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: 25 February 2009

Counsel: First Appellant in person and for Second Appellant
ND Wright for Respondent

Judgment: 20 November 2009

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 20 November 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Brookfields, P O Box 240, Shortland Street, Auckland 1140
Copy to: G Haden, 23 Wapiti Avenue, Epsom, Auckland 1051

Introduction

[1] The respondent (Mr Wells) brought proceedings in the Auckland District Court alleging the appellants and another party had defamed him. They were were debarred from defending the claim after defaulting on the payment of costs arising in interlocutory proceedings. After a hearing before Judge R Joyce QC, Mr Wells obtained an award of general damages of $50,000 against the appellants and $7,500 in exemplary damages against the first appellant (Mrs Haden). He also granted injunctive relief.

[2] The appellants appeal against the decision.

Background

[3] Mr Wells and Mrs Haden became acquainted when both were involved in a voluntary organisation known as the Auckland Air Cadet Trust. There was a falling out and Mrs Haden was removed as Treasurer.

[4] Soon after Mrs Haden began making enquiries into the Animal Welfare Institute of New Zealand (AWINZ). AWINZ is a trust which is dedicated to animal welfare. Mr Wells has had a long history of involvement in animal welfare and was instrumental in securing the passage of the Animal Welfare Act 1999. AWINZ is an approved organisation under the Act. In that capacity it has an arrangement with the Waitakere City Council for animal welfare purposes.

[5] Mrs Haden came to the view that there had been irregularities in the way in which AWINZ had acquired its status and that Mr Wells was using the organisation improperly to advance his own personal interests.

[6] She was instrumental in forming a trust with the same name which registered a website. Some of the defamatory statements complained of by Mr Wells were published on the website. Others were in emails and a fax message, some of which

emanated from the second appellant (Verisure), a security company operated by Mrs Haden. The recipients of the various messages included the Mayor, councillors and community board members of the Waitakere City Council, board members of the Auckland Air Cadet Trust and the staff of the animal welfare section of the Waitakere City Council. Among the meanings attributed in the statement of claim to the publications were that Mr Wells:

- Was dishonest and had taken money intended for charitable purposes for himself.

- Had deliberately misled a minister of the Crown in seeking to have AWINZ accepted as an approved organisation.

- Had misappropriated funds from AWINZ.

- Is corrupt, untruthful and untrustworthy.

[7] The proceedings issued in the District Court included a claim by the trustees of AWINZ and sought relief from Mrs Haden, Verisure and the trust she had formed for passing off and breach of the Fair Trading Act 1986. The injunctive relief granted by Judge Joyce under these causes of action is not challenged and it was not necessary for either the trustees of AWINZ or the trust of the same name formed by Mrs Haden to be parties to the appeal.

Procedural history

[8] It is necessary to say something about the procedural steps that led to the appellants being debarred from defending the proceeding as the relevant interlocutory orders are also the subject of challenge in this appeal.

[9] The defendants filed a counterclaim in the District Court seeking damages of $250,000. It ran to 55 pages, relying on five causes of action, including defamation. The counterclaim was struck out by Judge M-E Sharp on 7 February 2007. She found the defamation action could not be sustained. The defendants accepted that

the other causes of action should be struck out. In the course of her judgment Judge Sharp urged the defendants to obtain legal representation for what she said will undoubtedly be a difficult case to defend. She commented, "Defamation is never easy and does require specialised legal assistance".

[10] On 19 March 2007 Judge Sharp considered an application by the defendants to strike out the plaintiff's claim. In rejecting the application, Judge Sharp again urged Mrs Haden to obtain legal assistance.

[11] In another judgment delivered on 19 March, Judge Sharp ordered Mrs Haden personally to pay indemnity costs of $6,806.72 to the counterclaim defendant, the Auckland Air Cadet Trust, and, accepting the plaintiff's submission that costs in excess of scale should be awarded, she ordered the defendants to pay the plaintiff's costs of $9,000. On 10 May she ordered the defendants to pay scale costs of $3,200 in relation to the unsuccessful application to strike out the statement of claim.

[12] On 28 June 2007 Judge Sharp made what were described as timetabling directions, the first of which was that:

> 1 Within 14 days the defendants, or one of them shall pay in full all outstanding Costs awards payable to the plaintiffs failing which the defendants will be debarred from further defending the claims against them and statement of defence will be struck out.
>
> ...

