IN THE COURT OF APPEAL OF NEW ZEALAND

CA55/06
CA150/06
[2007] NZCA 117

	BETWEEN	VINCENT SIEMER Appellant
	AND	MICHAEL PETER STIASSNY AND FERRIER HODGSON Respondents

Hearing: 8 February 2007

Court: William Young P, Glazebrook and O'Regan JJ

Counsel: Appellant in Person and A Candy (McKenzie friend)
J G Miles QC and M Flynn for Respondents

Judgment: 4 April 2007 at 3 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The appellant is to pay costs of $6,000 and usual disbursements to the respondents.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] Mr Vincent Siemer appeals against two judgments of Potter J in the Auckland High Court. In the first, delivered on 16 March 2006, she found Mr Siemer and his company, Paragon Services Ltd (previously Paragon Oil Systems Ltd), guilty of contempt of court for having breached an injunction granted by Winkelmann J on 8 April 2005 and varied by Ellen France J on 5 May 2005. In this judgment, Potter J fined Mr Siemer and Paragon (jointly and separately) $15,000 and ordered them to pay costs on a solicitor and own client basis. In the second judgment, which she delivered on 2 June 2006, Potter J quantified costs and disbursements in the sums of $180,182.78 and $3,386 respectively.

[2] Mr Siemer's appeal raises many interconnected and overlapping arguments which we propose to address under the following headings:

(a) Challenges to the injunctions and arguments based on freedom of speech;

(b) Challenges to the procedure adopted by the Judge;

(c) Claims that the Judge was biased;

(d) Challenges to the factual findings; and

(e) Challenge to the costs award.

But, before we address those heads of argument, it is necessary to say something about the background to the case and the legal context in which it fell to be determined.

Background to the case

[3] Mr Siemer was involved in a dispute with co-shareholders in Paragon. At one stage in the process, Mr Stiassny was appointed as a receiver of Paragon. That receivership came to an end in July 2001. Differences remained between Mr Stiassny and his firm, Ferrier Hodgson, on the one hand, and Paragon and Mr Siemer on the other. These differences were ostensibly resolved pursuant to a compromise agreement of 9 August 2001. Under this agreement Paragon and Mr Siemer agreed not to comment to anyone on any matter arising in or from the receivership (and Mr Stiassny and Ferrier Hodgson made similar commitments). We note that, for ease of reference, we will usually refer to the dispute as being between Mr Siemer and Mr Stiassny and omit references to Paragon and Ferrier Hodgson.

[4] Mr Siemer does not accept that he is bound by the 9 August 2001 agreement for reasons which he has explained to us in considerable detail. He made numerous complaints about Mr Stiassny to various official bodies, including the Institute of Chartered Accountants and the Serious Fraud Office. Then, on 8 April 2005, a billboard appeared on the Farmers Car Park building in Hobson Street, Auckland which depicted an image of Mr Stiassny's face and contained the words "Michael Stiassny – a true story www.stiassny.org". This had been erected by Oggi Advertising Ltd on the instructions of Mr Siemer. It was adjacent to a billboard for Vector Ltd, a substantial company of which Mr Stiassny was the chairman. The website referred to on the billboard contained material which related to the Paragon receivership and was very critical of Mr Stiassny. On 8 April 2005, Mr Stiassny obtained an interim judgment from Winkelmann J. The orders made were in the terms applied for as follows:

> 1. The first respondent [Mr Siemer] direct the second respondent [Oggi] to remove the billboard referring to the applicant [Mr Stiassny] situation [sic] on the building formerly known as Farmers Car Park, Hobson Street, Auckland.
>
> 2. The first respondent remove all material from the website www.stiassny.org in any way relating to the applicant.

> 3. The first respondent be restrained from publicising any information in any way relating to the application [sic] pending further order of the Court. …

The third order reads a little oddly. We note that the second order contains the words "in any way relating to the applicant" and therefore suspect that the third order was intended to read:

> The first respondent be restrained from publicising any information in any way relating to the applicant pending further order of the Court.

So expressed it would be consistent with the terms of the second order. On the other hand, if construed literally, it must still be taken to preclude publication of material relating to the subject matter of the application, namely the contents of the website. So, one way or another, any further publication by Mr Siemer of allegations against Mr Stiassny associated with the Paragon receivership was precluded.

[5] On 12 April 2005 the website was closed down. Mr Siemer, however, applied to have the injunction rescinded. This application was heard on 28 April 2006 by Ellen France J. In a judgment which she delivered on 5 May 2006 she amended the terms of the injunction so that, relevantly, they prohibited Mr Siemer from publishing (at [84]):

> 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 … .

This injunction came into effect on 12 May 2005.

[6] A subsequent appeal to this Court against the judgment of Ellen France J was dismissed, see *Siemer v Ferrier Hodgson* CA87/05 13 December 2005.

[7] In the meantime, however, the website had been reactivated. This occurred on 3 May 2005. The site was then closed down again on 5 May 2005. We will discuss the details of this shortly. It is sufficient at this stage to note that Mr Siemer's explanation for the reactivation of the website (in apparent breach of the injunction granted by Winkelmann J) was that he had sold the website and the information on it to the Talayna Group of Italy, an entity associated with a Mr Edmundo Tunney, and that the reactivation had been at Mr Tunney's instance. The website was reactivated again on 19 May 2005 and continued in operation (with information relating to Mr Stiassny's involvement in the Paragon receivership on the website) up until either late December 2005 or January 2006. Since then, the website has remained operational but all material associated with the Paragon receivership has been removed.

