IN THE COURT OF APPEAL OF NEW ZEALAND

CA226/07
[2008] NZCA 255

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

Hearing: 24 July 2008

Court: Hammond, Panckhurst and Miller JJ

Counsel: Appellant in person, by written submissions
J G Miles QC and P J L Hunt for Respondents

Judgment: 24 July 2008 at 2.15pm

ORAL JUDGMENT OF THE COURT

A **We strike out those paragraphs in Mr Siemer's submissions set out in [24] of this judgment.**

B **The appeal is dismissed.**

C **The respondent will have costs on a 1A basis under the Court of Appeal (Civil) Amendment Rules (No 2) 2008, plus reasonable disbursements. The respondent will have an additional sum of $2,000 for the various appearances on the request for an adjournment, and associated therewith.**

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] Mr Siemer appeals against a number of interlocutory rulings given by Rodney Hansen J in a judgment delivered on 19 April 2007: HC AK CIV 2005-404-1808.

Background

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

[3] In December 2000, Mr Stiassny was appointed as the receiver of Paragon Services Limited (Paragon). There had been disputes between the shareholders in that company, one of whom was Mr Siemer. Mr Stiassny was appointed as receiver primarily for the purpose of protecting certain intellectual property. The shareholder disputes were resolved during 2001. At that time Mr Siemer became the sole shareholder. The receivership then terminated. One of the terms of an agreement which compromised the underlying dispute was a confidentiality provision relating to any matter arising in or from the receivership, including the fact of settlement.

[4] Mr Siemer had, and still maintains, various complaints over Mr Stiassny's conduct of the receivership. In April 2005, Mr Siemer caused a billboard to be emplaced in a prominent position in central Auckland. The billboard included the name and picture of Mr Stiassny, and referred viewers to a website which was distinctly critical of Mr Stiassny.

[5] Mr Stiassny thereupon sought and obtained an ex parte injunction which provided for the removal of the objectionable material from the website, and the removal of the billboard. There were also restraints on reinstating those information sources.

[6] There was apparently some initial compliance with these orders. But thereafter Mr Siemer did not comply with the orders which had been made. Then followed a series of proceedings and hearings which led to Mr Siemer being committed for contempt, and serving a term of imprisonment for that contempt. Alleged continuing breaches have since led to an application by the Solicitor-General for Mr Siemer's "permanent" committal to prison for contempt. That application has been heard and determined by a Full Court of the High Court: CIV 2008-404-42 July 8 2008. In the simplest terms, Mr Siemer has been given until 1 August to "clean up" the relevant offending material. There is a clear signal that further imprisonment will follow in the event of non-compliance.

[7] For present purposes we put all of this to one side, but there are some consequential points we need to make.

[8] First, as matters presently stand, Mr Siemer is at large, and therefore entirely able to conduct his own affairs, including this appeal.

[9] Secondly, there was raised before this Court, in this proceeding, an issue as to whether Mr Siemer was entitled to take any further steps in this appeal because of his continuing contempt. We dealt with that issue in a judgment delivered on 14 December 2007: [2007] NZCA 581. For the reasons given in that judgment we declined to strike out this appeal; briefly put, we took the view that notwithstanding the continuing contempt, Mr Siemer must have the ability to advance this appeal and be heard on it.

[10] Thirdly, there has been considerable difficulty in getting this appeal on for hearing. A fixture was allocated some months ago. Then, somewhat surprisingly, Mr Siemer raised various difficulties. We say "somewhat surprisingly" because Mr Siemer's basic complaint is that he says that Mr Stiassny acted improperly, and that he (Mr Siemer) can demonstrate that "fact". In short that he can, in the simplest terms, "justify" his continuing complaints against Mr Stiassny. Of course, if that is the case, one would have thought that it is in Mr Siemer's interests to get the merits of this dispute on for hearing. Instead, the advancement of the merits has been continually deflected by various unfortunate side-excursions.

[11] One of these side-excursions was that Mr Siemer made an application for an adjournment of this hearing. His given reason was the unpromising one that he was going to be overseas – apparently on holiday – at the relevant time. The Court indicated that the fixture would stand. It was made plain that Mr Siemer could appear in person, by counsel, or if it better suited his purposes, that he could file written submissions. He elected to follow the last course. He has filed written submissions.

