IN THE COURT OF APPEAL OF NEW ZEALAND

CA453/2009
[2009] NZCA 624

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	MICHAEL PETER STIASSNY First Respondent
AND	KORDA MENTHA (FORMERLY FERRIER HODGSON) Second Respondent

Hearing: 1 December 2009

Court: O'Regan, Robertson and Baragwanath JJ

Counsel: Appellant in person (by video conference)
R E Harrison QC as counsel assisting the Court
J G Miles QC and P I L Hunt for First and Second Respondents

Judgment: 22 December 2009 at 4 pm

JUDGMENT OF THE COURT

A The appeal in CA453/2009 is treated as abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005.

B An extension of time to commence a new notice of appeal is granted and we direct that the notice of appeal in CA453/2009 be treated as having been resubmitted and accepted for filing on the date of this judgment.

C The application to strike out the appeal, which we treat as applying to the new appeal, is granted in part. We strike out the appeal except to the

extent that it relates to the quantum of the damages awarded in favour of the respondents in the High Court.

D Security for costs is dispensed with.

E We make no award of costs in relation to the matters dealt with in this judgment.

REASONS OF THE COURT

(Given by O'Regan J)

Introduction

[1] The appellant wishes to appeal against a decision of Cooper J in which he was found liable for both defamation and breach of contract and ordered to pay the respondents damages totalling $920,000: *Korda Mentha v Siemer* HC AK CIV 2005-404-1808 23 December 2008. There have been a number of procedural issues in relation to the proposed appeal and, in addition, the respondents have applied to have this appeal struck out or, in the alternative, for an order increasing the amount of security for costs.

[2] The respondents' applications were heard on 1 December 2009 and, at the same time, we heard submissions on the procedural issues and the steps required to address them. This judgment canvasses all the issues dealt with at that hearing.

[3] Dr Harrison QC appeared at the 1 December hearing as counsel assisting the Court. We are grateful to him for his assistance.

A brief background to the present proceedings

[4] The past five years have seen the appellant entangle himself in a complex web of proceedings. For the purposes of this case, it is only necessary to refer to one strand of that web.

The events leading up to the High Court hearing

[5] The brief background that follows relies substantially on Cooper J's judgment.

[6] In December 2000, the respondents were appointed as the receivers of Paragon Oil Systems Ltd (Paragon). The appellant held shares in Paragon and was its managing director. In July 2001, the Paragon receivership was terminated when the appellant became the sole shareholder. However, a dispute which had arisen over the costs charged for the receivership continued.

[7] The appellant made numerous complaints regarding the respondents and the conduct of the receivership. Many of the appellant's allegations were published on a website, the existence of which was advertised on a large billboard in central Auckland.

[8] The respondents brought proceedings in defamation against the appellant (a claim based on an alleged breach of a settlement agreement dated 19 April 2005 was later added), and applied *ex parte* for an interim injunction restraining the appellant from publicising any information relating to the respondents and directing him to remove the billboard and certain material from the website. On 8 April 2005, Winkelmann J granted the application. Ellen France J rescinded that injunction on the appellant's application, but granted a new interim injunction in its place: *Ferrier Hodgson v Siemer* HC AK CIV 2005-404-1808 5 May 2005. An appeal against that judgment was subsequently dismissed: CA87/05 13 December 2005.

[9] The appellant did not comply with the terms of the injunctions issued by Winkelmann and Ellen France JJ. In a judgment delivered on 16 March 2006 (HC

AK CIV-2005-404-1808) and upheld on appeal ([2008] 1 NZLR 150 (CA) and [2007] NZSC 53), Potter J found the appellant to have breached the injunctions. She declared that he was in contempt of court, imposed a fine of $15,000, maintained the injunction granted by Ellen France J and ordered him to pay costs. She also directed that the further applications filed by the respondents, including one for an order that the appellant be debarred from defending the proceeding (the debarring order), lie in Court with liberty reserved to the respondents to apply for such relief, in the event of evidence becoming available that the injunction had again been breached.

[10] On 26 April 2007, the respondents alleged the appellant had further breached the injunction. They applied for his committal and for other associated orders. The appellant did not respond formally, by way of a notice of opposition and affidavits in support, to the application. Instead he advised the Registry that he would be overseas and unavailable for the allocated fixture. No formal application for an adjournment was filed, and the fixture proceeded in his absence.

