IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-001808

BETWEEN	KORDA MENTHA FORMERLY FERRIER HODGSON First Plaintiff
AND	MICHAEL PETER STIASSNY Second Plaintiff
AND	VINCENT ROSS SIEMER First Defendant
AND	PARAGON SERVICES LIMITED Second Defendant
AND	OGGI ADVERTISING LIMITED Third Defendant
AND	YAHOO! INC Fourth Defendant

Hearing: 8 October 2008

Appearances: J G Miles QC and P Hunt for Plaintiffs
No appearance for Defendants

Judgment: 23 December 2008

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
23 December 2008 at 4.30 p.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
McElroys, PO Box 835, Auckland
Copy to:
J G Miles QC, PO Box 4338, Auckland

[1] In this proceeding, commenced on 11 April 2005 the plaintiffs seek damages for defamation and breach of contract. It has two features which make it most remarkable. The first is its interlocutory history which culminated in an order made by Potter J on 9 July 2007 debarring the first defendant from defending the proceeding. As a consequence of that order, the substantive hearing proceeded before me on 8 October 2008 by way of formal proof and Mr Siemer did not appear.

[2] The second feature of the case is the seriousness of the allegations made by Mr Siemer against the plaintiffs, but in particular, Mr Stiassny and the fact that Mr Siemer has persisted in making them. He has defied injunctions obtained by the plaintiffs for the purpose of preventing the ongoing publication of the allegations, a course that has resulted in his imprisonment for contempt.

[3] These two aspects of the case need to be explained and understood in order to put the plaintiffs' claims for general damages of $1,250,000, and aggravated damages of $300,000 and punitive damages of $150,000 into context.

Parties

[4] The case advanced by the plaintiffs at the hearing concerned only Mr Siemer, the first defendant. The second defendant is in liquidation. An agreement has been entered into between the plaintiff and the third defendant, Oggi Advertising Ltd. Mr Miles indicated that the claim against Yahoo! Inc would be discontinued.

Background

[5] The case has its origins in a dispute between Mr Siemer and other shareholders in a company called Paragon Oil Systems Ltd. Mr Siemer considered that the other shareholders had stolen intellectual property and other assets belonging to the company. He commenced a proceeding in the High Court in which he sought relief from oppression by the majority shareholders. He sought an interim injunction and the appointment of a receiver.

[6] Mr Stiassny is a well known professional person, an accountant practising as a principal in the first plaintiff firm, and a specialist in receiverships and liquidations. Following negotiation between the parties, Mr Stiassny was appointed as the receiver of Paragon Oil Systems Ltd by consent. The parties agreed on the scope of the receivership which Mr Stiassny described, in an affidavit sworn on 20 April 2005, as being not of a conventional kind, and something of a "hybrid arrangement" pursuant to which Mr Siemer and the receiver were co-signatories on the company's bank account. As he put it:

> It was to be a caretaker administration because the interests of the company had been stalled due to the disputes which had arisen between the shareholders. They had reached an impasse.

[7] Mr Stiassny also explained that solvency was not an issue in the proceedings that had led to his appointment as a receiver, nor was it an issue in the receivership. Consequently, he had not been required to take a view or advise on solvency, and had not done so. Mr Siemer was of a different view and concluded that a report filed by the receiver in the High Court dated 12 March 2001 had wrongly described the company as insolvent.

[8] In July 2001 the substantive proceedings in the High Court were resolved in favour of Mr Siemer and the receivership of the company was terminated. However, a dispute had arisen during the receivership in relation to costs charged by Ferrier Hodgson (as the first plaintiff was then called). That dispute continued after the receivership had concluded. There was a negotiation between the parties and the firm took the view that it was more economic to compromise and achieve a settlement. The parties entered into a settlement agreement on 19 April 2005 documented in the form of a letter on Ferrier Hodgson letterhead and signed by Mr Alan Garrett (an employee of the first plaintiff) on behalf of Mr Stiassny and the firm, by Mr Siemer personally, and also by Mr Siemer on behalf of Paragon Oil Systems Ltd. The provisions of the agreement ("the settlement agreement"), under the heading "Paragon Oil Systems Ltd" were as follows:

> We have discussed a settlement of all issues between Ferrier Hodgson and Paragon, such that:

1. Ferrier Hodgson & Co will release all company records and drawings (which are the only company property remaining in our hands) to you.

2. Paragon will not comment to any party on any matter arising in or from the receivership including the fact of this settlement.

3. Ferrier Hodgson & Co. will not comment to any parties in relation to the receivership except as required by the Court or otherwise by law.

4. You will settle any obligation of the Company to Mr Clark such that Mr Clark will have no claim against Ferrier Hodgson & Co, and also settle the invoices attached such that the creditors will have no claim against Ferrier Hodgson & Co.

5. Neither Ferrier Hodgson & Co nor Paragon will have any further claim against each other in relation to any matter arising from the receivership whether known at this time or unknown.

References to Ferrier Hodgson & Co, and to Paragon, include references to their respective directors, employees, servants or agents. To give effect to this settlement, would you kindly execute the attached copy of this letter and return it to us.