What is before us on the present appeal?

[12] It is important to appreciate what is in issue before us today. After Mr Siemer made his allegations of impropriety, Mr Stiassny decided to bring civil proceedings against him. Two causes of action were raised. First, Mr Stiassny says there was a breach of the compromise agreement of 9 August 2001, as a result of what was published on the website. Secondly, Mr Stiassny says that Mr Siemer has defamed him. Both causes of action seek general damages of $1.25 million for special damages (for economic loss), punitive damages, and a permanent injunction.

[13] Once that proceeding was filed there were a number of interlocutory applications, which were dealt with by Rodney Hansen J. He dealt with a number of matters in a judgment of 8 September 2006, at which time the Judge also made some timetable orders for dealing with further applications.

[14] In a further judgment – that of 19 April 2007, which is under appeal before us – the Judge dealt with applications by Mr Siemer and Paragon to be provided with copies of documents, at a reasonable cost; an application by Mr Stiassny and his firm to strike out certain parts of the Siemer/Paragon statement of defence, and an application by Siemer/Paragon for further and better discovery from Stiassny/Ferrier Hodgson.

[15] Running contemporaneously with what is before the Court at the moment have been a series of assertions by Mr Siemer, of a scurrilous and scatter-gun character, that the various Judges who have had to deal with this litigation in its

various guises in this Court and the High Court, are in Mr Stiassny's pocket, or biased against him (Mr Siemer), or are not listening to him, and like allegations.

[16] There is a further difficulty on that account. In the judgment of this Court delivered by me on 14 December 2007 we formally warned Mr Siemer that any further material of an inappropriate character would not be permitted in his papers. The Court reserved its position to strike out the entire appeal, should he again transgress the clear directions given by this Court against the filing of inappropriate material.

[17] That warning fell on stony ground. Mr Siemer has again clearly transgressed in his latest submissions, of 26 June 2008, in (at least) paragraphs 10, 11, 16, 17, 18, 32, 33, and 38 of those submissions. Those paragraphs are full of scurrilous material against the judiciary.

[18] We interpolate here that Mr Siemer's Submissions in Response of 21 July 2008 add more material of a like kind.

[19] This raises the question: what course should the Court now adopt? Should it strike out the appeal; or deal with the merits? Or both?

Should the appeal be struck out?

[20] At some point, a Court may have to say, "enough is enough" and defend the integrity of its own processes as to how appeals are to be conducted. In our judgment of 14 December 2007 we dealt with an application to strike out this appeal, because Mr Siemer was still gravely in a continuing contempt of court. But for the reasons then given, we considered that Mr Siemer should have his day in court on the appeal. But that entitlement was to be contingent on no further infractions by way of ad hominem attacks by him.

[21] At [36] we said:

> 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.

[22] And at [49](h) we said:

> 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.

[23] The position could not have been made any plainer: the Court was prepared to entertain any arguments Mr Siemer might make as to why, as a matter of law, Rodney Hansen J was wrong. But he was going to have to restrict himself to those issues, and abjure from the gratuitous attacks he has been mounting on the judiciary. We do not by that say, or imply, that a Judge can never be criticised. The contrary is true, and sometimes there must necessarily be severe criticism. But such an exercise must always be done carefully and with the matters to be relied upon scrupulously laid out.

[24] What Mr Siemer has said in his submissions – which were of course filed after our warning – is as follows:

> Paragraph 10
>
> Obviously, respondent Stiassny had a private discussion with Hansen J. The appellant could see it in Hansen J's eyes on the day. What Hansen J was afraid of remains uncertain. What is apparent is that Hansen J was long before this ordered to cover for his master Stiassny. The circumstantial evidence for this is overwhelming.
>
> Paragraph 11
>
> The appellant hired investigators who discovered early on that Stiassny was lying about "Paramount" overcharging and that the judges were complicit in the scam.
>
> Paragraph 16
>
> That Rodney Hansen J prostrated himself over the bench repeatedly to unduly protect his charge is also demonstrated in his ruling that an unrelated party could definitely attest by affidavit the respondent Stiassny had NOT engaged in an email exchange with another party (subject of this appeal).

