IN THE COURT OF APPEAL OF NEW ZEALAND

CA226/07
[2007] NZCA 581

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	FERRIER HODGSON First Respondent
AND	MICHAEL PETER STIASSNY Second Respondent

Hearing: 3 December 2007

Court: Hammond, O'Regan and Robertson JJ

Counsel: Appellant in person
P J L Hunt for Respondents

Judgment: 14 December 2007 at 11 am

JUDGMENT OF THE COURT

A The application to strike out the appeal is dismissed.

B We give directions as set out in [49] herein.

C No order for costs.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] Mr Siemer has appealed to this Court an interlocutory decision of Rodney Hansen J in the High Court at Auckland (CIV 2005-404-1808 19 April 2007) in proceedings in contract, and for defamation.

[2] The respondents have now applied to strike out this appeal in its entirety, because (amongst other things) Mr Siemer is presently in contempt of Court.

Background

[3] Ferrier Hodgson is a firm of chartered accountants. Mr Stiassny is a principal in that firm.

[4] In December 2000, Mr Stiassny was appointed receiver of Paragon Services Limited (Paragon) following disputes between shareholders of Paragon.

[5] The receiver was appointed primarily for the purpose of protecting certain alleged intellectual property rights. The issues between the shareholders were eventually resolved during 2001. Mr Siemer became the sole shareholder in Paragon. The receivership came to an end.

[6] Mr Siemer had complaints over the conduct of the receivership. Eventually those disputes were resolved by a compromise agreement dated 9 August 2001. Relevantly, it provided that Mr Siemer would not comment on any matter arising in or from the receivership, including the fact of settlement.

[7] Nevertheless, in April 2005 Mr Siemer had a billboard erected in a prominent position in central Auckland. It included the name and a picture of Mr Stiassny and referred viewers to a website. This website contained a range of material which, as Rodney Hansen J said, "to put it neutrally, was critical of Mr Stiassny" (at [5]).

[8] Mr Stiassny and his firm thereupon sought and obtained an ex parte injunction from Winkelmann J which provided for the removal of the objectionable

material from the website and the removal of the billboard. Mr Siemer was also restrained from reinstating the billboard. Later, on a fully argued application to rescind the injunction, Ellen France J put in place a more limited injunction. This Court upheld Ellen France J's orders: CA87/05 13 December 2005.

[9] There was initial compliance with these orders, but then in the course of 2005 Mr Siemer published further material. This prompted a successful application by Mr Stiassny and the firm to have Mr Siemer held in contempt of court. Following a hearing before Potter J in the High Court at Auckland, Mr Siemer was, on 16 March 2006, fined $15,000 and ordered to pay indemnity costs totalling over $180,000. The fine has been paid. The costs remain outstanding. This Court dismissed an appeal against Potter J's judgment on 4 April 2007: [2007] NZCA 117. Leave to appeal to appeal to the Supreme Court was denied on 12 July 2007: [2007] NZSC 53. In so doing, and of distinct relevance to what we say hereafter, that Court said (at [10]): "There is no basis for Mr Siemer's claims of bias by [Potter J] nor for his similar claims concerning the Judges of the Court of Appeal."

[10] Subsequently, there were committal proceedings against Mr Siemer before Potter J in July 2007 which led to him serving a term of imprisonment.

The proceedings before Rodney Hansen J

[11] It is necessary to deal with the nature of the civil appeal which is still extant before this Court.

[12] Mr Stiassny and his firm commenced a civil proceeding, on two bases, against Mr Siemer and Paragon. First, there is said to be an alleged breach of the compromise agreement, arising out of the publication of material on Mr Siemer's websites. Secondly, there is a claim for defamation.

[13] It was in this context that certain interlocutory applications were heard by Rodney Hansen J in February 2007, with judgment delivered on 19 April 2007 (see [1] above).

[14] The proceeding before Rodney Hansen J concerned, in the main, applications by Mr Stiassny to strike out various parts of Mr Siemer's statement of defence.

[15] The Judge acceded to this application in numerous respects. He struck out certain paragraphs of Mr Siemer's statement of defence on, broadly, these grounds:

- irrelevant and scandalous allegations of bias against members of the judiciary;
- irrelevant arguments as to "rights to criticise" Mr Stiassny;
- contradictory statements or repetition;
- reference to "facts" not included in the allegedly defamatory statements themselves and unrelated to the current proceedings or the defence of honest opinion; and
- failure to respond in some respects to the plaintiff's allegations.