[8] Between 3 May 2005 and December or January 2006, additional material was, from time to time, placed on the website. As well, other actions – the details of which we will discuss shortly – were taken which drew attention to the website and/or made allegations against Mr Stiassny. Mr Stiassny's position is that Mr Siemer was responsible for this activity and that it breached the terms of the injunction.

The relevant legal context

[9] The contempt asserted against Mr Siemer is civil in nature, involving alleged breaches of court orders, see Arlidge, Eady and Smith *Contempt* (3ed 2005) at [3-1]. So the proceedings before Potter J were civil and not criminal. Further, given that allegations against Mr Siemer involved alleged breach of an interim injunction and formed a subset of the substantive proceedings between Mr Stiassny and Mr Siemer, the proceedings were interlocutory, see Arlidge, Eady and Smith at [3-299]. As a consequence the civil rules of evidence applied, and in particular, given the interlocutory nature of the case, hearsay was admissible under (but subject to the requirements of) r 249 of the High Court Rules. Further, cross-examination of deponents required an order of the Court, see r 253.

[10] It was not necessary for Mr Stiassny to establish that Mr Siemer knew he was breaching the injunction. It was, instead, sufficient to show that the relevant actions of Mr Siemer were deliberate. In saying this, we recognise that there is some authority which goes (or at least seems to go) the other way, see for instance *Irtelli v Squatriti* [1993] QB 83 (CA). But the weight of authority favours the view we have expressed, see for instance *Attorney-General v Hancox* [1976] 1 NZLR 171 (SC), *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137 (Restrictive Practices Court), *In re M v The Home Office* [1994] 1 AC 377 (HL) and Arlidge, Eady and Smith at [3-248] and [12-88] – [12-93]. A bona fide breach of an order which resulted from erroneous legal advice as to the scope of the order is nonetheless a contempt of court, see Arlidge, Eady and Smith at [3-249].

[11] On the other hand, despite the proceedings being civil in nature, Mr Siemer was entitled to rely on the privilege against self-incrimination and the criminal standard of proof that applied, see Arlidge, Eady and Smith at [3-39] and [3-43].

Challenges to the injunctions and arguments based on freedom of speech

[12] Much of what Mr Siemer had to say in support of the appeal involved challenges to the legitimacy of the injunction granted by Winkelmann J, the variation by Ellen France J and, the correctness of the decision of this Court which dismissed the appeal from the latter judgment. He also invoked freedom of speech arguments.

[13] These challenges are irrelevant to this appeal. It is no answer to an allegation of contempt of court involving breach of an injunction to assert that the injunction was wrongly granted. Nor could Mr Siemer realistically have expected Potter J to have set aside (in enforcement proceedings) the injunction which had been granted by Ellen France J and upheld by this Court. Similar considerations apply to Mr Siemer's complaints based on freedom of expression. Freedom of expression is an important consideration (and indeed very often the dominant one) when prior restraint is in issue. As well, freedom of expression is also relevant to the

interpretation of an injunction which limits the ability of a defendant to communicate as he or she chooses. But an injunction, while in force, must be complied with unless and until it is set aside.

Challenges to the procedure adopted by the Judge

The context

[14] The case had been extensively case managed prior to the hearing commencing on 26 July.

[15] Prior to the hearing there had been rulings as to which deponents would be required to attend for cross-examination. The latter point had been addressed by Keane J in a judgment delivered on 14 July 2005 (which was amended by a minute of 19 July 2005). The position which Keane J arrived at was as follows:

(a) Mr Siemer's application to cross-examine two of the deponents relied on by Mr Stiassny, namely Mr Frederick Thompson and Mr Campbell Rose, was granted.

(b) His application to cross-examine a third deponent, Ms Sabrina Vai, was deferred to the hearing.

(c) Mr Stiassny's application to cross-examine Mr Siemer was also in effect deferred.

[16] In the course of the judgment of 14 July, Keane J *Pickering v Attorney-General* [2001] 2 NZLR 324 (CA) in which McGechan J referred to the analogy between civil contempt and criminal proceedings. He also referred to *Comet Products (UK) Ltd v Hawkex Plastics Ltd* [1971] 1 All ER 1141 (CA) and went on:

> [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 [1143], 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 [1144], 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 [1144]-[1145], 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 [1145], that '… the judge might [think it right] 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 [1145] (see also Megaw LJ, Cross LJ, [1147]), 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.
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> …
>
> **Conclusion**
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> [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.

[17] The case was heard on 26 and 27 July and 19 and 20 December 2005. Mr Siemer and Paragon were represented by Mr Colin Henry on the first two days of the hearing. The case was to resume on 5 December 2005 but on that day Mr Henry sought and obtained leave to withdraw. Mr Siemer was not in court and the hearing continued, effectively ex parte, for some time until Mr Siemer arrived with new counsel, Mr Grant Illingworth QC, who managed to obtain an adjournment until 19 December. On that day Mr Illingworth was granted leave to withdraw and the hearing proceeded with Mr Siemer representing himself and Paragon unrepresented.