[11] Potter J found the appellant in contempt of court and granted leave to the respondents to issue a writ of arrest to bring him before the Court: HC AK CIV-2005-404-1808 9 July 2007. The Judge also made an order debarring the appellant from defending the proceeding until further order of the Court. She did so on the basis that the appellant had continued deliberately breaching the injunction and was refusing to pay the numerous costs awards against him, despite having the means to do so. The appellant did not appeal against this judgment.

[12] On 13 July 2007, the appellant was brought before the High Court. Potter J described his breaches of the injunctions as "serious, continuous, deliberate and contumacious" (at [23]) and imposed a term of imprisonment of six weeks.

[13] The substantive dispute between the respondents and the appellant was finally heard on 8 October 2008, with judgment delivered on 23 December 2008. As a consequence of the debarring order, the hearing proceeded by way of formal proof. The appellant did not appear and was not represented. Cooper J held that the respondents' claims had been made out. He awarded Mr Stiassny $825,000 in respect of the defamation claim, being $650,000 general damages, $150,000

aggravated damages and $25,000 exemplary damages, and Ferrier Hodgson $75,000 in respect of the defamation claim and $20,000 in respect of the claim for breach of the settlement agreement. He also granted a permanent injunction prohibiting the defamatory publications.

[14] Prior to delivery of Cooper J's judgment, the appellant was adjudicated bankrupt: *Korda Mentha v Siemer* HC AK CIV 2007-404-007675 6 November 2008.

The events leading up to the present hearing

[15] On 16 January 2009, this Court's Registry received two notices of appeal dated 12 January 2009. In one of these, the appellant sought to appeal against Cooper J's judgment. (The other appeal is not relevant to this proceeding: see *Siemer v Stiassny* [2009] NZCA 571.) The Registrar referred both notices of appeal to the Official Assignee for advice on whether the Assignee intended to continue or adopt them. No reply was received until 13 July 2009, when the Assignee wrote to the Registrar indicating an intention not to continue or adopt the appeal against Cooper J's judgment.

[16] Following receipt of that reply, the notices of appeal were brought to the attention of the President of the Court on 30 July 2009. In a minute issued that day, he made the following observations:

> [4] It is far from clear to me that the legal rights asserted by the appellant are to be taken as having vested in the Official Assignee. This is because rights of action which are purely personal to a bankrupt, as opposed to rights of action associated with injury to property or estate, do not pass to the Official Assignee on bankruptcy. So the appellant may be entitled to pursue his appeals personally irrespective of whether the Official Assignee is prepared to continue them.

[17] He directed that the appeals be listed for hearing to consider "what, if any, additional orders are required or appropriate in relation to their continuation".

[18] It was only after the President's minute that the present appeal was accepted for filing. In the interim, the appellant did not seek a fixture or file a case on appeal, for the obvious reason that the appeal's status remained uncertain. On 1 September,

2009 the respondents applied for orders striking out the appeal and increasing the amount of security for costs.

Issues

[19] By the time the appeal had been processed and allocated a file number, the time period for filing the case on appeal and seeking a fixture had elapsed. The first issue is, therefore, what procedural steps are required to keep the appeal on foot (or to put it back on foot) and whether the Court should facilitate them.

[20] If the appeal is on foot, it is then necessary to consider the respondents' applications. The issues raised by those applications are:

(a) Should the appeal be struck out?

(b) Should security for costs be increased?

Should the appeal be kept on foot?

[21] An appeal as of right must be brought within 20 working days after the date of the decision against which the party wishes to appeal: r 29(1)(a) of the Court of Appeal (Civil) Rules 2005 (the Rules). Rule 31(1) provides that an appeal is brought only when the appellant files a notice of appeal in the Registry by either delivering it by hand or by sending it by mail and serves a copy of the notice on every person who is a party to the proceeding in the court appealed from.

[22] As noted above, the appellant's notice of appeal was received by the Registry on 16 January 2009, ie within the prescribed time period. Although the appeal was not registered until 30 July 2009, this does not affect the date on which the appeal was brought. Rule 43 requires that the case on appeal is filed and a fixture date is sought within six months of an appeal being brought. This period expired on 16 July 2009, at which point the appeal was treated as abandoned: r 43(1). Despite the hearing proceeding on 1 December 2009, the appellant had not filed a case on appeal or sought a fixture. Nor had he applied for an extension of the period referred to in r 43(1). Accordingly, the appeal is deemed to have been abandoned and cannot be

revived: see *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 29 at 31 (CA), *Scenic Developments Ltd v Kelmarna Properties Ltd* (2004) 17 PRNZ 489 at [23] (CA) and *Erwood v Harley* [2008] NZCA 572 at [28]. For the appeal to proceed, therefore, it is necessary for the appellant to obtain an extension of the time within which to commence a new appeal.