[16] The Judge then dealt with several matters arising out of the parties' discovery obligations. First, Mr Siemer claimed that the documents discovered from Mr Stiassny had been incorrectly filed. This claim was rejected. Secondly, it was argued that a particular document (an email from Mr Stiassny to the late Mr Fardell QC) was missing. The Judge directed the plaintiffs to file an affidavit addressing this alleged email. Thirdly, Mr Siemer sought further and better discovery for several categories of documents. In relation to each category the Judge determined that there was no basis for further discovery: either discovery was complete, the documents were irrelevant, or the documents claimed were not within the possession of the plaintiffs.

[17] Further, following inspection of Mr Siemer's discovered documents, Mr Stiassny had applied for copies of specified documents. Mr Siemer was only prepared to give these on payment of a dollar per page. Rodney Hansen J

determined that 30 cents a page was appropriate, given this was the charge Mr Stiassny himself had made on his own documents.

[18] Finally, the Judge ordered Mr Siemer to pay costs to the plaintiffs on a Category 3B and C basis.

Matters get worse for Mr Siemer

[19] On 4 July 2007, Mr Stiassny and his firm brought an application for an order for the committal of Mr Siemer, with associated orders. This came before Potter J in the High Court at Auckland.

[20] Having found that there had been deliberate and "contumacious" (at [36]) breaches of the injunction upheld by this Court, including the development of a new website, Potter J made the following orders on 9 July 2007 (at [72]):

> (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.

[21] On 13 July 2007, Potter J sentenced Mr Siemer to six weeks imprisonment. He has served that sentence.

[22] In a later judgment of 31 August 2007, Potter J made a costs order of $51,791.03 against Mr Siemer in relation to the application which had been advanced on 4 July 2007. It appears therefore that the total costs awarded against Mr Siemer in these proceedings to date are now close to $300,000. As we understand it, those costs have not been paid.

Mr Siemer appeals the Rodney Hansen J judgment of 19 April 2007 to this Court

[23] There appears to be a dispute as to precisely when Mr Siemer appealed Rodney Hansen J's April 2007 judgment. We have examined the file: the Notice is dated 18 May 2007, and dated-stamped by this Court 21 May 2007. At most therefore, the appeal may have been lodged three days out of time. The respondents have deposed that they were not served with a notice of appeal, and that the first they knew of the appeal was when they received the appellant's submissions, on 31 August 2007. If the respondents' sequence of events is accepted, the appeal against Rodney Hansen J's judgment has technically been advanced substantially out of time. However, Mr Siemer has deposed that he posted a copy of the notice of appeal to the respondents' solicitors on the same day that he filed his appeal to this Court.

The respondents apply to strike out Mr Siemer's appeal

[24] The present application came about this way. On 12 September 2007 Mr Hunt filed a memorandum asking for directions as to whether, in light of Potter J's rulings, Mr Siemer "is debarred from prosecuting the appeal". He said, "In the event that is not possible [the respondents] will apply to strike out the appeal".

[25] Wilson J thereafter minuted the file in this Court, on 18 September 2007: "Respondents should, if they so wish, apply to strike out the appeal. Any such application should be placed in the next available Miscellaneous Motions List".

[26] The respondents have now moved to strike out the appeal in its entirety, and for orders that Mr Siemer pay the respondents' costs, on three grounds:

(1) Mr Siemer is debarred from defending the proceeding which is the subject of the appeal;

(2) Mr Siemer should be debarred from bringing the appeal because of his continuing contempt; and

(3) the appeal has not been brought within the 20 working day period stipulated in r 29 of the Court of Appeal (Civil) Rules 2005.

Discussion

Debarment

[27] Mr Hunt initially argued that Mr Siemer's appeal is now debarred altogether by Potter J's ruling (above at [20]). In oral argument however he accepted (and we think correctly) that this cannot be right. First, Rodney Hansen J's ruling was delivered, and was appealed by Mr Siemer, prior to Potter J's "debarment". Potter J's ruling could hardly be retrospective and operate against an appeal which was earlier in point of time. Secondly, and relatedly, it is difficult to see how Potter J's ruling could extend to the processes of this Court, an appeal having been made here. We therefore say no more about this head of argument.

Continuing contempt

[28] As Mr Hunt rightly acknowledged, this is the real issue on the strike out application.

[29] The first issue is one of fact: is Mr Siemer still contumacious? The short answer to this is unquestionably, yes. By her judgment of 5 May 2005 (see [8] above), Ellen France J enjoined Mr Siemer from publishing in any form any information containing allegations of criminal or unethical conduct as to improper personal enrichment, or any allegations of overcharging, on the part of Mr Stiassny or his firm in relation to the conduct of the receivership of Paragon Oil Systems Limited. At [36] of her 9 July 2007 judgment Potter J noted entries on two publicly accessible websites evidencing clear breaches by Mr Siemer of these terms of the injunctions. Indeed she found the breaches to be proved to the criminal standard, that of beyond reasonable doubt.