This appears to have been made in the course of a telephone conference. There was no prior written application for the order and there was no reference to it in a memorandum filed by counsel for the plaintiffs for the purpose of the conference.

[13] On 19 July 2007 Judge Sharp made the order striking out the statement of defence. The minute issued by the Court by email read as follows:

> The directions that I made on 29/06/07 were clear: By 13 June 2007 the defendants were to have have paid in full the outstanding awards of costs against them in favour of the plaintiffs or their statement of defence would be struck out. The defendants offer no adequate excuse for their failure to comply with that direction. The plaintiffs now seek an order in terms of the direction made.

> I can see no reasonable ground not to make one as the defendants' failure to meet the costs awarded by the due date constitutes an abuse of the process of the Courts.
>
> Accordingly under Rule 209(c) I strike out the defendants' statement of defence.

[14] It is unnecessary to refer to the further interlocutory steps that preceded the substantive hearing. It remains only to mention that, following that hearing and a bankruptcy proceeding in this Court arising out of the outstanding costs order, the defendants applied to review the costs orders and the order striking out their defence. The application was heard by Judge Joyce on 3 July and dismissed in his judgment of 30 July. Reasons for his decision were given the following day. He held that Mrs Haden had failed to "identify any rational basis (legal or factual) for any revisiting of Judge Sharp's relevant judgments" (at [26]).

[15] The appellants then sought special leave to extend the time for appealing against the costs judgments and the unless order made by Judge Sharp and the decision of Judge Joyce refusing to review the orders. Her application was dismissed by John Hansen J in a judgment delivered on 4 December 2008. He described the application for special leave as "hopelessly out of time" (at [10]) and that the application must fail on the grounds of delay. He noted, however, that s 76(5) of the District Courts Act 1947 appears to confer a power to review interlocutory decisions in the course of the determination of a substantive appeal.

Grounds of appeal

[16] Mrs Haden filed full written submissions before the hearing which did not precisely coincide with the grounds set out in the notice of appeal. The arguments she advanced at the hearing relied on a further detailed written submission which introduced additional material. For the purpose of this judgment, I will analyse the arguments, as Mr Wright did, by reference to the grounds set out in the notice of appeal. Although this will involve some departure from the way the arguments were advanced at the hearing, it ensures that no significant point is overlooked.

[17] It is convenient first to address the further challenge to the interlocutory orders which led to the defendants being debarred from defending the proceeding and then to deal with the following errors said to have been made by Judge Joyce:

a) Failing to advise the parties prior to the hearing of the scope of evidence.

b) Relying on evidence of defamatory publications post-dating those relied on in the statement of claim.

c) Relying on inadmissible evidence.

d) Giving insufficient weight to an apology tendered by Mrs Haden.

e) Failing to take into account, as considerations implied under s 29(b) of the Defamation Act, the limited nature of publication and evidence of honest opinion.

f) Failing to take into account the impact of injunctive relief.

g) Failing to address the defence of honest opinion.

h) Treating both appellants as equally liable.

i) Awarding aggravated damages in the absence of a claim.

j) Granting exemplary damages.

Interlocutory orders

[18] Mrs Haden's challenge to the interlocutory orders was confined to the unless order which led to her being debarred from defending the proceeding. She said that her inability to defend the proceeding, in particular to advance the defences of truth and honest opinion, placed her at a crippling disadvantage. She argued that the

unless order should not have been made, relying on *Hytec Information Systems Limited v Council of City of Coventry* [1996] 1 WLR 1666 at [18] where it was said:

> It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the execusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

[19] As mentioned earlier, John Hansen J refused special leave to appeal against the unless order and the interlocutory orders that led up to it on the ground of delay and, in the case of the unless order, on the further ground that r 433(7) of the District Court Rules gave the Judge clear jurisdiction to make the order. Of particular relevance is subpara (e) which provides:

> (7) In particular, but without limiting the powers of the Court or the Registrar under this rule, the Court or the Registrar may:
>
> ...
>
> (e) where any party is in default in complying with these rules or any order made thereunder, order that the proceedings if commenced by that party be stayed, or that the pleading of the party in default be struck out either at the time when the order is made or at such time thereafter and subject to such terms and conditions as may be specified in the order.