[18] Potter J, correctly, approached the case on the basis that what was alleged was a civil contempt and the application was, strictly, interlocutory in nature. Accordingly, the case fell to be determined primarily on the basis of affidavit evidence but subject to the possibility of additional oral evidence being called or cross-examination of deponents if permitted by the Court.

[19] At the hearing before Potter J issues arose as to the cross-examination of:

(a) Ms Vai;
(b) Mr Garrett;
(c) Mr Tunney; and
(d) Mr Siemer.

Mr Siemer's complaints about the procedure adopted by the Judge (other than those that are more conveniently dealt with under the heading of bias) relate primarily either to the rulings which the Judge gave in relation to each of those deponents or, more generally, to the fact that the contempt of court case was heard before the substantive proceedings.

Refusal to permit cross-examination of Ms Vai

[20] Mr Stiassny's primary allegation in relation to the operation of the website was that the purported sale to Talyana Group/Mr Tunney was a sham. Indeed, Mr Stiassny's position at one stage appeared to be that Mr Tunney did not exist. Support for this contention was provided in the affidavit of Ms Vai, an Italian private investigator. Mr Siemer, however, was able to produce an affidavit from Mr Tunney (sworn on 12 December 2005). By 19 December 2005, Mr Stiassny accepted that Mr Tunney existed, was a resident of the United States and was an old friend of Mr Siemer. Nonetheless, Mr Siemer wished to have Ms Vai available for cross-examination.

[21] Mr Siemer's application to this effect was declined by Potter J in a ruling of 19 December 2005. She concluded that cross-examination of Ms Vai would do little to assist the Court in determining whether the sale of the website was a sham. In those circumstances she concluded that it would be disproportionate in relation to cost and convenience to require Ms Vai's attendance, whether in person or by video link, for cross-examination.

[22] There was no error in this ruling. We accept that, despite the accepted existence of Mr Tunney, Ms Vai's affidavit perhaps retained some residual significance as to the bona fides of the alleged sale. But once Mr Tunney surfaced, Ms Vai's affidavit was at best of peripheral relevance. Further, and importantly, as will become apparent, the Judge did not decide the case against Mr Siemer on the basis that the assignment was a sham. So the evidence of Ms Vai was, in the end, of no materiality to the findings later made against Mr Siemer.

[23] Mr Siemer argued this aspect of the case before us very much on the basis that if Ms Vai had been available for cross-examination, improprieties on the part of Mr Stiassny, or perhaps his agents, in terms of the way in which his evidence was put together would become apparent. It is not obvious why any such improprieties would be relevant to the question whether Mr Siemer was guilty of contempt of court. But, in any event, the suggestion that there may have been such improprieties seems to us to be entirely speculative and as not warranting the expense and delay which would have been associated with an order that Ms Vai be cross-examined.

The abandoned application to cross-examine Mr Tunney

[24] Mr Tunney's affidavit of 12 December 2005 was lodged extremely late in the piece. Without objection from Mr Stiassny, it was nonetheless accepted as evidence in the case. This affidavit broadly (although by no means precisely) supported Mr Siemer's assertion that the website had been sold on a bona fide basis prior to the 3 May 2005 reactivation.

[25] Initially Mr Miles QC for Mr Stiassny wished to have Mr Tunney cross-examined. But eventually, either of his own volition or at the suggestion of Potter J, Mr Miles did not persist with this application. Mr Siemer complains about this. In part, because he sees the behaviour he attributes to the Judge as evidence of bias. He takes the view that if Mr Tunney had been cross-examined this would have enhanced his case. He also notes that the Judge was, in her judgment, critical of Mr Tunney's evidence despite the fact that he had not been cross-examined. This latter point

would have been of some moment had the Judge's criticisms of Mr Tunney's evidence been carried through into a finding that the sale was a sham. But although the Judge plainly thought it more likely than not that the sale was a sham, she was not satisfied to the criminal standard of proof that this was so. Given that the issue of sham is no longer before us (as Mr Stiassny did not seek to challenge this aspect of the Judge's ruling) this consideration is of no moment. We see no valid appeal point here.

[26] Mr Siemer complained to us that the "finding" of sham which the Judge made on the balance of probabilities was itself unfair and prejudicial to him and should not have been made in the absence of cross-examination. But, in a context in which proof on the balance of probabilities was not sufficient, there was no relevant finding. This whole issue is therefore peripheral, at best, to the questions which we must address.

Refusal to permit the cross-examination of Mr Garrett

[27] Mr Garrett is associated with Ferrier Hodgson (and thus Mr Stiassny). He has sworn a number of affidavits in the case. Aspects of those affidavits could be (and indeed were) criticised as involving assertions of opinion or conclusions. But after some "pruning", the affidavits largely went to the Court as recording the state of the website at particular times, producing documents relied on and providing some context for some of the specific allegations made against Mr Siemer. As Mr Miles put it, they were in effect a matter of record (or at least that was what was intended).