> Paragraph 17
>
> Judges may come from arguably the least respected profession on earth but in New Zealand Judges have no fear.
>
> Paragraph 18
>
> Hence a Judge can get away with misconduct in New Zealand if they are so inclined because no lawyer would dare to speak out.
>
> Paragraph 32
>
> The appellant again sought to submit evidence of fraud committed on the Court before the Court of Appeal on 18 June 2007 (CA172/07) [pages 65-78]. Again, a full bench of Humpty Dumpties openly found fraud was acceptable to NZ Courts, so long as it is committed by favoured lawyers and can be classified in the loosest interpretation as "inconsistent" accounts. The Humpties allergic reaction to "evidence" was evident in this transcript [specifically 71-76].
>
> Paragraph 33
>
> Two Judges can be heard on this tape doing a "Humpty" on New Zealand laws.
>
> Paragraph 38
>
> When the Honourable Justice Peter Mahon refuted this travesty and ruled within integrity and valour, the New Zealand Court ostracised him. The Berryman Bridge debacle, the Winebox scandal and the Russell McVeagh Bloodstock scandal all stand in further testament to broad and unbridled judicial corruption within the New Zealand Courts.

[25] We have no doubt that this panel would have been amply justified in striking out this appeal. What Mr Siemer has done in his submissions is indefensible; essentially, he has ignored the merits (or otherwise) of the appeal and simply attacked various counsel and Judges.

[26] That said, we remind ourselves of the sage observations of Lord Bingham in *Arab Monetary Fund v Hashim* [1997] EWCA Civ 1298 to which we referred at [41] of our judgment of 14 December 2007, that at the end of the day, it is the interests of justice which should prevail. We think that the overall interests of justice are here better served by our dealing with the merits of the appeal, and ignoring the side-shows Mr Siemer has raised. Knowing our views on the merits of the appeal points may be of assistance to the High Court, in due course. We do however strike out the offending paragraphs set out in [24] above.

The merits

The strike out application

(i) General

[27] The difficulties under this head arise out of Mr Siemer's second amended statement of defence to a third amended statement of claim. The difficulties fall broadly into two categories. First, some of them relate to Mr Siemer's habit – already referred to in another context, above – of intruding snide side comments which are irrelevant and grossly improper in relation to dramatis personae of one character or another in these proceedings. The second broad category is a difficulty routinely encountered in defamation cases over the scope of what may be pleaded.

(ii) Paragraph 1.12

[28] The problem here is in category 1. Siemer/Paragon pleaded "they also admit that Winkelmann J granted an ex parte order *to her former chambers partner Julian Miles* …" (emphasis added). Mr Miles is senior counsel for Mr Stiassny. There was no need to include the italicised comment. In technical terms it was and is irrelevant, it was scandalous, and it was a gratuitous ad hominem attack. It was also downright silly on Mr Siemer's part, if he wanted to get on with this case, because it was always going to be struck out and with heavy costs given the nature of what was there said.

[29] It is impossible to follow from Mr Siemer's "basic submissions for appeal" at page 205 et seq of the case on appeal and his written submissions as lodged quite what Mr Siemer's argument – if any – is on this point. The amended notice of appeal seems to proceed on the footing that *everything* that Rodney Hansen J did was wrong, but this particular issue is worth highlighting because it is emblematic of the sheer silliness that the High Court and this Court have had to confront.

(iii) Paragraph 2.7

[30] The plaintiffs averred that without the assistance of the Court and an injunction Siemer/Paragon were likely to carry on publishing. This was met by a pleading that "the [defendants] admit that they will continue to exercise their fundamentally legally protected rights to speak truthfully regarding the plaintiff's misconduct, as well as the sheer evidence of the plaintiff's misconduct where such misconduct is considered to pose a serious threat to the wellbeing of New Zealand citizens and the New Zealand economy …".

[31] Mr Siemer suggested to Rodney Hansen J – and appears to make the same point again before us – that this pleading does no more than to reaffirm his and his company's right to freedom of expression in circumstances in which he says "that right had been denied".

[32] Rodney Hansen J held this was not, as such, an issue in the substantive proceeding. He struck the pleading out. Again, he was quite right to do so. It is not easy to follow Mr Siemer's mind on this, but he appears to be echoing the not unfamiliar refrain by somebody who is sued in defamation: "If you sue me in defamation you are restricting my right to speech". That of course is not so, and never will be. Mr Stiassny says that Mr Siemer said certain things about him which are untrue and defamatory; the issue is simply whether those things have been established, or not.