[9] As can be seen from the paragraphs numbered 2 and 3, the parties exchanged similar obligations with respect to subsequent comment on matters arising from the receivership. Mr Stiassny explained that this had been an important part of the settlement for him as he had concerns about Mr Siemer's ability to comment on the receivership in a rational way. As a result of the agreement entered into, Ferrier Hodgson wrote off fees that had been charged in the sum of $20,281 (including disbursements and GST).

[10] Prior to the agreement being entered into, one of Mr Siemer's complaints had concerned over-charging by Ferrier Hodgson of a sum of $10,000 in February 2001. The sum was in fact billed to Paragon by mistake. Ferrier Hodgson had been working on another file names, Paramount, and time spent on that file had been mistakenly loaded to the Paragon file. Upon discovering the error, the time was credited back, and an apology was issued to Paragon for the error.

[11] Notwithstanding the settlement agreement, Mr Siemer continued to make complaints regarding Ferrier Hodgson, Mr Stiassny and the conduct of the Paragon receivership. The complaints included a letter to the Institute of Chartered Accounts of New Zealand dated 10 April 2002. In September 2004, Mr Siemer complained to

the New Zealand Shareholders' Association, copying his complaint to several parties at the Auckland Energy Consumers Trust, a shareholder of Vector Ltd, of which Mr Stiassny was the chairman. This was followed, on 26 October 2004 by a complaint to the Serious Fraud office. That complaint was copied to the Institute of Chartered Accountants, the Institute of Directors and the Minister of Justice.

[12] On 26 January 2005 there was a further complaint to the Institute of Chartered Accountants of New Zealand and on 8 April 2005 a series of complaints was set out on a website, www.stiassny.org. The existence of the web site was announced on a large billboard, erected next to a billboard advertising Vector Limited. The billboard, in addition to referring to the website, contained a large photograph of Mr Stiassny, and the words "Michael Stiassny A true story".

[13] Ferrier Hodgson responded to Mr Siemer's 10 April 2002 complaint. In July 2002 the Professional Conduct Committee of the Institute of Chartered Accountants resolved that no breach of the Code of Ethics could be identified and that the complaint would not be upheld. Mr Siemer complained to the Institute about that decision. This caused the Institute to appoint Mr Gary Turkington, barrister of Wellington to review the complaint and he duly conducted a review in accordance with the Institute's rules. Such a review concerns the procedures followed by the Professional Conduct Committee in the handling of an investigation and does not extend to the merits of the case or the decision reached. Mr Turkington concluded that the professional Conduct Committee had acted in a way that was procedurally correct in not proceeding with the complaint.

[14] It was the billboard and website which gave rise to the present proceeding. On becoming aware of their existence, and being of the view that the contents of the website were defamatory the plaintiffs commenced the present proceeding. An interim injunction was sought *ex parte*.

[15] Winkelmann J granted the application 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. …

[16] On 28 April 2005 Ellen France J heard an application made by Mr Siemer to rescind the injunction. In her judgment of 5 May 2005 she granted the application, but also granted a new interim injunction directed against the first and second defendants, directing that they were not to:

> a) 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 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; and
>
> b) … reinstate the billboard.

[17] In the course of her judgment Ellen France J expressed the view that the case before her was in an exceptional category where the Court could say that there was no reasonable possibility of a defence of truth succeeding in relation to any allegations of criminal or unethical conduct or as to improper personal enrichment.

[18] By the time the application was argued before Ellen France J, the pleadings which had originally alleged defamation had been altered so as to add a claim based upon the settlement agreement. Ellen France J's judgment was the subject of an appeal to the Court of Appeal heard on 2 November 2005. On 13 December, the Court dismissed the appeal relying on the contract cause of action and indicating in the circumstances that it did not need to reach the issue of whether the cause of action in defamation would have justified the grant of an interlocutory injunction.

[19] In the meantime on 3 May 2005 the plaintiffs filed an *ex parte* application for Mr Siemer's committal, claiming breach by the defendants of the orders that had

been made by Winkelmann J and Ellen France J. The application was heard by Potter J on 26 and 27 July and 19 and 20 December 2005. In her judgment delivered on 16 March 2006, Potter J held that the injunctions had been breached, and made a declaration that the first and second defendants were in contempt of Court. She imposed a fine of $15,000 on the first and second defendants jointly and severally, directing that it be paid within 30 days of the date of the judgment. She maintained the injunction that had been granted by Ellen France J on 5 May 2005 and directed that the defendants pay the costs of the plaintiffs in respect of the committal proceeding.

[20] The plaintiffs had also applied 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 the proceeding. Potter J directed that those applications should lie in Court with liberty reserved to the plaintiffs to apply for such relief, in the event of evidence becoming available that the injunction had again been breached. The judgment was upheld in the Court of Appeal in a judgment delivered on 4 April 2007.

[21] Subsequent to Ellen France J's judgment, Mr Siemer wrote a further letter of complaint to the Professional Conduct Committee of the Institute of Chartered Accountants on 22 August 2005. The letter again referred to alleged professional misconduct by Mr Stiassny. It complained that he had falsely labelled Paragon as insolvent and described his conduct as "disgraceful". That letter was forwarded by e-mail to several Members of Parliament, several councillors at Auckland City and a member of staff at Metrowater, a council controlled organisation owned by Auckland City of which Mr Stiassny was then the chairman.