[28] No application had been made to have Mr Garrett cross-examined prior to the hearing commencing in July 2005. The case had, as we have noted, been closely case managed. The application to have him cross-examined made by Mr Siemer on 19 December 2005 came out of the blue. There was no obvious point to be served by cross-examination and it may well have further delayed the conclusion of the hearing (even though Mr Garrett was in Court). Mr Siemer did not offer an

explanation as to why the application had not been signalled earlier. In those circumstances the Judge was perfectly entitled to decline Mr Siemer's application to cross-examine.

[29] In the course of argument before us we asked Mr Siemer what he wished to cross-examine Mr Garrett about. From what he said, it is clear his primary focus would have been on the merits of the underlying injunction and the judgment of this Court which upheld the orders made by Ellen France J. Such issues as Mr Siemer mentioned, which were potentially relevant to whether he had acted in contempt of court, in particular as to inquiries Mr Garrett made as to certain letters (which we will be discussing later) and stickers (also to be discussed later), seemed to us to be largely peripheral. As well, there is no indication that these points were put before Potter J.

[30] Accordingly we are of the view that there was no error in the approach taken by Potter J.

Directing cross-examination of Mr Siemer

[31] In the ruling which was delivered on 20 December 2005, the Judge directed that Mr Siemer be cross-examined on his affidavits. As noted, Keane J had earlier indicated that the question would very largely turn on whether Mr Siemer relied on his affidavits. By the time Potter J came to make the ruling it was clear that Mr Siemer did indeed rely in his affidavits. In dealing with this application the Judge said:

> [12] Mr Siemer in opposition to the application stated that he has given his evidence in affidavits filed on oath and that accordingly he would be guilty of perjury if he has given untrue evidence. He suggested that the plaintiffs were conceding that their evidence was not strong in seeking an application to cross-examine him. Further, that his rights under the Bill of Rights Act must be taken into account in relation to this proceeding, and that given the Court's decision to decline his application to cross-examine the witness Sabrina Vai it would be unjust to grant the plaintiffs' application to cross-examine him.

> [13] Dealing with each of those points in turn. It is of course a fact that Mr Siemer has given his evidence on oath in the affidavits he has filed. I do not accept the suggestion that it is a necessary implication that the plaintiffs consider their case to be "not strong" when they seek a right to cross-examine Mr Siemer. As I have previously observed, in criminal proceedings when an accused person gives evidence then that accused must be available for cross-examination by the Crown, the opposing party.
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> [14] I accept that s 25(d) of the Bill of Rights Act confers on Mr Siemer the right not to be compelled to give evidence but, like Keane J, I do not see that that assists him here. It is the very reason why Keane J deferred making a decision at the time he considered the plaintiffs' application. Mr Siemer has now elected to rely on the affidavits he filed, and he should therefore be available for cross-examination.
>
> [15] As to the ruling in relation to the witness Sabrina Vai, that involved, as do all such applications, a balancing exercise. Ms Vai's evidence related to factual matters which are before the Court in her affidavit. I reached the conclusion that cross-examination would not advance those particular issues significantly to outweigh the cost and inconvenience of bringing Ms Vai to Court for cross-examination. To an extent her evidence relates to peripheral mattes. Mr Siemer's evidence goes to the heart of the matter and is directly relevant to the issues in this case.
>
> [16] I therefore conclude that Mr Siemer should be available for cross-examination by the plaintiffs, and the plaintiffs' application will be granted subject to the cross-examination being confined within the limits of the nine headings I have previously set forth in this judgment.

[32] Although Mr Siemer did then give evidence, this evidence in the main consisted of him declining to answer the questions directed to him by Mr Miles despite the Judge's directions to do so.

[33] We endorse as correct the approach that the Judge took. Mr Siemer could not fairly expect to rely on his affidavit evidence but then avoid cross-examination. It is as simple as that. That this is so had been set out very clearly in the judgment of Keane J and Mr Siemer could have been under no doubt that if he relied on his affidavits he would almost certainly be cross-examined.

The fact that the contempt of court case was heard before the substantive proceedings

[34] Mr Siemer sees it as an abuse of process that the contempt of court proceedings came to be heard before the substantive claim against him with the

consequences that he could not rely on evidence that his core allegations against Mr Stiassny are correct or arguments that the injunction ought not to have been granted. Associated with this argument was a contention that Mr Stiassny is dragging the chain in terms of getting the substantive proceeding ready for trial.

[35] We are not in a position, on this appeal, to apportion blame for the comparatively slow progress of the substantive proceedings. More importantly, however, in a situation where an interim injunction has apparently been defied, both the Court and the plaintiff can be expected to devote primary attention to securing compliance with that order and imposing sanctions for any associated contempt of court. We are satisfied that there was no abuse of process in determining the contempt of court application ahead of the substantive claim.

Claims that the Judge was biased

[36] A good deal of the hearing before us was devoted to the contention advanced by Mr Siemer that the Judge had displayed bias towards him. This contention was supported by the affidavits of Mr Siemer and a number of other people who had been in Court during all or part of the hearing. Counsel for Mr Stiassny did not seek to cross-examine those deponents. There was, as well, an affidavit from Mr Garrett which broadly defended the way in which the Judge conducted the hearing. He was cross-examined before us. We also heard oral evidence from Mr Henry who did not swear an affidavit but gave evidence in response to a witness summons issued by this Court on the request of Mr Siemer. Mr Henry made some criticisms of the way the Judge conducted the hearing (for instance in relation to comments she made when he used a Latin phrase and for correcting his pronunciation of the name of Grieg J) but he stopped short of describing her as biased.