[23] The impact of r 43 was not canvassed at the 1 December 2009 hearing, though Dr Harrison pointed out that r 43 had the potential to derail the appeal. The reason that the issue was not raised was that counsel were working on the assumption that the date of filing of the appeal was 30 July 2009 (when it was registered). Having now considered the point, we are clear that the date from which the six month period referred to in r 43 is measured is the date of filing and serving of the appeal, which appears to have been 16 January 2009.

[24] Rule 43 provides that an extension of time to comply with the requirement to file the case on appeal and seek a fixture may be given, but only if it is sought before the six month period has elapsed or within three months thereafter. It is now too late for an extension to be sought.

[25] As the appeal in CA453/2009 is treated as abandoned, the question arises as to what can now be done. It has been established in a number of recent cases that an appellant may recommence the appeal by filing a new appeal. An extension of time to file the appeal under r 29A of the Rules is required. It will be given only in exceptional cases. The position is summarised in *Sexton v Rice Craig* [2007] NZCA 200 as follows:

> [31] As a consequence, it will be rare in deemed abandonment cases that the Court will exercise its r 29(4) discretion. The case for the exercise of the discretion will need to be compelling. The Court must reach an overall assessment in the light of all relevant considerations. These will include the explanation for the delay and for the failure to apply for an extension under r 43, and the merits of the proposed appeal. Other factors will also be relevant, for example, prejudice to the respondent. The hurdle is a high one.

[26] Rule 29(4), to which reference was made in *Sexton*, has since been replaced by r 29A. In *Body Corporate 202254 v City Rental Trustees Ltd* [2008] NZCA 309

the Court confirmed that the replacement of r 29(4) by r 29A did not affect the test outlined in *Sexton*.

[27] The overarching factor in the present case is the fact that the impact of r 43 has arisen because of the delay in the appeal being registered in this Court, consequent upon the delayed response to the Registrar's inquiry by the Official Assignee. The appellant could not be expected to have complied with r 43 in circumstances where he had no indication from the Court that the clock was ticking on the r 43 period from the date on which the notice of appeal was received. The Court has to accept that r 43 has come into play largely through its actions. We see this as an exceptional circumstance that justifies granting an extension of time to file a new appeal and restoring the status of the appellant's intended appeal to the position that would have applied if the delay in registering the appeal had not occurred. We consider the practical solution is to treat the notice of appeal that was filed on 16 January 2009 as having been re-submitted and accepted for filing on the date of this judgment.

[28] We do not overlook the fact that the *Sexton* test refers both to the merits of the appeal and prejudice to the respondents. We accept that the delay is inconvenient to the respondents, but we do not see that as a significant prejudice. As to the merits, we do not see that as a major factor where the need for the extension of time arises from the Court's own actions.

[29] We propose to treat the appeal as having effectively recommenced on today's date. We will consider the respondents' applications to strike out the appeal and for an order requiring security for costs as applying to the new appeal.

Should the appeal be struck out?

[30] The respondents argue that the appeal should be struck out because of:

(a) The debarment order in the High Court;

(b) The appellant's continuing contempt of the interim injunction and, since the decision of Cooper J, the permanent injunction.

[31] We will consider each in turn.

Debarment order

[32] The respondents renew the argument they made in applying to strike out an earlier appeal by the appellant against an interlocutory order made in the present proceedings: *Siemer v Ferrier Hodgson* [2008] 3 NZLR 22 (CA). We will refer to that appeal as the earlier strike-out application. The interlocutory order had been made before the debarment order, but the application to strike out the appeal was heard after the debarment order.

[33] This Court did not accept that the effect of the debarment order was to prevent the appellant pursuing his appeal. This was because the ruling against which he sought to appeal pre-dated the debarment order, and because "it is difficult to see how Potter J's ruling [the debarment order] could extend to the processes of this Court, an appeal having been made here": at [27].

