IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-5500

BETWEEN	GRACE HADEN First Appellant
AND	VERISURE INVESTIGATIONS LIMITED Second Appellant
AND	NEIL EDWARD WELLS Respondent

Hearing: 10 February 2009

Appearances: Appellant in Person
ND Wright for Respondent

Judgment: 13 February 2009

JUDGMENT OF ASHER J

This judgment was delivered by me on 13 February 2009 at 2:30 pm pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
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[1] The appellants, Grace Haden ("Mrs Haden") and Verisure Investigations Limited ("Verisure") appeal a decision of Judge Roderick Joyce QC, awarding the respondent, Neil Edward Wells ("Mr Wells"), damages of $50,000 and exemplary damages of $7,500 on a defamation claim. The appeal is set down for hearing on Wednesday, 25 February 2009. The issue before the Court is the appellants' application for leave to adduce further evidence on the appeal, filed on 9 February 2009. That application is opposed by the respondent, Mr Wells, and must be determined urgently.

Background

[2] Mrs Haden formed a very adverse view about Mr Wells. Mr Wells is a founding and continuing trustee of a trust known as the Animal Welfare Institute of New Zealand ("AWINZ"). Mrs Haden, the first appellant, is a trustee of the Animal Owners Support Trust (Inc) and has an interest in animal welfare issues. She is a private investigator. Verisure carries out private investigation services and has been described as the alter ego of Mrs Haden.

[3] Mrs Haden published a number of statements that were critical of Mr Wells and AWINZ. They indicated very improper behaviour on his part. Mr Wells then issued proceedings against her and Verisure. Interlocutory orders and costs orders were made against the appellants prior to the substantive hearing. Then unless orders were made when the appellants failed to pay the costs orders. Ultimately the appellants were debarred from defending the proceedings. The proceedings then proceeded before the District Court at Auckland as a hearing for damages only, based on a defamation cause of action. The hearing took place on 3 July 2008 and the judgment issued on 1 August 2008, awarding Mr Wells the damages referred to.

[4] The notice of appeal was filed on 26 August 2008. The damages orders and an injunction that was ordered were challenged. The grounds of attack on the decision included an assertion that the order debarring the appellants from defending the claim was wrongly made, as were earlier costs judgments. A very wide range of

grounds of appeal are set out, the bulk of them focusing on the substantive issues of whether many statements made by the appellants about Mr Wells were in fact true.

[5] In relation to the present application for leave to adduce further evidence, it is asserted that new evidence has come into Mrs Haden's possession "in the past few weeks". It is said:

> The evidence not only questions Mr Wells' credibility but exposes a public scam whereby public money was being used to set up a private SPCA type organisation, which is a parasite on a public service.

It is asserted by the appellants that what is questioned is "public fraud and corruption".

[6] An affidavit in support of the application was filed by Mrs Haden. Consistent with the application for leave the affidavit mainly contains material relevant to Mr Wells' actions in the 1990s, and the question of whether there was some sort of wrongful behaviour or corruption in relation to AWINZ. The headings of the documents which are set out and numbered are:

a) Documents showing background intent.

b) Legal advice documents.

c) Documents regarding the various trusts to refute the evidence of Wells and [the AWINZ trust].

d) Miscellaneous documents referred to proving conflicts in evidence.

Principles to be applied

[7] The relevant rule was previously r 716 and is now 20.16. It reads:

> **20.16 Further evidence**
>
> (1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.

> (2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.
>
> (3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
>
> (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[8] There are three relevant reported decisions, being: *New Zealand Co-operative Dairy Co. Ltd v Commerce Commission* (1991) 3 PRNZ 262; *Power NZ Limited v Mercury Energy Limited* [1996] 1 NZLR 106; *Comalco New Zealand Ltd v Television New Zealand Limited* (1996) 10 PRNZ 573. As Wylie J put it in *New Zealand Co-operative Dairy Co. Ltd v Commerce Commission* at 270, in a statement adopted by Barker J in *Power NZ Limited*, at 113:

> That the jurisdiction is to be exercised sparingly is, I think, well accepted and for good reason. The usual tests of earlier unavailability, cogency, and likely influence on the result, coupled with the strictures against turning an appeal into a new case, ensure that the privilege will be sparingly granted, but in my view that is not to put the test so high as to require the circumstances to be wholly exceptional.

[9] As Wylie J indicated, the jurisdiction to allow new evidence to be adduced must be exercised with caution. The adducing of such new evidence if it was previously available means that extra time has to be devoted to issues on appeal that should have been dealt with earlier. This can lead to an appeal being delayed, and add to cost, all to the detriment of the respondent.

[10] I propose therefore to proceed against the background that the discretion will be sparingly exercised, and to consider whether there are special reasons for hearing the evidence. Matters which will be influential are whether:

a) the new evidence relates to matters that have arisen after the date of the decision appealed against;

b) the new evidence could have been adduced at the trial if the party seeking to introduce the evidence could have obtained it with reasonable diligence;

c) the new evidence is of sufficient materiality and cogency to be likely to have an important influence on the result. It must have, on its face, probative value.

[11] I now turn to the evidence and whether it can be adduced.