[30] In anticipation of this hearing Mr Gregory Simms, a staff solicitor employed at McElroys Solicitors, Auckland has reviewed those websites. He has deposed that

the objectionable material has been removed from one website, but not the other. That has not been contested. So as a question of fact, the breaches complained of by Mr Stiassny and his firm continue, as at the date of this hearing.

[31] However, there is another deeply disturbing feature of this and the associated proceedings. Mr Siemer has in the past, and to this day, lashed out at judicial officers who have the burden of endeavouring to adjudicate on the various aspects of the claims which have come before our courts. Lord Reith once famously remarked, "When people feel deeply, impartiality is bias" (*Into the Wind* (1949)). Doubtless all litigants feel deeply about their cases and they can be bitterly disappointed when a ruling or decision does not go in their favour. What is inexcusable is to assert that the judge is corrupt or to make what are nothing more than wild-eyed and unsustainable allegations, simply because they lost.

[32] One example will suffice for present purposes. In his Amended Notice of Appeal to this Court in this appeal dated 30 August 2007 Mr Siemer has propounded as follows:

> Rodney Hansen J, by his legally untenable actions, has demonstrated an apparent bias, if not a willingness to deliberately bend the rules in favour of the court connected respondents. Justice must not only be done but must be seen to be done. Many of Rodney Hansen J's actions are sufficient to cause an impartial observer to wonder whether he is paid counsel for the respondents rather than an impartial arbiter.

[33] An appellant is entitled to submit to an appellate Court that a trial Judge's determinations are "legally untenable". But what is so distressing about Mr Siemer's statements are that they are of the, "If you are not for me, you are corruptly agin me" variety.

[34] How this document could have been formulated by, or escaped the attention of, Mr Siemer's solicitor (whose name is on the record) is itself a matter of concern. Officers of the court are sometimes required, where there is a proper basis for doing so, to have to make reference to and endeavour to impugn judicial actions which are said to be inappropriate, or even unlawful. They do so only after the most scrupulous consideration, and where there is (at least) some supporting evidence.

[35] Here, Rodney Hansen J had delivered a careful, fully reasoned judgment on issues relating to the pleadings and discovery and associated matters. Like so many defamation litigants, Mr Siemer has found himself in the difficulty that he wants to fight the litigation on his own terms. He wants to make very broad allegations that, essentially, Mr Stiassny is a thorough scoundrel, and he accordingly wants to conduct a broad inquiry associated therewith, rather than fight a court case on defined issues. Mr Miles QC has endeavoured to ensure that the pleadings are carefully delineated as to just what is in issue and what is not. Mr Siemer cannot expect to alter, as it were, the terms of the case by turning it into a vague general inquiry on his own terms. The plaintiffs are entitled to point to particular language used against them, to say that it is capable of being defamatory, and in due course to have the trier of fact determine whether that is so.

[36] If this appeal is to proceed to a determination, it must, and will be, on the footing that these irrelevant and intemperate allegations of judicial bias must be set to one side. In short, Mr Siemer's legal rights are the same as everybody else's. The law, not Mr Siemer's ill-concealed subjective views of the judicial officers who preside in cases in which he makes these outbursts, will determine whether he succeeds or not. These outbursts only serve to damage and deflect attention from whatever merit there might be in his case.

[37] The second issue, having determined Mr Siemer continues in his contumacious behaviour, is how the law and this Court should now regard such behaviour.

[38] One possibility is that which Mr Hunt put to us: Mr Siemer's behaviour has been, and continues to be of such a character, that we should now simply strike out his appeal.

[39] The law in this area has given courts some difficulty. Historically, the position was taken (apparently deriving from canon law) that one who is in contempt will not be heard further in the litigation – very much for his own benefit – until the contempt was purged. For instance, Lord Brougham said, "It is a general rule of all Courts, that no party shall be allowed to take active proceedings, if in contempt"

(*Curtis v Curtis* (1845) 5 Moo 252 at 256; 13 ER 487 at 489 (PC)). This was seemingly taken to be a "rule". Like most rule-based jurisprudence, however, the proposition subsequently came to be considered too broad, and it was thought that there may well be "exceptions". To take only one example, what if the contemptor wanted to apply to set aside the order, breach of which had got him into contempt in the first place? (For a discussion of the exceptions as they were thought to be see Arlidge, Eady and Smith *Contempt* (3ed 2005) at 912 et seq).

[40] More recently, senior appellate courts in the United Kingdom have taken the view that the question should be approached on the basis of a discretion to be exercised flexibly, and according to the circumstances of the case, rather than on the basis of a "rule". See, in particular, *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 46 (HL) per Lord Bridge of Harwich. As Lord Nicholls of Birkenhead said in *Polanski v Condé Nast Publications Ltd* [2005] 1 All ER 945 at [17] (HL), "A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute."