[34] As Mr Miles QC pointed out, the first of these grounds is inapplicable in the present circumstances because the hearing before Cooper J took place after the debarment order had come into effect. He argued that the second ground for rejecting the earlier strike-out application should not be applied in relation to the present appeal. He said that the respondents were not asserting that this debarment order made in the High Court extended to the processes of this Court because the Court of Appeal was bound by the High Court order. Rather, they were submitting that, as a matter of logic, if the appellant's conduct was such that he was barred from defending the case in the High Court, he should have no greater rights in relation to an appeal against that decision. In particular, it was argued that the appellant should not be permitted to raise issues on appeal which he was debarred from raising in the High Court.

[35] We see no reason to differ from the assessment the Court made in the earlier strike-out application on this argument.

[36] As Dr Harrison pointed out, the "logic" to which Mr Miles referred is debatable. If the debarment order does not extend to proceedings in this Court, it is hard to see why it should become the foundation for an order striking out the appeal.

[37] We are not prepared to strike out the appeal on this ground.

Continuing contempt

[38] Mr Miles argued that the appellant's continuing contempt of the injunctions granted in the High Court should disqualify him from being heard on appeal.

[39] This area of the law was also considered by this Court in the earlier strike-out application. As the Court noted then, the historical rule that a litigant who was in contempt would not be heard further in the litigation until the contempt was purged has now been replaced by a more flexible approach.

[40] As he had in the earlier strike-out application, Mr Miles cited in support of his argument the decision of the House of Lords in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1. That case is authority for the proposition that the court has a discretion whether to hear a contemnor who has not purged his or her contempt and that in deciding whether to bar a litigant the court should adopt a flexible approach. The court is entitled to exercise its discretion to decline to entertain an appeal where a contemnor has not only failed to comply with an order of the court but, for example, has made it clear he or she would continue to defy the court's authority, whatever the outcome of the appeal. Mr Miles referred us to the speech of Lord Bridge, particularly the following statement at 46 – 47:

> Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order.

[41] Mr Miles also relied on the decision of the England and Wales Court of Appeal in *Arab Monetary Fund v Hashim* 21 March 1997 (available on Bailii as [1997] EWCA Vic 1298). In that case, Lord Bingham of Cornhill CJ summed up the position as follows:

> From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.

[42] A similar approach has been taken in other cases in England and Wales: see for example *Grupo Torras SA v Al Sabah* [2000] CP Rep 76 (CA) and *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 at [45] – [58] (CA).

[43] As this Court did in the earlier strike-out application, we adopt the nuanced approach described by Lord Bingham in *Arab Monetary Fund*. Its focus on the interests of justice as the touchstone provides the appropriate balance between the importance of the observance of Court orders and the rights of litigants to be heard, as reflected in s 27 of the New Zealand Bill of Rights Act 1990. We see this as requiring an assessment of the fairness of the process adopted in the High Court: what could fairly have been in contemplation when the contempt occurred and as it continued? In other words, what could a person who defied the Court's orders as the appellant did expect the Court to do in the course of the proceedings in the face of his contempt? The ultimate test is the interests of justice: is there a risk of injustice if the appellant is not heard in this Court and therefore denied the opportunity of contesting the outcome of the High Court proceedings?

[44] We start by considering the appellant's record of failing to observe court orders.

[45] There is no doubt that the appellant continues to be in contempt and that he has consistently flouted the interim injunction ordered by Ellen France J, including after it was made permanent by Cooper J. In addition, he has engaged in other conduct which is clearly in contempt of court: see [8] – [13] above and the judgment

of this Court in the earlier strike-out application at [29] – [36]. He has not paid costs awarded against him, both in the High Court and in this Court. We were told the unpaid costs amounted to over $300,000. However, since the appellant was adjudicated bankrupt, the obligation to pay costs has now become a claim on his bankrupt estate. In those circumstances, we put the complaint of continuing non-payment of costs to one side.

[46] The Solicitor-General has taken proceedings against the appellant in relation to his contempt. The High Court found the appellant in contempt and ordered that he serve a term of imprisonment: *Solicitor-General v Siemer* HC AK CIV 2008-404-472 Chisholm and Gendall JJ. That order was modified on appeal to this Court ([2009] 2 NZLR 556) (the 2009 appeal), and is now subject to an appeal to the Supreme Court for which leave has been given and a hearing date in early 2010 has been allocated.