Evidence relating to matters that has arisen since the date of the decision

[12] The case was heard on 13 March 2008. Of the new evidence sought to be adduced, two documents are dated after 13 March 2008. There is an email exchange between the appellants and Unitec. The statement relied on from Unitec is on its face quite innocuous and irrelevant. Further, it is hearsay and not verified in any way by its sender. There is nothing in terms of s 18 of the Evidence Act 2006 to indicate that the statement is reliable or that the maker is unavailable. It appears to have no probative value. The second document is a letter from the North Shore City Council dated 14 January 2009. Again, its contents appear to be innocuous and irrelevant, and it is in any event hearsay. There is no basis for adducing either document.

Could the evidence have been ascertained with reasonable diligence at the trial?

[13] In the affidavit filed, which is the only further evidence before the Court at the moment, it is stated:

> 11. Over the past three years I have made a number of Official Information Act requests and Local Government Official Information and Meetings Act requests, and have had questions asked in Parliament, the information that was returned has always been sparse and evasive.
>
> 12. Mr Wells has significant ties to the labour party and Labour politicians – I suspected political interference.
>
> 13. After the election of the new Government, I again made requests and this time I have been granted access to the files which the Ministry

> of Agriculture holds and after meeting with the Ombudsmen, the Waitakere City council archive files were also made available – (except for the files 200-2004, which they claim to have lost and the files 2004-2008 were not made available).
>
> 14. I now have a multitude of documentation which came into my possession just last week and I am expecting two more reams of documents from MAF, which will not be in my possession before the deadline of filing for this affidavit.

[14] No further explanation is given as to the failure to adduce the evidence at an earlier point. The very general explanation given, which appears to be that efforts to obtain the information in the past have met with a sparse and evasive response, and that that has now changed, is entirely unsupported by any evidence or example. It amounts to no more than a bald and unparticularised assertion of prior unavailability. It does not provide any basis for an assertion that with reasonable diligence the evidence was unavailable. To the contrary, all the proposed evidence has the appearance of evidence that could have been obtained through the usual official information requests.

[15] It is not sufficient for a party to make a bald claim that prior evidence was unavailable, unless that is for some reason apparent on the face of the documents. Where, as here, the evidence on its face would have been freely available prior to the hearing, an explanation must be given which satisfies the Court that proper efforts were made to obtain it. The absence of such an explanation here is fatal to the application. It must fail in its entirety on this ground alone.

Will the evidence have an important influence on the result?

[16] The vast bulk of the new evidence that the appellants seek to adduce relates to documentary exchanges between July 1994 and June 2000, long before the defamatory statements. Its purpose appears to be to show that the defamatory allegations were in fact true, and that some of Mr Wells' earlier affidavit evidence or oral evidence at the trial was wrong. It all relates to the issue of Mr Wells' involvement with the relevant Councils and AWINZ. None of the evidence has any apparent relevance to the issue of damages, which was the issue before the District Court.

[17] A number of the documents relate to the period between 14 March 2005 and January 2009. However, none of them appears to have any relevance to the damages issue. Again, they all deal with the actions of Mr Wells and AWINZ in relation to various Councils.

[18] Mrs Haden in her submissions pointed out that she was directly challenging the earlier decision debarring her from defending the claim. She referred to s 66(5) of the District Courts Act 1947, which provides that on an appeal an interlocutory decision may be set aside, even if it has not been appealed against. Mrs Haden will be seeking to challenge that interlocutory decision, and she is asking for a rehearing in which she can defend the substance of the defamation claim.

[19] While she intends to raise on appeal the issue of the unless order and the order debarring her from defending at the trial, the documents that she seeks to adduce do not relate to the central issue that would arise in the event of such a challenge. That issue will be whether the appellants should have been debarred from defending the proceeding given their failure to pay costs. None of the documents that are referred to appear to have any relevance to this issue.

[20] Even if the general merits of the defamation action were considered on appeal, none of the documents on their face appear to have real probative value in showing any wrongful conduct on the part of Mr Wells. Rather, they all seem to provide a background basis for assertions by Mrs Haden in the nature of submissions. The bulk of the affidavit that she has filed is in the nature of a long submission based on her views on various documents.

[21] I conclude that the material which Mrs Haden seeks to adduce is not sufficiently material or cogent to have an important influence on the result of the appeal. It has no significant probative value.

[22] Further, with the exception of a few documents that have originated from Mrs Haden and which have no particular probative value in themselves, all the documents are from third parties and those third parties have not filed affidavits. All this evidence is hearsay. There is nothing to indicate that the makers of the

statements are unavailable. There might have been some basis for asserting that requiring those third parties to file affidavits would result in undue expense or delay in terms of s 18(1)(b) of the Evidence Act 2006, but that argument has not been advanced. Most of the evidence is, therefore, inadmissible.

[23] One of the documents is a decision of the Employment Relations Authority Auckland of 19 November 2007 in which some reference is made to Mr Wells in the context of the unlawful dismissal of a staff member of the North Shore City Council, Ms Jane Charles. However, that decision deals only with Mr Wells' conduct as a representative of his employer and contains no material relating to the effect on him of the defamatory statements, or indeed his conduct in relation to AWINZ. It is not relevant.

Conclusion

[24] I conclude that the application to adduce further evidence should be declined. Most of the evidence has not arisen after the decision. I am not satisfied that it could not have reasonably been obtained and adduced at the time of the trial. Moreover, the proposed new evidence is not sufficiently material or cogent to have an important influence on the result. Much of it would be inadmissible in any event.

Result

[25] The application for leave to adduce further evidence is declined.

Costs

[26] Costs are awarded against the appellants in favour of the respondent on a 2B basis.

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Asher J