[22] Next, a document headed "Cliff Note version of Fardell's legal misrepresentation of Vince and Jane Siemer" was passed by Mr Siemer to defence counsel in a trial for fraud being prosecuted by Robert Fardell QC. Mr Fardell was also subject to criticism by Mr Siemer, having acted as his legal advisor during the receivership of Paragon Oil Systems Ltd. While the main burden of this document was to criticise Mr Fardell, it also contained references to Mr Stiassny including:

a) "The receiver is stealing Paragon (and Siemer's investment) blind".

b) "Stiassny's handing of Paragon's receivership – Siemer's claiming total incompetence and fee gouging".

[23] Then on 24 November 2005, Mr Siemer uploaded a page to the website (www.stiassny.org) which was headed "Being Michael Stiassny". Among comments on this page were:

> (a) He [Mr Stiassny] is notorious for refusing inquiries into his professional conduct and outrageous fee charging.
>
> (b) In a number of cases, Paragon Oil Systems Ltd and New Zealand Stevedoring being just two I am closely aware, Fardell and Stiassny worked in tandem to plunder assets and put hard-working kiwis out of work and out of pocket.
>
> (c) **Conflicts of interest do not get any clearer than this** but apparently this is the least Fardell could do for Stiassny after Stiassny attempted to illegally spin off $5,000 per month legal fees from Paragon to Fardell. (Original emphasis.)
>
> (d) Paragon is a case study of how Stiassny makes gross "errors" and "oversights" repeatedly – the only consistent thread in his errors is that they favour him and are detrimental to the companies and shareholders of the companies he plunders.

[24] On 26 April 2007, the plaintiffs made a further application for an order for committal of the first defendant and associated orders pursuant to the leave that had been granted by Potter J in her judgment of 16 March 2006. The application was based on allegations that the first defendant had further breached the terms of the interim injunction of 5 May 2005, and had failed to pay the costs ordered by the Court and the Court of Appeal. No notice of opposition was filed, nor did the defendants file any affidavits. Mr Gates entered an appearance for the second defendant, Paragon Services Ltd, noting his belief that the company was in liquidation and sought and was granted leave to withdraw. Mr Siemer had earlier advised the Registry that he would be overseas until 13 July 2007, and unavailable for the fixture allocated for 4 July. He made no formal application for an adjournment and Potter J proceeded in his absence being satisfied that the application had been properly served.

[25] This time, the plaintiffs relied on material that was not only on the website, www.stiassny,org, but also on a further website established by Mr Siemer with the address, www.kiwisfirst.com. Having reviewed the evidence and noted the contents of the websites, Potter J held that there had been clear breaches by Mr Siemer of the injunction. It was apparent from the evidence also that Mr Siemer freely admitted that he was breaching the injunction, deliberately and wilfully, and proposed to continue to do so. The Judge held Mr Siemer in contempt of Court in relation to the further breaches of the injunction. She granted leave to the plaintiffs to issue a writ of arrest to bring Mr Siemer before the Court so that the consequences of his contempt could be determined. She made a further order pursuant to rule 258 of the High Court Rules debarring Mr Siemer from defending the proceeding until further order of the Court. She directed that Mr Siemer pay the plaintiffs' costs on the application for committal and associated orders on a solicitor/client basis.

[26] On 12 July 2007 the Supreme Court dismissed an application made by Mr Siemer for leave to appeal against the Court of Appeal decision upholding Potter J's judgment of 16 March 2006.

[27] Mr Siemer was brought before Potter J on 13 July. She noted that Mr Siemer had been responsible for wilful and deliberate breaches of the injunction and had admitted doing so. In fact, he had "flaunted his offending conduct to the plaintiffs and their advisors. He has challenged the plaintiffs and the Court in relation to the pursuit of the substantive proceeding. He has appeared at the offices of Ferrier Hodgson to disseminate material which he knew to be in breach of the injunction. He has developed a new website which along with the previous website has become a vehicle for further attacks against Mr Stiassny".

[28] It was recorded that Mr Siemer had paid the fine of $15,000 that the Court had imposed, but he had not paid costs awarded by the Court which exceeded $200,000. Potter J imposed a term of imprisonment of six weeks.

[29] Subsequently, a proceeding was commenced by the Solicitor-General. It was alleged that subsequent to Potter J's orders of 13 July 2007, Mr Siemer had continued to breach the interim injunction granted by Ellen France J by publishing

statements on the websites to which the public had access. The Solicitor-General's proceeding was heard by a Full Court (Chisholm and Gendall JJ) on 16 and 17 June 2008. The Court delivered its judgment on 8 July 2008. Among the Court's conclusions were a determination (at [86]) that the Crown had proved beyond reasonable doubt that material remaining on the websites after Mr Siemer had been sent to prison by Potter J contravened the injunction granted by Ellen France J. They were new publications or republications of the offending material. Further, Mr Siemer's involvement in the publications since he was sent to prison constituted a "serious and deliberate attempt to thwart and impede the proper administration of justice". It was proved beyond reasonable doubt that his contempt of Court had continued since his committal. The Court directed that a writ of arrest be issued to bring Mr Siemer before the High Court at Auckland at 10.00 a.m. on 1 August 2008. At that time, Mr Siemer would be committed to prison for a period of six months. However, that order was to lie in Court pending further order of the Court on 1 August 2008. The intent was to allow Mr Siemer a final opportunity to arrange for the removal of the offending material from the website and provide the Court with a suitable undertaking that it would not be replaced on any websites in contravention of the Court order.