[47] The appellant has had a number of opportunities to purge his contempt and comply with the injunctions but has not done so. He stood to gain by doing so. The debarment order was made "until further order of the Court". It was clear it would have been discharged if the appellant had complied with the injunction and paid the costs awarded against him. The order committing the appellant to a term of imprisonment for contempt, as modified by this Court, is subject to a proviso that it would come to an immediate end if the appellant complied with the injunction. Yet he remains in contempt and has given no indication of any intention to comply with the injunction.

[48] We accept Mr Miles' submission that the appellant's contempt has been and continues to be a serious defiance of the Court's orders. We are conscious that, despite having obtained an injunction in May 2005, the respondents still have not had an effective remedy in respect of the defamation and breach of contract claims, which have now been upheld by the High Court. Given the "paramount importance" of the "prompt and unquestioning observance of court orders" (to use Lord Bingham's words) this is a telling factor in favour of the strike-out application.

[49] Against this, we must weigh the need to ensure that the Court does justice to the appellant. Dr Harrison's submissions suggested that there were aspects of the High Court process which were unfair. He was concerned that the appellant may not have been given notice of the hearing before Cooper J and of the amended pleading which Cooper J allowed to be filed at the outset of that hearing. He also queried whether the appellant had been given the chance to have the debarment order set aside, given that his bankruptcy meant he was no longer liable for the costs awards, and his failure to pay those costs was one of the bases on which the order was made.

[50] Having heard Mr Miles' response to those concerns, we have considered for ourselves the record of the High Court on those matters.

[51] We start first with the suggestion that the appellant did not attend the hearing before Cooper J because he was not aware of either the fact that a fixture had been allocated or the day on which the hearing was to take place. We are satisfied that this is not the case. There are a number of documents that establish that the fixture was brought to the appellant's attention:

(a) On 9 September 2008, a Deputy Registrar sent a "notice of date of formal proof hearing" to the appellant's address for service, informing him that hearing was set down for 8 October 2008.

(b) The appellant responded by filing a document titled "Memorandum Request to Vacate Hearing Set for 8 October 2008 as a Matter of Law and Equity" and dated 15 September 2008. He began by acknowledging receipt of the above notice. He then set out a number of reasons why the "hearing cannot legally proceed as scheduled".

(c) On 29 September 2008, Venning J issued a minute declining the appellant's application to vacate the hearing.

(d) The appellant filed a further memorandum, dated 2 October 2008, criticising Venning J's decision not to vacate the hearing date.

[52] We now turn to the concerns expressed about the debarring order itself, and the suggestion that the appellant may not have had a fair opportunity to appeal against it or have it set aside.

[53] As noted at [11] above, Potter J made the order debarring the appellant from defending the proceeding on 9 July 2007. The appellant was given formal notification of the fixture date (4 July and, if necessary, 5 July 2007) by letters dated 3 May and 25 May 2007. He responded by email, stating that he would be overseas until 13 July 2007 and therefore unavailable for the fixture. The High Court Registry advised him that if he wanted an adjournment, he should file a formal application. The appellant responded by email dated 26 June 2007 attaching an unsigned memorandum in which he said that he would not return to New Zealand until 11 July 2007 and that no counsel was instructed to act on his behalf. He confirmed this position in a further email on 29 June 2007, in which he also explicitly refused to file a formal application for adjournment. At no stage did the appellant file a notice of opposition or submissions.

[54] Potter J recounted this narrative in her judgment at [3] – [8]. She observed that the respondents' application had been served on the appellant, that a party who has not filed a notice of opposition has no entitlement to be heard, that the appellant's non-attendance was deliberate and that a formal application for an adjournment had not been filed (and would have been opposed by the respondents). In those circumstances, the Judge resolved to proceed with the hearing.

[55] At the hearing, the respondents sought, in addition to a writ of arrest and an order for costs, an order that the appellant (and Paragon) "be debarred from defending the substantive proceedings". Potter J observed at [22] Mr Miles' concession that an order debarring the appellant was more appropriate than an order striking out his defence, because it was the "'more flexible' alternative".

[56] After setting out the evidence, the Judge found the appellant in contempt of court. She granted leave to the respondents to issue a writ of arrest to bring him before the High Court so that the consequences of his contempt could be determined: at [58]. The Judge then considered the application for an order debarring the

appellant from defending the proceeding. The respondents relied on the appellant's breaches of the injunction as well as his failure to pay numerous costs awards against him. The Judge then concluded in the following terms:

> [68] The plaintiffs do not seek an order that the defence be struck out. They seek that the appellant be debarred from defending the proceeding until outstanding costs are paid. The circumstances of this case are undoubtedly extreme. Having already been found in contempt of Court, the appellant continues to deliberately breach the injunction, and now refuses to pay the costs awarded against him despite having effectively admitted that he is financially able to do so. It is appropriate that I make such an order in the exercise of the Court's discretion.

