IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-6822

BETWEEN	VINCENT ROSS SIEMER First Plaintiff
AND	JANE DINSDALE SIEMER Second Plaintiff
AND	MICHAEL PETER STIASSNY First Defendant
AND	FERRIER HODGSON AND CO LTD Second Defendant
AND	THE ATTORNEY GENERAL OF NEW ZEALAND Third Defendant
AND	DAVID COLLINS Fourth Defendant
AND	JUDICIAL CONDUCT COMMISSIONER IAN HAYNES Fifth Defendant
AND	THE CHIEF JUSTICE OF THE SUPREME COURT OF NEW ZEALAND Sixth Defendant

Hearing: 2 June 2009

Appearances: Mr Powell for the fourth defendant applicant
Mr Siemer in person (with McKenzie friend - Ms P Bright)

Judgment: 30 November 2009

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 30 November 2009 at 12 noon pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] These proceedings were commenced by the plaintiffs Mr and Mrs Siemer in October 2008. On 16 October 2008 Priestley J directed that the proceeding only be served on the fourth defendant. Service on the other defendants was not to proceed until further order. He directed that the Solicitor-General act to ensure that the interests of the third, fifth and sixth defendants were protected in accordance with the Solicitor-General's obligations. The Solicitor-General has now brought an application for an order striking out the statement of claim, or in the alternative directing that the plaintiff deposit security for costs in the sum of $20,000. The application to strike out is brought on the basis that the pleadings in their entirety are likely to cause prejudice, embarrassment and are otherwise an abuse of the Court's processes. Further, that they disclose no reasonable cause of action against the fourth defendant. The plaintiffs oppose the application.

[2] The statement of claim narrates that I issued an ex-parte injunction, and an apparently related allegation that I had previously been in the same chambers as counsel acting for Mr Stiassney, the party who obtained the injunction. Because of these factual allegations I raised with counsel for the Solicitor-General and Mr Siemer whether there was any objection to my hearing this application. Counsel for the Solicitor-General and Mr Siemer confirmed that they had no objection to my hearing the application. I am satisfied that any previous involvement I have had in proceedings involving Mr Siemer does not affect my ability to hear this application.

[3] The key events with which this proceeding is concerned commenced in April 2005 with the issue of defamation proceedings and the subsequent obtaining of an injunction by Mr Stiassny to prevent Mr Siemer from further disseminating defamatory material. But there have also been a number of acts and decisions taken in other proceedings that are now relied on by Mr Siemer. These proceedings include:

(a) Proceedings brought against Mr Siemer for contempt of Court, in relation to his breach of Court orders made in the course of the defamation proceedings;

(b) Judicial review proceedings seeking review of decisions taken in the course of Coronial proceedings; and

(c) Perjury proceedings commenced by Mr Siemer.

[4] Mr Siemer also makes allegations in these proceedings as to actions taken by the Judicial Conduct Commissioner in response to a number of complaints made by Mr Siemer about various judicial officers in connection with the listed proceedings.

[5] There are five causes of action pleaded as follows:

(a) Conspiracy to pervert or defeat the course of justice. This is pleaded against all defendants. Allegations are made as to the conduct of individual defendants, followed by a sweeping allegation that these actions had the "overriding purpose and effect of defeating the course of justice", and amounted to a conspiracy to obstruct, pervert and/or defeat the course of justice. The plaintiffs say that the third and sixth defendants are sued in respect of the acts of other members of the Crown, judiciary and police;

(b) Misfeasance in public office. Pleaded against the third, fourth, fifth and sixth defendants only. The fourth defendant is sued in respect of his actions in issuing and prosecuting contempt proceedings, in telling Parliament he could not answer questions in relation to those proceedings because they were sub-judice (which Mr Siemer claims they were not) and in procuring a search by the police of the plaintiffs' home. As against the fifth defendant it is alleged that he repeatedly covered up judicial misconduct. Again, the third and sixth defendants are sued in their representative capacities;

(c) Violation of the plaintiffs' human rights. Pleaded against the third, fourth, fifth and sixth defendants only. The allegations in this cause of action centre on first the denial of procedural rights in the contempt

proceeding, and secondly on the execution of a search warrant at the plaintiffs' home.

(d) Conspiracy to injure by unlawful means. Pleaded against all defendants. The allegations relate to the conduct of the defamation and contempt proceedings.

(e) Malicious prosecution. This cause of action is pleaded against the fourth defendant only, and relates to his initiation and prosecution of the contempt proceeding.

[6] It is relevant background to this application that Mr Siemer has previously issued proceedings against the first, second and fourth defendants. The proceeding involved allegations connected with the conduct and disposition of the defamation and contempt proceedings (*Siemer v Stiassny and others* HC AK CIV2008-404-0104). The causes of action pleaded in those proceedings were conspiracy to defeat the course of justice, depriving Mr Siemer of legal rights and conspiracy to bring a false allegation. All three defendants in that case filed applications to strike out the proceedings on the grounds that the pleadings did not disclose reasonable causes of action, were likely to cause embarrassment, prejudice or delay, or were otherwise an abuse of Court. Prior to the hearing of the applications Mr Siemer filed an amended pleading in which he sought to add in additional defendants and causes of action. That draft pleading was very close in content to the present pleading.