[30] Mr Siemer did neither. I heard evidence from Mr Garrett that, as at 8.30 a.m. on the morning of the hearing (8 October 2008) the websites www.stiassny.org and www.kiwisfirst.co.nz remained in place, containing the material defamatory of Mr Stiassny.

[31] It is against the background of the facts that I have recited that Mr Miles QC submits for the plaintiffs that the case is unprecedented in terms of the length and severity of the campaign that Mr Siemer has mounted against the plaintiffs, and the extent to which he has defied the rule of law.

Amendments to the statement of claim

[32] The hearing before me proceeded on the basis of a fourth amended statement of claim. It was filed on Thursday 2 October 2008 and was the subject of an oral application for leave at the outset of the hearing on 8 October. Mr Miles summarised

the differences between the fourth amended statement of claim and the third amended statement of claim, dated Friday 17 February 2006 which was the statement of claim current when Potter J made the order debarring the defendant from defending the proceeding, on 9 July 2007.

[33] The amendments were in a number of categories. First, new paragraphs were inserted (paragraphs 1.24 to para 1.37) which updated the pleadings as to the chronology of Court proceedings and actions taken by the defendant in relation to the websites www.kiwisfirst.com and www.stiassny.org. Other matters covered were issues that had been canvassed in evidence before Potter J prior to her judgment of 9 July. It was apparent that the pleadings simply added allegations that were based on the record covered in various Court decisions including (paragraph 1.32), Mr Siemer's e-mail to Mr Garrett, the second defendant's manager, in which he stated "I hope you don't mind that I ignored the injunction".

[34] Similarly, the plaintiffs added particulars of the alleged defamatory remarks in paragraphs 3.1(12) and 3.1(13). Once again, the added particulars referred to materials that had already been canvassed in previous Court decisions albeit in the context of the contempt proceedings. A further pleading was added at 3.11(6) in respect of the claim for aggravated and punitive damages which referred to the "first defendant's repeated, intentional and continuing breaching of the injunction in contempt of this Honourable Court".

[35] I formed the view that it would be in the interests of justice to allow the plaintiffs to proceed on the basis of the amended pleadings. The matters relied on were all within Mr Siemer's knowledge, and indeed, revolved around actions quite deliberately taken by him. Any prejudice to him of allowing the amendments in his absence, must be off-set by the countervailing consideration that the plaintiffs were entitled to put their full case to the Court and rely on the further claims arising since the statement of claim was last amended.

[36] I do not consider that it would be just if, because of the procedural order debarring the first defendant from defending, the plaintiffs could not update their claim to reflect ongoing conduct for which the defendant was admittedly responsible.

Defamation

[37] The amended statement of claim sets out extensively by way of extracts from the various websites and correspondence referred to, the defamatory words on which the plaintiff's rely. They say that the various words referred to meant and were understood to mean that:

a) The second plaintiff, in his professional capacity as receiver of Paragon Oil Systems Ltd, acted criminally or that there were good grounds for believing that he acted criminally.

b) That his conduct as receiver of Paragon Oil Systems Ltd was significantly more scandalous than that of the Enron accountants or financial officers.

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

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

[38] Mr Miles summarised the allegations as being that Mr Stiassny had falsely labelled Paragon insolvent and lied to the Court about it; overcharged for accounting services; carried out dishonest and deceptive accounting practices; lied to the Professional Conduct Committee of the Institute of Chartered Accountants; amassed a huge fortune through acting dishonestly; stolen Paragon's technology; been guilty of serious criminal conduct; committed perjury; acted in a manner worse than the criminals of the Enron scandal; was to be compared to Saddam Hussein. I accept that Mr Miles' summary is accurate.

[39] Insofar as the first plaintiff is concerned, the plaintiffs assert that the frequent references to the first plaintiff in the documents that were relied in respect of Mr Stiassny's claim meant and were understood to mean that the first plaintiff itself had acted criminally or condoned criminal activity by the second plaintiff, in that it

allowed or condoned conduct significantly more scandalous than that of the Enron accountants or financial officers, was itself grossly unprofessional and unethical, encouraged improper personal enrichment on the part of the second plaintiff and was a party to the second plaintiff's conduct as receiver of Paragon Oil Systems Ltd.

[40] I am satisfied that the words relied on by the plaintiffs had the meanings and were meant to have the meanings alleged in the amended statement of claim, and were defamatory. There can also be no doubt that Mr Siemer was responsible for the publications of the words as alleged. Potter J gave detailed reasons in her judgment of 16 March for determining why Mr Siemer had been responsible for publishing the various materials that she held had breached Ellen France J's injunction and reached those determinations on the basis of application of the standard of proof beyond reasonable doubt. The Full Court reached a similar view with respect to materials subsequently published in its decision of 8 July 2008. It too applied the standard of beyond reasonable doubt.

[41] I reach these same conclusions on the basis of the evidence that I have heard from Mr Stiassny and Mr Garrett (including the affidavits filed by them earlier in the proceedings, to which they made reference in their evidence). It can appropriately be observed that, although he had initially tried to deny responsibility for some of the material before Potter J his stance subsequently altered so that with respect to the material published subsequently, as Mr Miles put it, he proudly owned the defamatory comments and openly persisted in them.