[20] However, as recognised by John Hansen J, s 76 of the District Courts Act 1947 appears to provide the appellants with a further opportunity to challenge the order. Section 76 provides as follows:

> **Powers of High Court on appeal**
>
> (1) Having heard an appeal under section 72, the High Court may—
>
> (a) make any decision or decisions it thinks should have been made:
>
> (b) direct the District Court in which the decision appealed against was made—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the High Court directs; or

(iii) to enter judgment for any party to the proceedings concerned the High Court directs:

(c) make any further or other orders it thinks fit (including any orders as to costs).

(2) The High Court must state its reasons for giving a direction under subsection (1)(b).

(3) The High Court may give the District Court any direction it thinks fit relating to—

(a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The High Court may act under subsection (1) in respect of a whole decision, even if the appeal is against only part of it.

(5) Even if an interlocutory decision made in the proceedings concerned has not been appealed against, the High Court—

(a) may act under subsection (1); and

(b) may set the interlocutory decision aside; and

(c) if it sets the interlocutory decision aside, may make in its place any interlocutory decision or decisions the District Court could have made.

(6) The powers given by this section may be exercised in favour of any respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.]

[21] On its face, s 76(5) appears to give this Court jurisdiction to set aside an interlocutory decision made in proceedings which have been appealed, even though the interlocutory decision itself has not been appealed against. As Mr Wright acknowledged, the plain words of s 76(5) do not appear to limit the jurisdiction of the court to revisit earlier decisions. However, it would seem extraordinary if the power could be invoked in circumstances such as the present where, having initially failed to appeal the orders and unsuccessfully sought leave to do so out of time, the appellants seek to challenge an interlocutory decision which was fundamental to the way in which the proceedings had been conducted. A successful challenge would not only run counter to a decision of this Court on the application for leave to appeal but could potentially dispose of the substantive appeal

[22] As Mr Wright submitted, that cannot be what is intended by s 76(5). Its function and purpose is to ensure that interlocutory decisions can be set aside if required in order to give effect to the decision on appeal, not to expand the right of appeal to permit a party to alter the basis of the case they presented at trial. As observed in *Paper Reclaim Limited v Aotearoa International Limited* [2007] 2 NZLR 124 at [15]:

> There are strong policy reasons why the courts should take a restrictive approach to applications by parties to litigation who seek to alter the basis of the case that they presented at trial, after judgment has been given. They reflect a strong societal interest in the final determination of concluded litigation. This interest must be balanced against the individual interests of particular litigants who, having received an adverse judgment, consider that the approach they took at the trial of their dispute was based on an incorrect premise and that a new approach is necessary to achieve the right result. It has been said that part of the societal interest lies in the risk that a liberal approach would lead to temptation by dissatisfied litigants to commit perjury. Another consideration is the unfairness to a successful litigant in allowing the protraction of proceedings by its opponent because its witnesses now say their evidence was mistaken.[5] To these ends courts are required to function within prescribed limits framed to ensure there is an end to litigation.

[23] Considerations of fairness and justice point strongly against permitting the right of appeal in this case to be used to undermine the basis on which the substantive hearing was conducted. The potential prejudice to the plaintiffs (of whom only one is a party to the appeal) is obvious. The unless order shaped the way in which the case proceeded to a hearing. A successful challenge at this stage would effectively require the entire proceeding to be relitigated.

[24] No reasons for the failure to appeal in time or to explain the lengthy delay were put before John Hansen J. The appellants applied unsuccessfully for leave to adduce further evidence on appeal but that did not include evidence relevant to the issue of the unless order and the order debarring the appellants from defending at the trial – see judgment of Asher J in this proceeding of 13 February 2009 at [19].

[25] Mrs Haden sought to explain from the bar the reasons why no steps were taken to appeal at the time. Her version of events was not accepted by Mr Wright. Even if I had the power, there is no evidential basis which would permit me to conclude that the delay in challenging the interlocutory orders could be justified.

[26] John Hansen J rejected a submission by counsel for the appellants (who were represented for the purpose of the application for leave) that Judge Sharp was not entitled to make the unless order. He said at paras [19] – [20]:

> [19] Given the way in which these proceedings had been conducted by the appellants, in particular Mrs Haden, it is clear that Judge Sharp considered it was necessary to make orders ensuring that earlier orders made by the Court were complied with. In my view, r 433 clearly empowers the Judge to make the unless order that she did and I do not accept Mr Finnigan's submission that the only course available to a party in whose favour a costs order has been made is to pursue it as a civil debt.
>
> [20] Given the power invested in the District Court Judges by r 433, there was, in my view, clear jurisdiction to make an unless order.