[37] In advancing his submissions as to bias, Mr Siemer to some extent relied on the rulings of the Judge as to cross-examination to which we have already referred. As well, he complained about the actions of the Judge in proceeding with the hearing on 5 December 2005 after Mr Henry had withdrawn but when Mr Siemer was not

himself present. He describe the Judge as having "dismissed" both Mr Henry and Mr Illingworth (albeit that all the Judge had done was grant each of them leave to withdraw as they had requested). More generally, however, Mr Siemer relied on what he alleged was a lack of interest in the submissions which he or his counsel advanced, a more gracious and accommodating response to the submissions advanced by Mr Miles, belittling of Mr Henry and to some extent of Mr Siemer, occasional judicial anger and what Mr Siemer saw as the Judge offering assistance to Mr Miles – in allegedly suggesting that Mr Miles should not persist with the application to cross-examine Mr Tunney and providing Mr Miles with a reference to a case that supported his position as to Mr Siemer's inability to represent Paragon (the case being the well known decision, *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA)). Mr Siemer also noted that at the outset the Judge declined his request for an electronic record to be taken of the proceedings.

[38] Complaints of bias against a Judge are not common but are not unknown either. It sometimes happens that an unsuccessful litigant will attribute the outcome of the case to judicial bias rather than the view the Judge took of the merits. One of the problems with such a complaint is that there is usually no obvious reason why a Judge with no personal or financial link to the parties or outcome of the case should be biased. Given this, the most likely explanation for impugned judicial conduct is usually that it was a reaction to unmeritorious arguments or evidence.

[39] Issues of alleged or actual bias sometimes arise out of the way in which jury trials have been conducted. Even in this sensitive context, this and other similar courts have recognised that trial judges are entitled to a reasonable degree of latitude in terms of response to the way in which a case unfolds. Representative cases are *R v Parata* (2001) 19 CRNZ 352 (CA), *R v Rikys* CA428/01 3 July 2002, *R v Singh* CA333/95 24 July 1996 and *R v Sharma* CA360/04 and CA364/04 6 July 2006. Of more relevance in the present context, however, are decisions which concerned proceedings which were not tried before juries. In this context it is sufficient to cite two cases.

[40] In *Francis v Police* HC ROT AP38/01 and AP45/01 20 June 2001, Anderson J was asked to overturn a decision of a District Court Judge on the grounds of, inter alia, judicial bias. The transcript of the hearing revealed that the Judge had:

(a) referred to the appellant's words as "facile";

(b) told him to shut up; and

(c) called him insolent.

The Judge had, as well, at one stage sent the appellant to the cells to compose himself. In the view of Anderson J, the appellant had been querulous and disrespectful, had extended the trial beyond the allotted time, had talked over the Judge, introduced red herrings and embarked on fishing expeditions during cross-examination. In that context, indications that the Judge had lost his temper did not disclose apparent bias.

[41] Broadly to the same effect is the decision of the Court of Appeal of England and Wales in *BLP UK Ltd v Marsh* 2003] EWCA Civ 132. The complaint was that an employment tribunal had displayed bias allegedly manifested by the chairwoman rolling her eyes, tut-tutting, snorting, shaking her head and directing intimidating looks at witnesses giving evidence. The Employment Appeal Tribunal did not accept that all the particular complaints had been made out but accepted that the chair of the tribunal had displayed some hostility to the losing party. It nonetheless dismissed an appeal on the basis that such behaviour was merely a reflection of the chairwoman's reactions to the case as it unfolded and did not show a real possibility of bias. The Court of Appeal agreed with that approach.

[42] It is critical to look at the complaints made by Mr Siemer in the context of the case that developed. This can perhaps be best illustrated by indicating what happened on 26 July 2005.

[43] At the commencement, Mr Henry asked that the full proceedings be recorded electronically. That is not the usual practice in the High Court in civil proceedings.

The request might therefore be thought to have implied that the Judge would not take an appropriate record of the proceedings. Unsurprisingly, the Judge dismissed the application.

[44] This was followed by an application by Mr Henry to the Judge that she recuse herself. In part this was on the basis of a complaint that Mr Henry had made about her to the Chief High Court Judge in relation to another case, a complaint which the Judge had not previously known about. Mr Henry also relied on an earlier decision of the Judge in a criminal case in which she referred to profiling practices developed by the New Zealand Customs Service which were addressed to West African nationals. Mr Henry suggested that the Judge had in this way stigmatised West African nationals and that he, too, had been stigmatised (on the basis that he might be thought by his appearance to be from West Africa, although he is in fact from the West Indies). The Judge understandably took this application as a scarcely veiled assertion that she was racist.

[45] When she declined this application, Mr Henry then sought an adjournment of the proceedings on the basis that Mr Siemer and Paragon wished to appeal the judgment on the recusal application. She declined the application.

[46] Mr Henry then, so it would appear from a ruling delivered by Potter J, endeavoured to seek an adjournment on the basis that he had not had sufficient opportunity to prepare the case. The Judge interrupted this application, telling him that she would be prepared to hear such an application after the plaintiffs had concluded their case.