[42] It is apparent that Mr Siemer deliberately calculated that his defamatory statements would bring Mr Stiassny and his firm into disrepute and intended that to be the consequence of his defamatory statements.

Damages

[43] In his evidence, Mr Stiassny said that Mr Siemer's allegations had been particularly hurtful to him, to Ferrier Hodgson and his family.

[44] As to the personal affect on him, his integrity had been repeatedly and viciously attacked in front of his business partners, staff, and family. He had been defamed to professional bodies to which he belonged, including the Institute of Chartered Accountants of New Zealand and the Institute of Directors.

[45] Although he was not in a position to assess any particular loss that the firm had sustained, he considered it possible that some potential engagements in the early days had been lost due to Mr Siemer's comments. Legal costs had been incurred in excess of $1 million and although costs awards had been made against Mr Siemer, none of them had been met. In any event, the costs awarded would not cover as much as one-third of the actual costs incurred.

[46] The opportunity cost in time spent within the firm on the present litigation was in excess of $400,000 with the attention of senior staff and partners being obliged to focus on monitoring Mr Siemer's publications, compiling evidence, attending hearings and managing the litigation in consultation with counsel.

[47] As part of the relevant background Mr Stiassny referred to the fact that he had been obliged to serve trespass notices on Mr Siemer to protect his home and family. He had been obliged to explain to his children that Mr Siemer's published comments about him were not true and reassure them concerning their physical well-being. There had been instances where his children had suffered harassment by their peers and they had been intimidated by protests conducted by Mr Siemer outside his home.

[48] He complained also that some of the language used by Mr Siemer had apparently been calculated to be offensive to him and caused distress. Examples that he gave included ridicule of his name. Mr Siemer had distributed stickers saying "There is an 'ass' in our website www.stiassny.org". Also there had been references to his Jewish religion and to the persecution of the Jews. Thus, in his letter to the New Zealand Institute of Chartered Accountants of 14 February 2005 Mr Siemer had written:

> News Flash! Michael Stiassny tells Professional Conduct Committee that sky is yellow… again, the sky is yellow.

[49] Further, on www.stiassny.org, on the "interviews page" Mr Siemer had referred to him as a man with "exceptional sway within the small Jewish community" and had commented that "when the judiciary determines that a ruthless and powerful man's reputation is so priceless…the Gestapo cannot be far behind…people like Adolph[sic] Hitler…".

[50] On a page headed "the Smartest Guy in the Room", Mr Siemer had stated:

> Stiassny will likely have taken his family and ill-gotten gains to exile in Israel or Switzerland.

[51] On the welcome page, Mr Siemer had referred to Mr Stiassny in the phrase:

> …what a good Jew he is (no joke).

[52] In another letter dated 26 September 2005 to the New Zealand Institute of Chartered Accountants there had been a comparison drawn to a merchant who puts his candy on the top shelf and then offered children coming into the store a hand up to retrieve it. When doing so, "his hand slips and he touches the child inappropriately". It was said that the defence based on hand slipping would lose all value when several different children had been abused in the same manner. Mr Siemer wrote that the Institute was "unquestionably aware of a number of times where Stiassny has been cited for his 'hand slipping'". Mr Stiassny also referred to implications in some of the material that he bore some responsibility for the death of his friend, Robert Fardell QC.

[53] In assessing the level of damages, Mr Miles submitted that the Court should take into account five considerations. First, the nature of the defamatory statements. The more serious they are, the more damage is done. Secondly, the extent of publication. The wider the publication, again the more damage is done. Thirdly, injury to the plaintiff, being how the plaintiff has reacted. Fourth, injury to reputation, being how others have reacted and finally, the defendant's behaviour.

[54] Addressing each of these issues in turn there is no doubt that the defamatory words are in the most serious category, alleging the relating to dishonesty of a professional person, and criminal conduct. The statements have been ongoing and

escalating, comparing Mr Stiassny to the criminals involved in the Enron scandal, and even to Saddam Hussein. As Mr Miles submitted, they strike at the heart of Mr Stiassny's personal and professional reputation, and Ferrier Hodgson's business reputation.

[55] As to the extent of publication, I am satisfied on the evidence that publication has been on a very wide basis. A large billboard displayed in a prominent position highlighted the existence of the website www.stiassny.org. There were letters to the Institute of Chartered Accountants, the New Zealand Shareholders', Association, the Auckland Energy Consumer Trust, The Serious Fraud Office, The Institute of Directors, the Minister of Justice, and several media organisations such as the National Business Review and the Independent. Mr Siemer was responsible for notices and stickers distributed in Auckland, including at and near the offices of Ferrier Hodgson in prominent buildings frequented by members of the commercial community, including Tower Centre, Vero Centre and the High Court. There had been interviews with media organisations such as the Sunday Star Times. Throughout, the websites, www.stiassny.org and www.kiwisfirst.com have been maintained. The first, active since 14 March 2005 had brief periods of down time in the period 12 April 2005 to 3 May 2005 and 5 May 2005 to 19 May 2005. However, it has been active since and remains active. It states that it has had at least 50,000 visitors.

[56] The site www.kiwisfirst.com has to the plaintiffs' knowledge been active since April 2007 and remained active as at the date of hearing of the present matter. When a Google search of Mr Stiassny's name is carried out, those two websites are the top two results.