(iv) Paragraph 3.2(a)

[33] This paragraph of the statement of claim alleges that certain of the words relied on by Stiassny/Ferrier Hodgson meant and were understood to mean that in his professional capacity as a receiver Mr Stiassny "acted criminally or that there were good grounds for believing that he had acted criminally".

[34] The response to that pleading was a denial that the words meant Mr Stiassny "acted criminally", but if they did mean that, Mr Siemer says they were an honest opinion.

[35] Either the words have the pleaded meanings or they do not. As the Judge rightly said there can be no room for qualification on that. Accordingly, and rightly in our view, he struck out the offending passage.

[36] There is a secondary – though important – aspect to this subset of the dispute between the parties. In support of his alternative averment that he was advancing an honest opinion, Mr Siemer – correctly – gave particulars as to the basis of that opinion. These purported to provide details of the facts and matters relied on to support the claim that Stiassny/Ferrier Hodgson had submitted documents for the purpose of gaining a pecuniary advantage, and did so dishonestly.

[37] Mr Miles (relying on s 11 of the Defamation Act 1992) had taken the position that what was provided was insufficient: in broad terms, the particulars should include a reference to where the particulars appear in published materials or to their being generally known at the time of publication.

[38] It is important to appreciate what really lies behind the scrap over this pleading. As we apprehend it, Mr Siemer's position is that, for the purposes of the defence of honest opinion, a defendant should not be confined to events which occurred during the receivership of Paragon. At the risk of oversimplifying it, he wants to say that Mr Stiassny is – at large – a dishonest person. In short, Mr Siemer wants to put in issue a great deal of Mr Stiassny's professional work, in a generalised kind of way. The Stiassny/Ferrier Hodgson position is that it is this receivership which is under examination. Hence the respondents' concern is that what is not in issue here are matters unrelated to Mr Stiassny's work as a receiver of Paragon.

[39] The Judge took the view that, in the context of the claim as pleaded, it was not open to Mr Siemer to introduce matters "that have nothing to do with the [Stiassny/Ferrier Hodgson] conduct of the receivership". The Judge accordingly struck out the relevant subparagraphs.

[40] As to the alternatives that were put, a further sub-issue is that Mr Miles not unreasonably wanted clarified whether a defence of "truth", as such, was being

pleaded. If it was being pleaded, then of course it needed to comply with s 38 of the Defamation Act.

[41] The Judge took the view of the pleadings that what Mr Stiassny is really advancing is a "defence of honest opinion" rather than a defence of truth, and the orders that he made were that he would *not* make a strike out order. Rather, he directed Mr Siemer to amend paragraph 3.2(b) "to make it clear that the particulars are relied on in support of a defence of honest opinion, not truth".

[42] If anything this ruling was favourable to Mr Siemer. The pleadings were in disarray under this head. The Judge might well have been justified in striking them out, on that count alone. He in fact gave Mr Siemer a chance to rescue his pleadings.

[43] Mr Siemer's various submissions advanced in support of the appeal do not appear to suggest any argument as to why this course was not correct. We can see no reason to interfere with the Judge's ruling on this issue.

(v) Paragraph 3.3

[44] In this paragraph the plaintiffs said that the words used in their ordinary meaning meant and were understood to mean that Mr Stiassny's conduct as receiver "was significantly more scandalous than that of the Enron accountants or financial officers". This elicited the averment, in defence, "when one considers the relative size comparison between Enron and Ferrier Hodgson the number of inexplicable accounting errors and false representations … are arguably more scandalous."

[45] The Judge rightly struck this out on the ground that the pleading must respond to the allegation. If the defendants accept the passages relied on in the publication carried the pleaded meaning, but rely on honest opinion, they should say so. And they cannot substitute another meaning of their choosing: see *Television New Zealand Limited v Haines* [2006] 2 NZLR 433.

[46] Again, we are not persuaded that the Judge was wrong. This appeal point is dismissed.