[41] In *Arab Monetary Fund v Hashim* [1997] EWCA Civ 1298 Lord Bingham of Cornhill CJ said the question is: "whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders." (See also Arlidge, Eady and Smith at 915.)

[42] We also remind ourselves – counsel did not refer to it – that s 27 of the New Zealand Bill of Rights Act 1990 may well make undue restrictions on even contumacious litigants being heard wrong in principle. In light of the course which we propose to adopt it is not necessary for us to resolve this difficult issue now. We heard no argument on it. We do note that in *Paul Magder Furs Ltd v Attorney-General for Ontario* (1991) 85 DLR (4^{th}) 694 the Ontario Court of Appeal was faced with persistent disobedience to an order to refrain from Sunday trading. The business was not permitted to be heard so long as Mr Magder remained in defiance. That Court held that the Canadian Charter of Rights and Freedoms gave no licence to break the law or defy an order of the court; indeed that Court saw it to be an abuse of

process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remained in force.

[43] Given that today there is a discretion, the question here is therefore, what are the relevant factors in the exercise of the discretion in this case?

[44] On the one hand, Mr Hunt was quite right to say that this is an appalling case of continuing contempt, made worse by the despicable and unwarranted side-show attacks on judicial officers. Further, Mr Siemer has not paid the costs he was required to pay.

[45] On the other side, Mr Siemer is involved in civil litigation in which serious claims involving large sums of money are made against him. He wishes to say, in this Court, that the holdings made by Rodney Hansen J were "untenable in law". We have not heard legal argument on those holdings, and it would be wrong to pre-empt whatever view this Court might take of them, after proper argument. As Denning LJ and Romer LJ observed in *Hadkinson v Hadkinson* [1952] P 285 (CA) it is a very strong course for a court to refuse to hear a party to a cause. It is one which can be entertained only by "grave considerations of public policy" (Denning LJ at 298), where the contempt itself impedes the course of justice, and where there is no other effective means of securing compliance.

[46] In the result, although we do not strike the appeal out, we give directions for the future conduct of it.

Time

[47] It is difficult on the material presently in Court to determine just how far (if at all) Mr Siemer was out of time on the lodgement of his appeal. Part of the difficulty is that his command of the rules of procedure is imperfect and some steps may not have been properly taken. We are not disposed to strike the appeal out on this ground.

Directions

[48] Rule 5 of the Court of Appeal (Civil) Rules 2005 provides that this Court may give any directions that seem necessary for the just and expeditious resolution of any matter that arises in a proceeding. Rule 48 provides that this Court has all the powers and duties of the court of first instance concerning procedure, including the amendment of pleadings.

[49] We give the following directions:

(a) If it is necessary, we give leave now, for the late filing of the appeal.

(b) Mr Siemer must, within 14 days of the date of this judgment, submit and serve the following fresh documents: a notice of appeal containing full and proper points on appeal, the case on appeal, and his submissions. Those documents must not include any objectionable statements of the character to which we have already referred, relating to judicial officers. This does not preclude Mr Siemer from arguing that, for expressed reasons, the holdings of Rodney Hansen J were wrong in law; it does preclude him from making the sort of gratuitous observations to which we have already referred.

(c) The respondents will have 14 days to file reply submissions.

(d) There is correspondence on file from a case officer in this Court that security for costs has been fixed by the Registrar at $4,740, and paid. No more need be said on that issue.

(e) A copy of this judgment is to be forwarded by the Registrar to the solicitor who is named on Mr Siemer's documents as his solicitor. That solicitor is to confirm by memorandum within 10 days whether he was, and still is, acting for Mr Siemer in this matter. The Court reserves its position as to what, if any steps it might consider to be

appropriate thereafter. There may also be an issue as to whether Mr Siemer can appear in person on the appeal, if he has counsel. This will be a matter for the panel hearing the case, in due course.

(f) As soon as the fresh submissions have been filed, the appeal is to be set down for hearing.

(g) Any further documents – beyond those we have already enumerated – which are attempted to be filed by Mr Siemer in this proceeding are to be referred by the Registrar to the presiding Judge on this panel for scrutiny. If they contain scandalous material against judicial officers they will be returned to Mr Siemer and not placed on the Court file.

(h) This Court reserves its ability to strike out the appeal on application by the respondents or of its own motion if Mr Siemer's conduct exhibits contempt for this Court's processes.

[50] The hearing of any application by the respondents in the High Court to have judgment entered against Mr Siemer will need to be deferred until this appeal has been disposed of.

[51] There will be no order for costs.

Solicitors:
Dennis J Gates, Whangaparaoa for Appellant
McElroys, Auckland for Respondents