[57] In spite of proceedings being commenced and an injunction being issued, Mr Siemer has repeated, widened and escalated the defamatory statements. He has done so in defiance of the Court orders. Notwithstanding the orders made for his committal to prison, the publications continued. Mr Siemer's conduct has brought about repetition of his defamatory statements in the media.

[58] I have already referred to the severe affect on Mr Stiassny and his family. I accept that the affect has been very significant and part of that must be attributable to the fact that because much of the material is on two websites which Mr Siemer refuses to remove, the effect is ongoing.

[59] Furthermore, in response to Mr Siemer's allegations, media organisations have responded with articles of their own, including the National Business Review and the Sunday Star Times. Other websites have also repeated Mr Siemer's allegations (www.scoopit.co.nz, www.kiwiblog.co.nz and www.indymedia.org.nz) . I am also satisfied on the evidence that staff members at Ferrier Hodgson have had to endure reactions from families and contacts, and I have already referred to comments made to Mr Stiassny's children by their peers.

[60] Mr Siemer has acted deliberately, vindictively, and has added to his defamatory statements as time has gone on. He has courted publicity and has disregarded Court orders requiring him to cease. It is difficult to imagine what more he could have done to ensure that his defamatory remarks hit home or were brought to the attention of a wider public.

[61] Section 28 of the Defamation Act provides that:

> In any proceedings for defamation, punitive damages may be awarded against the defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

[62] In *Television New Zealand v Quinn* [1996] 3 NZLR 24 Lord Cooke referred to that section at 36, stating that its contents were little different from the former law. He also said that the ordinary practice, in both New Zealand and England, was to direct a global award, even if the jury were satisfied that "an added punitive element should be reflected in it". That practice was thought to militate against impermissible doubling up in calculating awards, but one consequence of it was that it was not possible to conclude with certainty how often New Zealand juries had awarded something for punitive damages.

[63] There can be no doubt that this is a case where an award of damage should properly include an element of a punitive nature. It would be difficult to imagine a

defendant more determined to persist in his defamation. His persistence has involved ignoring injunctions, and the various other steps that have been described by which the plaintiffs have tried to assert their rights. I am in no doubt that this is a case where punitive damages will appropriately form part of the award.

[64] In *Television New Zealand v Quinn*, McKay J said at 45:

> Comparisons with awards in other countries are of limited value. I believe the best guide is to apply the experience of other verdicts in other defamation cases to arrive at what appears to be the appropriate level in the particular case, and to recognise that a reasonable jury may properly go some distance above or below that figure. I do not suggest any detailed comparison of one award with another, as I believe that would be unhelpful. What is called for is rather a judgment of the particular case in the light of the overall experience. The relatively small number of cases that go to trial in New Zealand makes the task more difficult… .

[65] In the present case, because of the allegations painting the plaintiffs as dishonest to an extreme and even criminal degree, Mr Miles submitted that the best comparisons to draw were with the awards made in *Quinn* and *Columbus and Another v Independent News Auckland Ltd* (HC AK CP600./98, 7 April 2000, Anderson J).

[66] In *Quinn*, the defamatory allegations were that the plaintiff had illegally sold drugs for doping racehorses and was involved in financial irregularities at the Auckland Trotting Club. The plaintiff was the President of the Trotting Club. Two television programmes had been aired by Television New Zealand. The theme of the television programmes was to allege that he had been involved in the unlawful distribution of drugs used to enhance the performance of racehorses. To those allegations, the second programme added allegations of excessive expenditure on a grandstand, the disappearance of chattels, and sale of land at an undervalue. The jury awarded damages of $400,000 for the first, and $1.1 million for the second. The defendant applied for an order setting aside the judgment on the grounds, amongst other things, that the damages were excessive. The Judge rejected the allegations in respect of the first award, but quashed the second award and ordered a new trial on the question of damages arising from the second programme. On appeal, the first award was upheld, but so was the Judge's decision setting aside the award in respect of the second programme.

[67] At 38, Lord Cooke said that the jury were entitled to regard each of the programmes "as a bad piece of defamation, most injurious to the plaintiff's reputation and grievously wounding to his feelings, although there was no evidence of financial loss". He also thought that there was room for a substantial element of punitive ingredients in each award. However, while prepared to accept the first award in the sum of $400,000 he thought that the second award was too high. The allegations in the second programme were no more serious than in the first, and while some greater punitive element might have been called for in the case of the second award to mark the vindictiveness of the defendant's conduct in widening the defamation in the face of the complaint about the first programme, an award of $500,000 would have been the upper limit of what was reasonable. Although McKay and McGechan JJ wrote separately, they agreed with the conclusions reached by Lord Cooke. Richardson J agreed with the other Judges, and Gault J agreed with Lord Cooke.

[68] In *Columbus and Another v Independent News Auckland Ltd* (HC AK CP600/98, April 2000, Anderson J) Mr Columbus was awarded a total sum of $675,000. The defendant moved for an order for a new trial as to damages. In analysing the jury's award Anderson J postulated that the jury could have included in its award the sum of $175,000 compensation for economic loss, with the balance of $500,000 to cover general and aggravated damages.