[47] There followed an application by Mr Henry for an order excluding from the evidence in the proceedings three of the affidavits relied on by Mr Stiassny, an application which was based on a very technical reading of rules 242 and 248 of the High Court Rules. Given that the case had been case managed and that no argument on this point had been previously raised, not to mention the technicality of the point, the application was not long on merit.

[48] All of this provided an inauspicious start to the hearing. This is not to say that Mr Henry (or Mr Siemer for that matter) were not entitled to make the applications. But they provide a context in which some irritation on the part of the Judge is understandable.

[49] When the hearing resumed on 5 December, Mr Henry sought and was granted leave to withdraw. Mr Siemer knew that this was going to happen. He was, however, nonetheless not present in Court. He did not put in place arrangements for alternative representation and he did not appear to represent himself. The Judge continued with the hearing, resulting in the intervention from Mr Illingworth. In the end the proceedings were adjourned at Mr Illingworth's request until 19 December so there was no prejudice to Mr Siemer in any event. We see no grounds for criticism of the Judge in being prepared to proceed with the hearing given Mr Siemer's non-appearance. This is particularly so given that the website, with apparently contravening material on it, was still operating and the Christmas vacation was fast approaching.

[50] Some aspects of what happened on 19 and 20 December also warrant attention. The application to cross-examine Mr Garrett came very late in the piece, particularly given the case management processes. Perhaps more relevantly, Mr Siemer's response to the Judge's entirely predictable direction that he be cross-examined on his evidence was quite extraordinary.

[51] Against that background, we find that the actions attributed by Mr Siemer to the Judge did not disclose actual or apparent bias. This head of the appeal is dismissed.

Challenge to the factual findings

Overview

[52] The core allegations made by Mr Stiassny against Mr Siemer can be discussed conveniently under the following headings:

(a) Reactivations, maintenance, continued operation and updating of the website;

(b) Distribution of stickers; and

(c) Letters sent to the trustees of the Auckland Electricity Consumer Trust, accountants and newspapers.

It will also be necessary to discuss, as a discrete topic, the reliance placed by Mr Stiassny on hearsay material.

Reactivations, maintenance, continued operation and updating of the website

[53] The website was created on 14 March 2005. It was registered in the name of Mr Siemer who gave an address in the United States. On 12 April 2005 (after the first injunction) the site was closed down. It was reactivated on 3 May 2005 and closed down again on 5 May 2005 (coincidentally on the same day as the judgment of Ellen France J was released). The website was reactivated on 19 May 2005 and continued in operation until after the hearing before Potter J concluded on 20 December 2005. However, prior to the delivery of Potter J's first judgment, the material on the website associated with Paragon was removed.

[54] Mr Siemer's position throughout has been that on 26 April 2005 he sold the website to an entity known as Talayna Group of Italy which is associated with his friend, Mr Edmundo Tunney. He maintained, too, that the basis of the sale was that the website would not be activated until after the resolution of the hearing before Ellen France J which was then pending. So he did not expect it to be reactivated on 3 May and he was able to secure the deactivation on 5 May.

[55] In her findings, the Judge expressed considerable scepticism about the genuineness of the sale to Talayna but she stopped short of concluding beyond reasonable doubt that the sale was a sham. She held nonetheless that Mr Siemer was in contempt of court in that he had placed Mr Tunney in a position to operate the website in a way which was a breach of the injunction, a conclusion she supported

by reference to *Seaward v Paterson* [1897] 1 Ch 545. She also said that Mr Siemer was in a position to have cancelled the agreement with Mr Tunney and should have done so. Further, she concluded that the website had in any event been updated by Mr Siemer and that this was in breach of the injunctions.

[56] On this point it is necessary to discuss briefly some of the key features of the relevant evidence:

(a) On 3 May 2005 Mr Garrett checked the website to find it fully operative and with some recent updates. One was a reference to a *Sunday Star Times* article which had been an exhibit to an affidavit of Mr Siemer of 26 April 2005. There was also a reference to certain material not being included because it had been obtained on discovery in other litigation. The publication of discovered material has been discussed at the hearing before Ellen France J on 28 April 2005.

(b) On the same day Mr Neale Jackson (a Ferrier Hodgson employee), using the computer and name of his flatmate, logged onto the website. He made an on-line comment about the website's contents and asked a question. On 9 May 2005 he received a response from Mr Siemer in which he, inter alia, said:

> Our company is back up and running but Stiassny has taken his toll. We believe there are still a number of documents Stiassny has retained, certainly missing. I am sure you will hear plenty of this case in the months ahead as we are preparing a lawsuit against him and possibly a criminal prosecution.

(c) On 9 May 2005, Mr Garrett checked the website www.paragonoilsystems.com and found material on it directed at the late Mr Robert Fardell QC which repeated allegations against Mr Stiassny associated with the Paragon receivership. Given the nature of the material, it is difficult to see how it could have come to be on the website without the assistance of Mr Siemer.

(d) On 25 May 2005 Mr Garrett checked the www.stiassny.org website. It stated:

> 25/5/05 Mr Siemer is currently preparing a criminal prosecution against Michael Stiassny. Anyone having any evidence of [sic] question is invited to contact us through the 'Contact Us' tab.

The accompanying article bears a notation indicating that Mr Siemer is the author.