[27] The appellants have been unable to point to any basis on which I should go behind the judgment of John Hansen J and give them a second bite of the cherry as an incident of the substantive appeal. I would interfere with the interlocutory order only if it is necessary to give effect to the decision reached on the merits of the appeal.

Scope of hearing

[28] Mrs Haden submitted that the appellants' rights to a fair trial were prejudiced by the failure of the Court to inform them in sufficient time of the evidentiary restrictions to which they would be subject at the hearing.

[29] Counsel for the plaintiffs had sought specific directions prior to the hearing in response to an affidavit by Mrs Haden which contained material that went beyond the issue of damages. Among other things, the affidavit challenged allegations in the statement of claim and sought to substantiate statutory defences to the defamation action. Mr Wright explained that he was concerned to ensure in advance of the hearing that such evidence was inadmissible and that he would not be prejudiced by not filing evidence in reply.

[30] Mrs Haden complained that it was not until the Judge delivered his judgment that he finally ruled on the scope of the hearing, specifically that evidence would be confined to proof and quantum of damages. That is in accordance with rr 2.39 and

12.29 (previously rr 467 and 468 of the District Court Rules), the equivalent of High Court Rules 15.10 – 15.11. Although there was no ruling as such on the scope of the evidence before the hearing commenced, Judge Joyce recounts in his judgment at [42] – [46] the approach he took to evidence at the hearing. He said:

> [42] As contemplated by the relevant Rules, evidence in chief was exchanged in affidavit form prior to the hearing. Thus, although I allowed some additional oral evidence in chief on each side, the hearing was largely occupied with cross examination arising out of the affidavits.
>
> [43] Despite the technical parameters (procedurally speaking) and given that Mrs Haden was a litigant in person, I made clear at the outset of the hearing that, speaking generally, I would not encourage any sustained endeavours to contain or restrain the nature of the cross examination. But I remained fully conscious that it would fall to me ultimately to determine, when necessary, where the boundaries lay.
>
> [44] Thus it was possible for the hearing to proceed (as in fact it did) with little by way of interruption or diversion.
>
> [45] In that process, and as a matter of fact, Mrs Haden was actually able to give, or allude to, all of the evidence she apparently had that might have been adduced at a defended hearing – although, of course, she could not run her originally pleaded defences as such.
>
> [46] In my view, that pragmatic approach has been advantageous to the ends of justice.

[31] It is clear that the Judge chose to take a more liberal approach than would have been permitted had both parties been represented and Mrs Haden does not complain that she was unfairly restricted in cross-examination. The prejudice she complains of is that, had she been aware of the scope of the hearing in advance, she would have had an opportunity to call witnesses who could have testified as to Mr Wells' bad character.

[32] There was no obligation on the Court to advise the parties in advance of the hearing as to the evidence they should file. Pre-trial directions, in general terms, simply required affidavits to be filed and served by specified dates. There is nothing to indicate that Mrs Haden felt constrained in the witnesses she could call. She cannot rely on her ignorance of the rules governing the scope of the hearing although, as it happens, the exchange of memoranda in advance of the hearing made it clear that the plaintiffs were proceeding on the basis that evidence should be confined to damages.

[33] I am satisfied that the appellants were not unfairly disadvantaged by the Judge's rulings in relation to the scope of the hearing.

Evidence of defamatory publications post-dating the statement of claim

[34] At the hearing before Judge Joyce the plaintiffs relied on evidence of publication of further defamatory material not relied on in the statement of claim. Mr Wright explained that, once the statement of defence had been struck out, Mr Wells made a deliberate decision not to file an amended statement of claim (in accordance with timetable directions) which would have expanded the scope of the hearing. His priority was to obtain an early hearing so as to obtain urgent injunctive relief. The cost to him was to confine damages to the $50,000 originally claimed which, in light of the further publications complained of, he regarded as inadequate.

[35] Mrs Haden submitted that evidence of the further publications (occurring after the statement of claim was filed on 18 July 2006) should not have been admitted and relied on. In summary, the evidence of which Mrs Haden complained comprised:

- Passages from the affidavit of Mr Wells concerning the consequences of Mrs Haden's conduct on AWINZ.