[69] The defamatory allegations in *Columbus* were that the plaintiff, who had been prominent in the popular music industry of New Zealand for about 40 years at the time, had been unprofessional and greedy in his dealings with the Auckland Rugby Union in respect of an event which he had arranged and at which he had performed, providing pre-match entertainment on the occasion of a rugby test between the All Blacks and the Springboks. The defamatory article had been published on the front page of Truth, and also used in the billboard advertising for that edition.

[70] Mr Miles maintained that the present case was more serious than either *Quinn* or *Columbus* having regard to the nature and extent of the defamatory publications and the defendant's behaviour. In the case of Mr Columbus, the

allegation was simply that he had over charged on one occasion. It was said of Mr Quinn that he had been engaged in illegal drug and financial transactions. Mr Siemer submitted that the allegations against Mr Stiassny were more serious, accusing him of dishonesty, criminal conduct and perjury. Further, in *Columbus* there was a single article in the newspaper and billboards. In *Quinn* there were two national television broadcasts. Mr Siemer's campaign had, however, been more extensive and persistent with the defamatory remarks published widely and repeatedly using a number of different means which had drawn attention to, and reinforced each other including precipitating media attention. The publications were ongoing at the time of trial.

[71] In *Columbus*, it had been treated as an aggravating factor that the publications had been undertaken with a mercenary motive. In *Quinn*, the defendant had broadcast a second programme. On the other hand, Mr Siemer's behaviour had been worse. His attacks had widened and escalated and the attacks had taken place over a very long time.

[72] On this basis, Mr Miles submitted that a higher award of damages was appropriate than had been granted in either *Columbus* or *Quinn*. Further, he submitted that given Mr Siemer's persistence up to date in the face of the orders of the Court, it was likely that he would not comply with any permanent injunction and his campaign would continue. He submitted that the Court must compensate for the possible lack of protection afforded to the plaintiffs by any injunction, by making a significant award of damages.

[73] The plaintiff called evidence from Mr Garrett concerning the present day value of the awards made in *Quinn* and *Columbus*. *Quinn* was decided in 1996. The award of $400,000 that was upheld in the Court of Appeal would be worth $523,000 in 2008, having regard to increases in the CPI over the relevant period. I note here that, when the matter returned to the High Court from the Court of Appeal, the parties agreed that the trial Judge, Anderson J, should decide the level of damages applicable in respect of the second programme. In a decision that he delivered on 29 November 1996, *Quinn v Television New Zealand* (HC AK CP1098/90, 29 November 1996) Anderson J awarded $250,000, resulting in a total award for the

two programmes of $650,000. By my calculation (this figure was not given in evidence by Mr Garrett) the 2008 value of an award of $650,000 would be $774,875.

[74] The notional *Columbus* award of $500,000 (excluding established economic loss) would equate to $625,000 in 2008. Having regard to what he submitted was the more serious nature of the defamation in the present case, Mr Miles submitted that an award in the vicinity of $1.2 million would not be inappropriate.

[75] Of the two cases to which Mr Miles referred, for the purposes of comparison, *Quinn* is probably the most useful, although as McKay J held in *Quinn*, the different circumstances that will apply in each case mean that a detailed comparison of one award with another is not likely to be a fruitful exercise. Although Mr Miles submitted that the nature of the defamatory allegations was more serious in the present case than in *Quinn*, I do not consider that the difference is as significant as Mr Miles contended it was. In both cases, there were allegations of illegal acts and in both cases the defamatory comments were repeated. What does set this case apart is the conduct of the defendant in repeating and broadening his attack on the plaintiff, time and time again, and in maintaining down to the hearing date the websites containing the defamatory material.

[76] Against those considerations one must balance the fact that in *Quinn* there was a television audience estimated on the evidence at about 700,000 (see the judgment of McKay J at 44). McKay J held at 45 that it was necessary to take into account, in the case of defamatory remarks on television "the greater reach and impact of television" as opposed to the print media. Counter-balancing that factor again is the fact that a television programme goes to air generally on one occasion and is then left to memory. Where the internet is used to publish defamatory statements, the material may remain present for many years. The present facts offer an illustration of that and indeed, there can be no guarantee as a result of this judgment that the position will alter. Notwithstanding the last point, it must be wrong in principle for the Court to award a sum of damages anticipating a future breach. The damages that I will award will apply down to the date of the judgment; if publication continues after that point, it will need to be the subject of a further claim.

[77] Unlike some cases (*Columbus* being one) the present facts do not justify any conclusion that the defendant has calculated to profit from his conduct. Rather, his intent appears to have been to damage Mr Stiassny's reputation because of perceived misconduct in the receivership of Paragon (allegedly labelling it as "insolvent"), overcharging and for retention of documents relevant to the company's intellectual property after the receivership ended. While there is no substance in the allegations that Mr Siemer makes, the case lacks any element of a defendant calculating to make a profit. On the other hand, the defendant's conduct has aggravating features which make it truly exceptional.

[78] In addition to the matters already mentioned, it must be taken into account that the defamatory comments have been accompanied in some cases by clear instances of vile racist abuse.

[79] Another consideration I have born in mind is the fact that Mr Siemer has already been the subject of punitive action in the context of the contempt proceedings dealt with by Potter J and by the Full Court. Although those Courts have not acted to punish the defamatory remarks *per se* Mr Siemer has in effect been indirectly punished for repetition of the defamatory remarks. I have concluded, in the unusual circumstances of this case, that any element of the award for exemplary damages (which are after all designed to punish, and not to compensate) should be reduced to some extent on account of the decisions in the contempt proceedings.

