contempt of Court may be determined.

Debarring from defending this proceeding

[59] The plaintiffs seek an order debarring Mr Siemer from defending this proceeding. They rely on his contempt of Court in breaching the injunction and his failure to pay costs orders made by this Court and the Court of Appeal, which have been sealed and served.

[60] Details of the costs orders are given in affidavits of Vanushi Rajayagan:

Judge	Date of judgment	Date sealed	Date served	Amount
Ellen France J	19.12.05	17.8.06	20.4.07	$10,133
Ellen France J	5.5.06	17.8.06	20.4.07	$8,542
Potter J	2.6.06	17.8.06	20.4.07	$180,182.78
				$3,386 disbs
Rodney Hansen J	8.12.06	20.12.06	17.5.07	$3,681
Rodney Hansen J	7.6.06	20.12.06	17.5.07	$5,332.50
Rodney Hansen J	19.4.07	15.5.07	17.5.07	$16,005
Total				$**227,262.28**

In addition, the Court of Appeal on 13.12.05 and 4.4.07 ordered costs of $6,000 plus disbursements.

[61] Rule 258 provides:

> **Enforcement of interlocutory order**
>
> (1) If a party fails to comply (the **party in default**) with an interlocutory order, the Court may, subject to any express provision of these rules, make any order that it thinks just.
>
> (2) The Court may, for example, -
>
> (a) if the party in default is a plaintiff, order that the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceeding:
>
> (b) if the party in default is a defendant, order that the defence be struck out and that judgment be sealed accordingly:
>
> (c) order that the party in default be committed;
>
> (d) if any property in dispute is in the possession or control of the party in default, order that the property be sequestered:
>
> (e) order that any fund in dispute be paid into Court:

(f) appoint a receiver of any property or of any fund in dispute.

(3) An order must not be enforced by committal unless the order has been served personally on the person in default or that person had notice or knowledge of the order within sufficient time for compliance with the order.

. . .

[62] The Court's power is discretionary. In *Stephens v Cribb* (1991) 4 PRNZ 337 it was recognised by the Court of Appeal that a debarring order is reserved for extreme circumstances. The plaintiffs submitted that this is an extreme case.

[63] Counsel also referred to *Kidd v Van Heeren* HC AK CIV 2004-404-6352 16 November 2006 where Cooper J stated at [18]:

> … Plainly, Rule 258(2)(a) contemplates that if the party in default is a plaintiff, an order may be made, if it is just to do so, staying the proceeding, or dismissing it as to the whole or any part of the relief claimed by the plaintiff. In the present case, where the proceeding is already stayed, and judgments of the High Court, the Court of Appeal and the Supreme Court have effectively maintained the stay there would be no force in the repetition of the threat of staying the proceeding in the case of non-compliance with the order for costs. In those circumstances, it seems to me that it was entirely appropriate for the defendant to seek an order that the proceeding be dismissed in the case of non-payment. Another possibility, probably of little practical utility in a case such as the present where the parties reside overseas, would be an order that the plaintiff be committed, as is contemplated by Rule 258(2)(c).

[64] In [19] he said:

> The powers given to the Court under Rule 258(2) are wide-ranging and have teeth. That must reflect the intention that interlocutory orders should be complied with. That in turn reflects the importance of interlocutory orders for the just and efficient determination of proceedings before the Court.

[65] In this case the parties seeking the order debarring the first defendant from defending the proceedings are of course the plaintiffs, but the approach taken in *Kidd v Van Heeren* must be equally applicable.

[66] Rule 48E provides:

> **Costs in interlocutory applications**
>
> (1) Unless there are special reasons to the contrary, costs on an opposed interlocutory application-

(a) Must be fixed in accordance with these rules when the application is determined; and

(b) Become payable when they are fixed.

(2) Despite subclause (1), the Court may reverse, discharge, or vary an order for costs on an interlocutory application if satisfied subsequently that the original order should not have been made.

(3) This rule does not apply to an application for summary judgment.

[67] In accordance with r 48E the various costs orders made against the defendants were payable when they were fixed, except the costs fixed by me which were payable within 30 days of 2 June 2006. No payment has been made by Mr Siemer or the second defendant, this notwithstanding that in seeking leave from the Supreme Court to appeal the judgment of the Court of Appeal, Mr Siemer states in support that he has significant overseas assets. (The second affidavit of Mr Garrett annexes a copy of Mr Siemer's application for leave dated 30 April 2007). In those circumstances non-payment of the costs awarded against him is open defiance of the Court's orders that these costs be paid.

[68] The plaintiffs do not seek an order that the defence be struck out. They seek that Mr Siemer be debarred from defending the proceeding until outstanding costs are paid. The circumstances of this case are undoubtedly extreme. Having already been found in contempt of Court, Mr Siemer continues to deliberately breach the injunction, and now refuses to pay the costs awarded against him despite having effectively admitted that he is financially able to do so. It is appropriate that I make such an order in the exercise of the Court's discretion.

[69] It is not necessary that I make a separate finding of contempt in relation to the unpaid costs. Rule 258, supported by the inherent jurisdiction of the Court, provides its own remedies, even to the point of committal (r 258(3)).

Costs

[70] When the plaintiffs have established an intentional failure by the defendant to comply with the terms of the injunction, as in this case, the Court will order the defendant to pay the plaintiffs' costs on the application on a solicitor-and-client

basis: *Country Colours Limited v Resene Paints Limited*. Accordingly there will be an order that the first defendant pay the plaintiffs' costs in respect of this application on a solicitor-and-client basis.

[71] The plaintiffs are to file a memorandum detailing costs and disbursements within 14 days of the date of this judgment. The first defendant is to file a memorandum in response within a further 7 days. I will then fix the costs to be awarded against the first defendant pursuant to this order. Costs will thereupon become payable by the first defendant to the plaintiffs within 30 days. If the defendant fails to file a memorandum in accordance with this timetable, I shall proceed to determine costs on a solicitor-and-client basis in the absence of such a memorandum.

[72] **Summary of orders**

(1) Leave is granted to the plaintiffs to issue a writ of arrest to bring Mr Siemer before this Court so the consequences of his contempt of Court may be determined.

(2) Mr Siemer is debarred from defending this proceeding until further order of the Court.

(3) Mr Siemer is to pay the plaintiffs' costs on the application for committal and associated orders on a solicitor-and-client basis.