- Excerpts from a website controlled by Mrs Haden repeating her criticisms of Mr Wells. The Judge recorded in his judgment at [314] that he had carried out a Google search to establish that the defamatory material was still on the website.

- Questions asked in Parliament which the Judge saw as having been instigated by Mrs Haden and which, he said at [127]:

> ... is demonstrative too of Mrs Haden aggravating matters by maintaining her campaign despite this proceeding. In fact this proceeding became in the hands, and according to the lights, of Mrs Haden a fresh platform for her campaign.

[36] Under the heading "**Aggravation**" the Judge set out how some of this material aggravated damages:

> [312] Mrs Haden (with Verisure) has made use of this proceeding itself and of the world wide web repeatedly to make her self-perceived case that Mr Wells is a fraudster.
>
> [313] Mrs Haden has persisted in that endeavour throughout this proceeding. In doing so, she has (with Verisure) freely and frequently repeated the kinds of accusations that are identified in the statement of claim.
>
> [314] A simple google search with the keyword 'AWINZ' discloses no change in this respect as at the end of June, but instead some 5 or so links to her and Verisure's materials.
>
> [315] Far from this proceeding being Mr Wells' instrument to oppress and suppress (Mrs Haden's position) she has unhesitatingly used it in an endeavour further to beat Mr Wells about.
>
> [316] I am entitled, when considering matters of aggravation in the context of compensatory entitlement, to look at Mrs Haden's conduct from the time she began defaming Mr Wells down to the time of this judgment; and this is a case where I consider I have a real obligation to do so.
>
> [317] As variously identified above, Mrs Haden and Verisure have (in terms distinctly aggravating matters) used the power of the web to attract untold publicity to their irrational yet determined accusations.
>
> [318] Moreover, not only on 13 March but also before me again on 3 July Mrs Haden unhesitatingly repeated her defamatory allegations in terms continuing to demonstrate (at best for her) a wilful blindness to the flaws in her case.

[37] Aggravated damages are given to compensate a plaintiff when the injury or harm has been aggravated by the manner in which the defendant has acted. They may reflect the damage caused by an intransigent and disdainful attitude to a plaintiff in the course of litigation, including conduct during the trial: *Quinn v Television NZ Limited* [1995] 3 NZLR 216 at 223. The material referred to by the Judge, particularly what was contained on the website, was relevant to show Mrs Haden's determination to continue her campaign against Mr Wells, notwithstanding the issue of proceedings. The evidence complained of was plainly admissible for this purpose.

Additional inadmissible evidence

[38] Mrs Haden complained that, in addition to the evidence discussed in relation to aggravated damages, other evidence was relied on by the Judge which was inadmissible for one reason or another. This included:

- Passages in Mr Wells' affidavit addressing the effect of the defamatory publications on his family and health.

- An email from Paul Burke, dated 21 November 2007, exhibited to Mr Wells' affidavit and set out in [122] of the judgment.

- Extracts from the AWINZ.co.nz website referred to at [128] – [131] of the judgment.

[39] Mrs Haden put forward a range of arguments as to why this evidence was inadmissible, including:

- That it was uncorroborated hearsay of events which did not relate to the statement of claim.

- Website material was referred to without identifying defamatory material.

- The Judge relied on material which was either not defamatory and/or which the plaintiffs had failed to prove she had published, e.g. what was on the AWINZ website.

[40] Mr Wright, correctly in my view, submitted that much of what Mrs Haden complains of is based on a misconception of the limited nature and purpose of the hearing. She was unable to contest the essential elements of the plaintiffs' claim – that there were defamatory statements published by the defendants – and she did not seek to retreat from them at the hearing. On the contrary, she acknowledged publication of the material and publication of further defamatory statements.

[41] It is true that some of the material placed before the Court was hearsay in nature but it is clear that the Judge was alive to the restricted use to which that evidence could be put. For example, he was not prepared to rely on a medical certificate annexed to Mr Wells' affidavit supporting his claim that he had suffered significant ill-health as a result of work-related stress. It was not suggested that the email from Paul Burke referred to in [38] emanated from, or was associated with, Mrs Haden. Rather, it was relied on as leading to the publication of defamatory material by Mrs Haden on a website. The document was not being relied on to prove the truth of its contents.

[42] There is nothing to indicate that Judge Joyce made improper use of the evidence referred to by Mrs Haden.