(vi) Paragraph 3.5

[47] The dispute here is that paragraph 3.5 of the statement of claim pleaded that certain words were meant and were understood to mean that Mr Stiassny "gained improper personal enrichment through exploitation of the Paragon receivership". The pleading in response was that the articles were true or an expression of honest opinion "that are clearly not limited to [Mr Stiassny's] conduct in the Paragon receivership". This is again an illustration of the point discussed earlier of Mr Siemer endeavouring to inappropriately "broaden" the dispute. Mr Siemer/Paragon cannot invoke a defence to a meaning which is not relied on by the plaintiffs. The particular words were therefore correctly struck out.

(vii) Paragraph 3.14

[48] Paragraph 3.14 endeavours to advance what is said in paragraph 2.7 in another guise. Again, the Judge correctly struck it out.

The Siemer/Paragon application for further and better discovery

[49] There have been a series of disputes over discovery. For present purposes these fall into the following categories.

(i) Identification of documents

[50] Mr Siemer complained about the way in which documents were listed in the Stiassny/Ferrier Hodgson list of documents. The essence of the dispute under this head is that the documents are not all individually itemised. Mr Siemer complained that this did not comply with Rule 298 of the High Court Rules. A number of documents are identified by number.

[51] We do not find it necessary to deal with this matter in detail. The Rule and the law on it were – we think correctly – set out by the Judge at [44]-[47] of the judgment under appeal. The course taken complies with a practice approved by this

Court as long ago as *Hunyady v The Attorney-General* [1968] NZLR 1172. This appeal point is dismissed.

(ii) Document 14.4

[52] The dispute under this head concerns what Mr Siemer regards as an inappropriately "missing document". There is no doubt that a document – an email – numbered 14.4 was in the plaintiffs' list of documents (which was a list of documents for which the plaintiffs did not claim privilege or confidentiality). There is a dispute about the provenance of that email. Mr Siemer thinks it is an email from Mr Stiassny to the late Robert Fardell QC. The Stiassny interests think it is an email from them to Chen & Palmer. In any event, when Mr Siemer asked for a copy he was told it had been mistakenly included as a discoverable document when it should have been "privileged". A legal executive employed by the plaintiffs has made an affidavit in which she explains that she noticed the error, and took the course of removing the document and replacing it with a pink page on which she wrote: "Document 14.4 was privileged email (FH/Chen) accidentally included in discoverable section".

[53] The Judge noted that perhaps there had been a second document, albeit one which on its face might attract a claim of privilege.

[54] In the event, the Judge directed that the plaintiffs were to file an affidavit directed specifically to the document Mr Siemer claims to have seen: whether it has ever been in their possession or power and, if the document has been but is no longer in their power or possession, what has become of it.

[55] This is a frivolous and inappropriate appeal point. Quite apart from anything else it is premature – what is actually being appealed? – and if anything it is again favourable to Mr Siemer.

(iii) Particular discovery

[56] Mr Siemer/Paragon sought discovery of all records relating to Stiassny/Ferrier Hodgson's conduct of receiverships and liquidations of Access Brokerage, ParaPara Growers, complaints which were made to the Institute of Chartered Accountants, and certain Vector pricing information relating to "public claims" made by Mr Stiassny in his capacity as Chairman of Vector.

[57] The High Court Judge held, "I am satisfied that the documents in these categories have no relevance to the matters in issue in the proceedings and are not discoverable … the defamatory meanings relied on [in the proceedings] concern [Mr Stiassny's conduct of the Paragon receivership]." We agree: Mr Siemer had to respond to what had been alleged with respect to the particular defamation alleged.

[58] There is nothing in this point. This appeal point is also dismissed.

Conclusion

[59] We strike out those paragraphs in Mr Siemer's submissions set out in [24] of this judgment.

[60] Mr Siemer has not made out any of his grounds of appeal. The appeal is dismissed.

[61] The respondent will have costs on a 1A basis plus reasonable disbursements under the Court of Appeal (Civil) Amendment Rules (No 2) 2008. The respondent will have an additional sum of $2,000 for the various appearances on the request for an adjournment, and associated therewith.

[62] We note that the advancement of the merits of this dispute have been distinctly delayed by the difficulties which have been created by and associated with this appeal. Amongst other things, a February 2008 fixture was lost. We would urge that there be an early fixture, on the merits. In that respect, we note that the debarment order of Potter J made on 9 July 2007 is still on foot.

Solicitors:
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