[57] Although to some extent this part of the Judge's discussion centred on the appellant's obligation to pay the costs awards against him and his failure to do so, the Judge had already recorded her finding that the appellant was in contempt of court due to his breaches of the injunction. The Judge's "summary of orders" at [72] simply recorded that the appellant "is debarred from defending this proceeding until further order of the Court".

[58] The appellant did not appeal against the order. He suggested to us that he could not do so because he was in prison after it was made and the appeal period lapsed. Whether that is so or not, there is nothing to indicate any attempt to seek an extension of time for appealing despite a number of references to that possibility by this Court.

[59] After the earlier strike-out application, this Court issued a minute dated 27 February 2008. In that minute, the Court dealt with a number of procedural points relating to the upcoming appeal. It concluded, however, with the following observations:

> [12] Recognising, as we do, that this Court, in the judgment of 14 December 2007, refused to strike out the present appeal, there can be little or no point in determining the appeal if the debarring order is to remain in place. The point becomes apparent when one considers what would happen after we allowed or dismissed the appeal against the directions of 19 April. Unless the debarring order were set aside, the appellant could play no part in the trial. Whatever success he had gained in placing additional material in this Court pursuant to the present Minute, and even if he succeeded in whole or in part in challenging Rodney Hansen J's judgment striking out various parts of the second amended statement of defence, he would still have to sit mute and play no part in the trial.

> [13] The appellant may apply to the High Court to set aside the debarring order (something which presumably at the least would require him to meet the cost orders against him) or he could apply to this Court for leave to appeal out of time against the debarring order. If he takes the second course, that application and (should leave be granted) the appeal could be addressed at the same hearing as the appeal from the decision of Rodney Hansen J.

[60] The appellant did not take up either of the suggestions made at [13] of the minute. Instead, he responded by way of a memorandum dated 3 March 2008:

> [12] By the same token, there is no need to separately appeal the 'debarring order' of Potter J (as suggested in the Minute) when Certiorari will force the Court into a review which the appellant respectfully submits will expose the entire case of the respondents as a fraudulent abuse of process, as well as a contravention of the appellant's guaranteed legal rights.

[61] On 24 July 2008, this Court issued judgment in relation to the appellant's appeal against Rodney Hanson J's interlocutory orders: *Siemer v Ferrier Hodgson* [2008] NZCA 255. The Court dismissed the appeal on its merits. It concluded with the following observations:

> [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.

[62] Finally, in its judgment in the 2009 appeal, this Court again referred to the debarring order and the fact there had been no appeal against it: at [17].

[63] We are satisfied that the appellant has chosen not to appeal against the debarring order or to seek to have it set aside. He has had the opportunity to do either. He had proper notice of the hearing before Cooper J. He chose not to attend. He did not try to have the debarring order set aside so he could participate in that hearing. He has similarly chosen to continue to defy the injunction when compliance with it would have removed the basis for the debarring order.

[64] The appellant's notice of appeal indicates that he wishes to challenge a number of aspects of the High Court decision including:

(a) The amendments allowed to the statement of claim;

(b) The alleged failure by Cooper J to address the evidence before him;

(c) The alleged failure by Cooper J to take into account simultaneous appeals to this Court and to the Supreme Court, neither of which had relevance to the High Court hearing;

(d) An alleged "fabrication of evidence" by the trial Judge;

(e) An allegation of breach of the New Zealand Bill of Rights Act (essentially a circuitous challenge to the debarment order, which he had chosen not to challenge at a time when the Court could have dealt with such a challenge);

(f) An assertion of a right to trial by jury (which, of course, did not apply in the circumstances of a formal proof hearing from which the appellant was debarred).

[65] Underlying all of these grounds of appeal is the reality that the appellant seeks to challenge the basis on which the injunction has been issued (his liability in defamation and breach of contract) and the granting of the injunction itself. What he seeks to challenge, therefore, is the injunction of which he is in contempt, and which mirrors the terms of the interim injunction of which he was in contempt from the time it was issued in 2005 until the time it was replaced by the permanent injunction issued by Cooper J. In other words, he seeks to challenge the order which he has continuously refused to comply with.