Apology

[43] In the course of interlocutory proceedings, Mrs Haden proffered what the Judge described as a "very generalised" apology. Mrs Haden acknowledged in her submissions in the District Court that it was given for no other reason than to be released from the proceedings. The Judge found that Mrs Haden's subsequent conduct showed that the apology was never intended to be anything more than "an insincere sop" and that she had "turned her back on it": at [216]. He was not prepared to place any weight on it.

[44] Mrs Haden submitted that, notwithstanding the limited scope and purpose of the apology, it should have been taken into account. She did not elaborate on that submission and I do not think it can survive analysis.

[45] By s 29(a) of the Defamation Act 1992, in assessing damages the Court shall take into account in mitigation of damages:

> (a) In respect of the publication of any correction, retraction, or apology published by the defendant, the nature, extent, form, manner, and time of that publication.

[46] Mrs Haden's apology was limited in nature and given for the purpose of achieving an exit from the proceedings. The Judge was clearly entitled to take the view that her subsequent unrepentant attitude and conduct eliminated whatever weight might have been attributed to the apology in mitigating damages.

Considerations implied under s 29(b)

[47] Mrs Haden submitted that the Judge erred in his approach to s 29(b) of the Defamation Act in failing to give consideration to the extent of publication and evidence of honest opinion.

[48] The submission appears to be based on a misunderstanding of s 29(b) which requires the Court to take into account in mitigation of damages:

> (b) In respect of the publication, by the defendant, of any statement of explanation or rebuttal, or of both explanation and rebuttal, in relation to the matter that is the subject of the proceedings, the nature, extent, form, manner, and time of that publication:

[49] There was no statement of explanation or rebuttal published by Mrs Haden. Section 29(b) could not apply. At [221] of his decision, the Judge rightly found that s 29(b) was of no utility to Mrs Haden.

[50] I accept that the extent of publication is relevant to an assessment of damages. However, there is nothing to indicate that the Judge misdirected himself on this issue. As Mr Wright pointed out, Mrs Haden's decisions to publish nearly all of the defamatory publications at issue on the internet effectively destroys any suggestion that she sought to restrict publication to a narrow class of persons having a specific interest in and duty to receive the information. This also disposes of any question (also implied in Mrs Haden's grounds of appeal) that a defence of qualified privilege might have been raised. Similarly, the defence of honest opinion was not available and could not be introduced via s 29(b).

Effect of injunction

[51] Mrs Haden submitted that the Judge failed to give any weight to the fact that he was also granting relief by way of an injunction and that this should have operated to mitigate damage. No submissions were made in support of this ground of appeal.

[52] By s 29(c) of the Defamation Act the terms of any injunction or declaration that the Court proposes to make or grant shall be taken into account in mitigation of damages. It is clear that the Judge turned his mind to s 29(c) as he refers to it in [233] of his judgment when stating that he would be granting injunctive relief. There is nothing to indicate that the grant of an injunction was not taken into account. I would have expected it to be a factor carrying little, if any, weight, as the continuing publication of defamatory material warranted injunctive relief to avoid further injury.

Honest opinion

[53] Mrs Haden submitted that the Judge should have given consideration to a defence of honest opinion because he said at [230] of his judgment that he would revisit the issue and did not do so. In fact, he did discuss the issue at [334] in the context of exemplary damages where he explained that, even if the defence pleading had survived, the defence of honest opinion could not have been sustained. However, the point is academic. The defence of honest opinion was not available to the appellants.

Liability of appellants

[54] In the grounds of appeal it is claimed that, in assessing damages, the Judge erred in treating all appellants as responsible for all publications when they had not all published the statements. The use of the pronoun "all" is a misnomer which may have been intended to incorporate a reference to the trust which was a defendant in

the proceeding. It is not therefore a party to the appeal and, as earlier noted, there is no challenge to the injunctive relief ordered against it.

[55] In another passage of her submissions Mrs Haden appears to identify the substance of this ground of appeal as being that damages were awarded against both appellants when they are separate legal entities. She says that Verisure Investigations is not her alter ego and it could not have sent emails or been the author of the publications.

[56] I am satisfied, however, that there was ample evidence to support the finding that Mrs Haden and Verisure were jointly responsible for the publications. Verisure sent three of the emails containing defamatory material relied on by the plaintiffs. Mrs Haden was a director. Verisure was the vehicle for her private investigation business. As the Judge found at [26], Verisure was, in a practical sense, the operational instrument, or alter ego, of Mrs Haden.