(e) On 26 May 2005 there was more new material on the website including comment on the process in relation to Mr Siemer's complaint to the Institute of Chartered Accountants against Mr Stiassny and adverse comments directed at Ellen France J.

We note as well that in her judgment the Judge refers to a copy of the judgment of Ellen France J being placed on the website along with an interview with Mr Siemer about it. The affidavit referring to this material was not included in the case on appeal.

[57] The express terms of the written agreement as to the sale of the website did not confer a right of cancellation on Mr Siemer. But in a letter to Mr Miles, Mr Siemer had referred to an arrangement as to price refund if the website remained "censured" for more than 30 days. He had also given evidence to the effect that it had been agreed between him and Mr Tunney that the website should not be activated unless the injunction granted by Winkelmann J was lifted. So there was an evidential basis for the conclusions of the Judge as to Mr Siemer's ability to prevent the operation of the website.

[58] In any event, and leaving the cancellation issue aside, Mr Siemer was guilty of contempt of Court on the simple basis that his sale of the website and material relating to Mr Stiassny to Mr Tunney necessarily involved a publication of that material to Mr Tunney and was thus a breach of the injunction granted by Winkelmann J. Further, the course of events associated with the reactivation of the

website on 3 May (with material obtained on discovery deleted but with other material associated with Mr Stiassny included), its de-activation on 5 May and reactivation on 19 May (including associated events which we are about to discuss) and the nature of the material published establish that he was a party to its operation. It is inconceivable that the website could have been operated as it was (including updates) without his co-operation.

Distribution of stickers

[59] Mr Stiassny's case is that on 19 May 2005 Mr Siemer distributed stickers depicting a photograph of Mr Stiassny and the words "Michael Stiassny – a true story www.stiassny.org". 19 May is of course the day that the website was reactivated.

[60] The allegation as to distribution of stickers was supported by direct evidence from a Mr Frederick Thompson (who at the time was a solicitor employed by McElroys, the solicitors acting for Mr Stiassny) to the effect that at 1.25pm on 19 May he observed Mr Siemer walk from the lift in the McElroys' building and promptly take the lift down. Shortly afterwards he was advised that stickers had been affixed to the walls of the lifts. He had not, however, seen the person he identified as Mr Siemer place stickers in the lifts. There was also evidence from a Mr Campbell Rose, a solicitor employed by Russell McVeagh. He said that at approximately 1.30pm on the same day he saw a man whom he identified as Mr Siemer leave the toilets in the Russell McVeagh offices in the Vero Centre and meet a woman and that they walked together towards the lift lobby. He then went to the toilets where he found a sticker. He immediately left the toilets and saw that the man he had identified as Mr Siemer was still waiting for the lift to arrive but the woman was not with him. He says that he noticed that the man was holding a sticker in his right hand which was the same as the sticker which he had found in the toilet.

[61] At trial both men were cross-examined closely by Mr Henry who was then appearing for Mr Siemer. In an affidavit of 15 June 2005 Mr Siemer denied visiting either the Vero Centre or McElroys' offices on 19 May but when he came to give

oral evidence, he declined to answer questions associated with the proposition that he was responsible for the placement of the stickers.

[62] The Judge accepted the evidence of identification given by both men. There were some infelicities or incongruities associated with aspects of the details of what they claimed to have seen. But Mr Thompson in particular was a strong witness as he had twice before dealt with Mr Siemer and was thus well-placed to recognise him. Conceivably, if cross-examined, Mr Garrett could have provided a little more context, for instance as to the days on which stickers were distributed (which were apparently not confined to 19 May 2005) and the nature of the stickers. But as indicated we see no error in the decision not to direct cross-examination of Mr Garrett and the Judge had to decide the case on the evidence before her. In the context of the case as a whole (which of course included the campaign that Mr Siemer had conducted against Mr Stiassny) the finding of fact made by the Judge was well open to her and we are not persuaded that it was wrong.

Letters sent to the trustees of the Auckland Electricity Consumer Trust, accountants and newspapers.

[63] A number of letters were sent in May 2005 to members of the Auckland Energy Consumers Trust which referred to "corporate undertaker Michael Stiassny" and contained a card bearing Mr Stiassny's image and the legend "Michael Stiassny – a true story www.stiassny.org". Also, in May 2005 a letter addressed to "all accountants" under the signature of "Forensic Investigations" was sent to a Sheila Davidson. The envelope had the name Paragon Oil Systems Ltd on it. The letter indicated that Forensic Investigations was assisting Mr Siemer to put together a possible criminal prosecution case against Mr Stiassny and invited those who had similar experiences to contact Forensic Investigations at its postal address or through www.stiassny.org. Attached to the letter was a card featuring Mr Stiassny's photograph and the words "Michael Stiassny – a true story www.stiassny.org". As well, in late May 2005 letters were sent to *The Independent* and possibly *The National Business Review* in terms broadly similar to those of the letters to the trustees of the Auckland Electricity Consumers Trust and Ms Davidson.

[64] The case for Mr Stiassny was that Mr Siemer was responsible for all of this correspondence. In the case of the letters to the trustees of the Auckland Electricity Consumer Trust, Mr Stiassny relied on handwriting evidence from Mr Gordon Sharfe, who attributed the address details on two of the envelopes to Mr Siemer. We note in passing that Mr Garrett's affidavit did not address the handwriting on the third envelope. When he gave oral evidence, Mr Siemer declined to answer questions addressed to his responsibility for the letters to Auckland Electricity Consumer Trust and to accountants and the stickers or cards apparently sent to the newspapers.