[66] We see this as precisely the sort of situation envisaged by cases such as *Morgan Grampion* and *Arab Monetary Fund*. Much of what the appellant wishes to challenge on appeal is related to the limitations of the High Court hearing because of the debarment order, but he seeks to do this after the hearing to which the debarment order related, having passed up numerous opportunities to challenge it prior to, or at, the hearing. The Court would be doing an injustice to the respondents if it allowed its processes to be abused in that way. We are satisfied that the interests of justice in

this case require that the Court refuse to give the appellant the opportunity to challenge on appeal the order which he has continuously defied.

[67] We acknowledge that, in doing so, we are reaching a different outcome from that reached by this Court in the earlier strike-out application. It considered that, despite his contempt, the appellant should be able to pursue his arguments that the interlocutory rulings which he sought to contest were legally wrong. Two years later, the position is even worse than it was then. Now the injunction has been confirmed in the judgment of Cooper J. The appellant has been found guilty of contempt of court by the High Court; this Court has upheld that finding and the order committing the appellant to prison, albeit on modified terms. The costs awards remain unpaid and the appellant's bankruptcy means they are unlikely to be recovered. And the continuous contempt has continued for two more years. The balance between the paramount importance of observance of court orders and the importance of giving litigants access to the courts has shifted towards the former consideration.

[68] We do, however, consider that the position in relation to the award of damages made by Cooper J may give rise to different considerations. At the time the damages award was made, the appellant was bankrupt. The fact that he has not met the damages award cannot, therefore, be fairly described as an indication of contempt by him of that order. We are cognisant that by any standards the award is an extremely large one, and we have concerns that an award of that magnitude has arisen from a process in which the party against whom it is made has not participated. We propose, therefore, to allow a challenge to the quantum of the damages award to be mounted in this Court, so that that aspect of the proposed appeal by the appellant will be excluded from the ambit of the strike-out order.

[69] We order therefore that the appellant's appeal be struck out in all respects except to the extent that it relates to a challenge to the quantum of the damages award made by the High Court. That challenge is limited to an argument based on the facts as found by the High Court Judge, which are not susceptible to challenge in this Court. In essence, the argument which remains available to the appellant is that

the award of damages for the defamation and breach of contract as found by the High Court Judge is excessive.

Security for costs

[70] The respondents seek an order that security for costs in the sum of $6,000 be required. Security for costs is normally a matter for the Registrar, but where the court is seized of the matter it may deal with the issue itself: *Erwood v Maxted* [2009] NZCA 542 at [26].

[71] Mr Miles recited to us the numerous costs orders which have been made in favour of his client against the appellant, which remain unsatisfied. We accept that in the normal course of events security would be required, and even more so in this case where defaults in the payment of costs awards have been continuous.

[72] Against that is the reality that the appellant is a bankrupt. Mr Miles pointed to evidence of actions taken by the appellant to secrete assets offshore, which he said provided a basis for the proposition that the appellant would be able to post the security if called upon to do so.

[73] As Dr Harrison pointed out, however, if the appellant were to bring funds into New Zealand he would be obliged by law to pay them over to the Official Assignee, so the availability of offshore funds is probably not going to provide a proper source of payment of security. The appellant may be able to seek funding from family members and the like, but we have no evidence before us as to his ability to do that.

[74] In the circumstances, we think that the realistic approach to this issue is to accept that, as a bankrupt, the appellant does not have access to funds in New Zealand. We can see no point in allowing the appeal to proceed (albeit to a very limited extent) and then setting a level of security which leads to the consequence that it cannot proceed. We therefore decline to make any order for security for costs to be paid.

Result

[75] We rule as follows:

(a) The appeal in CA453/2009 is treated as abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005.

(b) We give an extension of time to appeal until today's date and direct that the Registrar treat the notice of appeal received by this Court on 16 January 2009 in CA453/2009 as a new notice of appeal filed on today's date.

(c) For the purposes of r 43, the appeal will be treated as having been brought on today's date.

(d) We allow the application to strike out the appeal in part. We strike out the appeal except to the extent that it relates to the quantum of the damages awarded in favour of the respondents in the High Court.

(e) We dispense with security for costs.

[76] We make no award of costs in relation to the matters dealt with in this judgment.

Solicitors:
McElroys, Auckland for First and Second Respondents