Aggravated damages

[57] Mrs Haden submitted that the Judge should not have awarded any element of aggravated damages as they had not been pleaded. She argued that it was unfair for him to have regard to material which post-dated and was not raised in the statement of claim. Under this head she included the evidence discussed in paras [34] – [37] above.

[58] Aggravated damages are not a separate head of loss or damage. They are compensatory and intended to reflect the manner in which or the motives with which a wrong has been committed: *Attorney-General v Niania* [1994] 3 NZLR 106 at 111 - 112. They need not be separately pleaded; it may well be that it would be wrong to do so: *Tairawhiti District Health Board v Perks* [2002] NZAR 23.

[59] There is no injustice in evidence post-dating the statement of claim being taken into account. It was the appellants' own conduct which was the aggravating factor. It could not be misrepresented or mischaracterised without the appellants

having a full opportunity to respond. With one caveat, the evidence earlier reviewed was admissible and relevant for this purpose.

[60] That caveat concerns the Judge's search of one of the internet sites – see [35] – [36] above. It would not normally be appropriate for a Judge to rely on the evidence of his own internet researches. It is elementary that all evidence should be adduced at a time and in a manner that gives the parties a proper opportunity to examine it and, if necessary, respond. But in this case no harm was done as the Judge's search was for the limited purpose of ascertaining whether one of the websites continued to publish defamatory material.

[61] There was no error in principle in the way the Judge approached the assessment of damages. The figure he fixed was plainly available to him given the highly damaging nature of the appellants' statements and the way in which they were published.

Exemplary damages

[62] Mrs Haden submitted that the award of exemplary damages was against the weight of evidence. She repeated submissions referred to earlier that the evidence relied on was hearsay and unreliable.

[63] Exemplary or punitive damages may be awarded where a defendant's conduct has been high-handed to an extent calling for punishment beyond that inflicted by an award of compensatory (including aggravated) damages: *Television New Zealand v Quinn* [1996] 3 NZLR 24 at 36. Exemplary damages are preserved by s 28 of the Defamation Act which provides that punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

[64] Judge Joyce found that there could be no clearer case of flagrant disregard of the rights of the plaintiff. He said that for no good reason Mrs Haden had embarked upon and persisted with "a relentless and vindictive campaign to destroy Mr Wells' good reputation".

[65] The Judge's findings fully supported his conclusions and the exemplary damages awarded were by no means excessive.

Other matters

[66] For completeness, I comment on some matters incidentally referred to in Mrs Haden's submissions and not expressly addressed earlier in this judgment.

[67] She referred to an alleged breach of s 27 of the New Zealand Bill of Rights Act 1990 which enshrines the right to justice according to law. As the preceding discussion makes clear (see in particular at [30] – [32]), I am satisfied that the appellants were afforded a full and proper opportunity to advance their position at the hearing. Indeed, the Judge went out of his way to minimise the disadvantages flowing from the appellants' self-represented status.

[68] Conduct of counsel. Mrs Haden criticised the conduct of Mr Wright in her submissions. His conduct was not a ground of appeal. No useful purpose would be served by canvassing this matter.

[69] Judicial conduct. Mrs Haden complained that Judge Joyce's judgment is "defamatory" of her. She referred to numerous passages in his decision which she sees as unfairly and gratuitously denigratory of her.

[70] Judge Joyce expressed his decidedly unfavourable view of Mrs Haden and her conduct in trenchant and often colourful terms. This may well have fuelled the continuing sense of grievance which has characterised Mrs Haden's pursuit of this appeal. Judges who are obliged to express unfavourable opinions of the character and conduct of litigants, should bear in mind the importance of moderation, as encapsulated in the cautionary words of the Court of Appeal in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495:

> [102] Turning now to adverse comments, judges are duty bound to refrain from making unnecessary comments. The various codes of judicial conduct – including the Australasian ones – call on judges to be courteous to the litigant, observe proper decorum, and to be particularly cautious and circumspect in their language. And judges should not issue oral

> condemnations that are unrelated to the furtherance of the cause to be decided or are simply gratuitous.

[71] Mrs Haden should not, however, allow the critical terms in which Judge Joyce expressed himself to obscure the realities which lay behind them. His findings are unassailable as a matter of fact and law.

Result

[72] The appeal is dismissed.

[73] The respondent is entitled to costs on a category 2 band B basis.