[65] The evidence adduced by Mr Stiassny on this aspect of the case was far from complete.

[66] The best evidence on this issue came from Ms Davidson. She gave direct evidence of the letter (addressed to "all accountants") which she received and the Paragon envelope. In the context of the case as whole, including reactivation of the website on 19 May and the evidence of Messrs Thompson and Rose, it was open to the Judge to infer that Mr Siemer sent this letter.

[67] There is rather more difficulty with the letters to the Auckland Electricity Consumers Trust trustees. The relevant letters and envelopes were not produced by the recipients but rather were annexures to one of the affidavits of Mr Garrett. He explained that he had obtained them from the chief executive of the Auckland Electricity Consumer Trust. So evidence as to their receipt is hearsay. Further, it was only implicit in the material to which Mr Garrett referred that the envelopes (two of which were linked to Mr Siemer by handwriting analysis) contained the offending letters. There had, however, been no challenge to the admissibility of this evidence prior to closing submissions. Further, there are some reasonably obvious points to be made about the envelopes and the letters. Mr Siemer admitted in his submissions to the Judge that the handwriting on two of the envelopes was his. There was a correspondence between the dates on the letters and postmarks on the envelopes. The nature of the letters was such as to suggest (in the context of the case as a whole) likely involvement of Mr Siemer. If the envelopes Mr Siemer admitted

addressing had not contained the letters in question, one might have expected him to have said so. In those circumstances, we think that the evidence on this aspect of the case, although in part of a hearsay nature, supported the conclusion drawn by the Judge.

[68] We reach the same view with respect to the letter sent to *The Independent* for reasons which broadly correspond to those just given, this despite the hearsay nature of the proof that the letter in question was received by *The Independent*. The hearsay arose because the letter was produced as an exhibit to the affidavit of Mr Garrett and was not produced by its recipient.

[69] In the case of *The National Business Review*, there is no evidence, other than what appeared in the paper, of the letter which was allegedly sent. In this instance, we think that it would over stretch the principles which permit hearsay evidence (which we are about to discuss) to uphold the Judge's findings on this aspect of the case.

The reliance placed by Mr Stiassny on hearsay material

[70] As is apparent from what we said in the course of discussing the evidence, there were critical features of the case advanced by Mr Stiassny which relied on hearsay evidence. Illustrative examples which we have just discussed are the way in which Mr Stiassny sought to prove the letters to the trustees of the Auckland Electricity Consumer Trust, *The Independent* and *The National Business Review*. As well, proof that stickers had been affixed to the lifts in the McElroy's building came second hand, through Mr Thompson, and this too involves hearsay.

[71] Rule 249(2) of the High Court Rules applied to the proceedings (see [9] above). That provides :

> … the Court may accept statements of belief in an affidavit in which the grounds for the belief are given if –
>
> (a) the interests of no other party can be affected by the application; or

(b) the application concerns a routine matter; or

(c) it is in the interests of justice.

[72] The case was also subject to the provisions of the Evidence Amendment Act (No 2) 1980 as they apply to the admission of hearsay in civil cases, but those provisions do not materially advance the position from the point of view of Mr Stiassny.

[73] The affidavits relied on by Mr Stiassny which contain hearsay assertions were not drafted with r 249(2) in mind. But broadly they can be taken to assert belief on the part of the deponents for reasons which are stated, namely the assertions of others. Further, they concern issues which, while in one sense important, might have been thought to have been uncontroversial: that the relevant letters to the trustees of the Auckland Electricity Consumers Trust were contained in the envelopes in question; that the letter to *The Independent* which was produced had been sent; and that stickers had been placed in the lifts in the McElroys' building. The affidavits which Mr Stiassny relied on had been subjected to a rigorous vetting process involving Mr Henry and many passages had been deleted. If the hearsay points which we are discussing had been raised, it would probably have been easy for Mr Stiassny to adduce further direct evidence on the issues in question. In that context, it might be thought that it was too late for Mr Siemer to take such hearsay points in his closing submissions (as he did for instance in relation to the letter/envelope issue) or in this Court.

[74] A problem in the case is that the Judge did not address directly why she acted on the basis of hearsay evidence and, in particular, did not say why she considered that it was admissible. It can, however, only have been on the basis that r 249(2)(c) applied. We are of the view that her conclusion, implicit thought it was, that it was in the interests of justice to admit the hearsay was correct save in relation to *The National Business Review* letter, a copy of which was not produced in evidence.

Challenge to costs award

[75] This challenge was not pursued in the oral submissions and we, in any event, see no basis upon which we could legitimately interfere with the way in which the Judge exercised her discretion to fix costs.

Conclusion

[76] The only respect in which we differ from the Judge as to liability (*The National Business Review* letter) is too trivial to warrant, in itself, any interference with the orders made by the Judge and see no other basis for interference. The appeal is dismissed. Mr Siemer is ordered to pay costs of $6,000 and usual disbursements to Mr Stiassny and Ferrier Hodgson.

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