[80] Weighing these factors as best I can, I have decided that Mr Stiassny should be awarded a sum of $825,000. Although as Mr Miles reminded me it is not customary to break such an award down into its constituent elements, the justification of that normal approach seems to me to be far less persuasive in circumstances such as the present where the matter is being dealt with by a Judge alone than it is in the case of a jury trial. I therefore identify the elements of my award as being $650,000 general damages, $150,000 aggravated damages and $25,000 exemplary or punitive damages.

The first plaintiff

[81] Turning then to the position of Korda Mentha, there is no direct evidence of economic loss. However, there does not need to be. In *Mount Cook Group Ltd v Johnston Motors Ltd* [1990] 2 NZLR 488, Tipping J said at 497:

> There has been some suggestion that companies can only obtain damages by proving special damage, namely actual identifiable financial loss… . I do not accept that proposition. In my view the position is as stated above, on the basis that damages may be obtained by a company in respect of defamatory material likely to cause commercial loss without any evidence being necessary of actual loss having been suffered. In any such case the appropriate assessment must be made upon all the material available to the Court or the jury. Another way of putting the point is to say that a company may obtain damages for defamation but only in respect of financial loss, either shown to have been suffered or shown to have been probable: see *News Media Ownership v Finlay* [1970] NZLR 1089 per Haslam J at p 1103… .

[82] Having regard to the nature and extent of the defendant's defamatory statements in the present case, and the inevitable linkage or association of the second with the first plaintiff, I have no doubt that Korda Mentha will have suffered some financial loss as a result of instructions not being given to the firm that might have been given to it had the defamation not occurred. The statements were directly relevant to the company's core business activities, and to the ethics with which principals of the firm approach their work. Consequently, the firm's business reputation must inevitably have suffered to some degree.

[83] It is very difficult to estimate the extent to which such damage may have occurred. But I make an award in the sum of $75,000 in the expectation that that will sufficiently cover the position in circumstances where it appears that the company has continued to operate successfully in its chosen area of expertise.

Permanent injunction

[84] The plaintiffs seek a permanent injunction prohibiting the defamatory publications. I have no doubt that it is appropriate to make such an injunction having regard to the whole history of this matter. Whether or not Mr Siemer will comply with it, is another issue. In the circumstances, I make the injunction

permanent, and reserve leave to the plaintiffs to apply for any further order that may be necessary to enforce it.

Breach of contract

[85] As has been seen, the agreement of 9 August 2001 provided that "Paragon will not comment to any party on any matter arising in or from the receivership including the fact of this settlement". It was made plain by the terms of the agreement that "Paragon" included the directors, employees, servants and/or agents of the company. Mr Siemer's whole public campaign against the plaintiffs has been a breach of that agreement, although he has purported to justify it from time to time on the basis that the agreement had been repudiated by the plaintiffs.

[86] It is not possible for me to take into account any defence that Mr Siemer might have raised in relation to this aspect of the claim, since he has been debarred from defending it. In the circumstances, being satisfied that there has been a breach of the contract, it merely remains to consider what damages should flow for the breach. I am satisfied on the evidence that the settlement agreement was entered into by Ferrier Hodgson on the basis that the relationship with Mr Siemer had proved difficult, there had been ongoing arguments about fees and the quality of work performed and the commercial decision was taken to waive the firm's entitlement to any further fees on the basis of the settlement in the terms agreed. The object was plainly to put an end to Mr Siemer's ongoing complaints so as to enable the firm to move on and no longer be troubled by its dealings with Mr Siemer.

[87] In *Watts v Morrow* [1991] 4 All ER 937 Bingham LJ held at 959-960:

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party… . But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damage will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.

[88] Mr Miles submitted that the settlement agreement was intended to avert precisely the sort of situation that has unfolded as a consequence of Mr Siemer's

breach of it, even though the extent of Mr Siemer's campaign could not, of course, have been foreseen. Subsequently, it may be said that Mr Siemer has caused exactly the sort of adverse publicity and embarrassment the agreement was supposed to prevent. Another consequence has been significant personal distress to Mr Stiassny, but the damages award for defamation will sufficiently compensate him for that.

[89] The first plaintiff will also be compensated in respect of the damage it has suffered as a result of the defamation. However, it has been deprived of the rights which it sought to obtain by virtue of the agreement and I award an additional sum of $20,000 to mark the breach of the agreement, noting in this context that as a result of entry into the agreement the first plaintiff abandoned its claim for outstanding fees.

Result

[90] In accordance with the foregoing there will be judgment for the first plaintiff in respect of the defamation claim in the sum of $75,000, and in respect of the claim for breach of the settlement agreement, in the sum of $20,000.

[91] There will be judgment for the second plaintiff in respect of the defamation claim in the sum of $825,00 being $650,000 general damages, $150,000 aggravated damages and $25,000 exemplary damages.

[92] The plaintiffs are entitled to a permanent injunction against the first defendant in the terms set out in paragraph (e) of the prayer for relief following paragraph 3.16 of the fourth amended statement of claim.

[93] The plaintiffs are also entitled to costs. If the claim for costs is to be pursued, I will receive a memorandum on that subject on or before 12 February 2009.