[7] In striking out the proceeding, Harrison J said:

> [7] A cursory reading of Mr Siemer's documents proves the points advanced in argument by Mr Miles QC for Mr Stiassny and Ferrier Hodgson and Mr Sinclair for the Crown. The documents seek to raise again for argument issues which are already the subject of judicial determination. They seek the collateral advantage of re-litigating complaints under the new guises of allegations of conspiracy, breach of the New Zealand Bill of Rights Act etc. To that extent they stem from an improper motive and are themselves an abuse of process.
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> [9] I agree with Mr Miles. The defects in the pleadings are so fundamental that they could never be remedied by amendment. The documents are not only an abuse of process. More importantly, their only apparent purpose is to abuse. A civilised society provides Courts of law to

> determine legitimate disputes, not to ventilate malicious grievances against the legal system and anybody associated with its administration.

Solicitor-General's application to strike out

[8] The Solicitor-General argues that the proceedings constitute an abuse of the Court processes in two respects. First, they amount to a collateral attack on the decision of Harrison J, dated 20 August 2008, striking out the statement of claim in the earlier related proceedings. Although it is conceded that the fact that a claim is struck out does not preclude the plaintiff from advancing the same causes of action in a new proceeding, it is argued that it is nevertheless an abuse of process to commence substantially the same proceeding without the addition of new allegations of fact, or invoking principles of law that repair the deficiency that was found earlier.

[9] It is conceded that there are some new allegations set out in the statement of claim. These are allegations in respect of the coronial proceedings, and in relation to the execution of a search warrant by constables at the plaintiffs' home. In relation to the former it is said that these allegations serve no purpose other than to further illustrate the depth and breadth of the conspiracy that lies at the heart of the statement of claim in the present proceeding and in the earlier proceedings. As to the latter, it is said that the factual allegations are not linked to any of the pleaded causes of action other than by an unsupported assertion that the Solicitor-General initiated the execution of the warrant. The Solicitor-General acknowledges that there are some new causes of action. However, he says that these were included in the draft amended statement of claim placed before Harrison J. He proceeded to strike out the claim as he was not satisfied that the defects he had identified were remedied by the amendment.

[10] The Solicitor-General's alternative argument is that the claim when viewed overall is a collateral attack on the outcome and processes involved in each of the various proceedings identified above. The proper course for such allegations to be investigated is via the appeal process. The plaintiff has pursued and is still pursuing this course. The only claims that would not be covered by this submission are the allegations of malicious prosecution against the Solicitor-General, and misfeasance

in public office (if this is taken as linked to the allegation in relation to the search warrant). But the Solicitor-General says the malicious prosecution claim has no prospect of success since the contempt allegation has been upheld, and it was an allegation of civil, not criminal contempt. In relation to misfeasance in respect of the search warrant, it is argued that the factual matters pleaded there are so wholly without foundation that the cause of action should be struck out.

[11] In relation to Mrs Siemer's claim the Solicitor-General accepts that she was not a party to the earlier proceedings, and it follows that neither of the arguments about abuse of process can be applied in her case. Nevertheless, the Solicitor-General argues her claim should also be struck out. This is because the only claim she makes against the defendants is the assertion in connection with the execution of the search warrant.

[12] Finally, the Solicitor-General says that if the statement of claim survives in any form, an order for security for costs should be made against Mr Siemer. Mr Siemer has been adjudicated bankrupt in New Zealand. This means that he is likely to be unable to pay any award of costs made in favour of the Solicitor-General. A staged award of security for costs is sought, which in the first instance should cover the filing of a statement of defence. An amount of $7,000 is suggested to be adequate for that purpose.

Mr Siemer's submissions in opposition

[13] Mr Siemer submits that the Solicitor-General is seeking orders striking out a claim as unsustainable, though he has yet to file a statement of defence to refute the allegations against him. In relation to the earlier proceeding, he says that Harrison J did not accept the amended claim and therefore that amended claim was not part of the proceeding struck out by Harrison J. Mr Siemer emphasises the principle that a claim should not be struck out unless the Court is certain it cannot succeed. He argues that the claims he has pleaded are permitted by statute, are supported by extensive evidence, and those allegations and evidence have not been refuted by the defendants.

Relevant principles

[14] The relevant High Court Rule is 15.1 which provides:

> 15.1 Dismissing or staying all or part of proceeding
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> (1) The court may strike out all or part of a pleading if it -
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
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> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
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> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[15] In relation to an application to strike out a proceeding on the basis that it discloses no reasonably arguable cause of action, the relevant principles are well settled. They are, as was, summarised by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, which was endorsed by the Supreme Court in *Couch v Attorney-General* [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J:

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward.

[16] Proceedings may also be an abuse of process if they are frivolous, vexatious, attempt to relitigate matters already determined or are a duplication of other proceedings. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541 Lord Diplock said:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been

> made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

Analysis and decision

[17] There can be no doubt that the current proceeding amounts to an attempt to revisit previous proceedings in which Mr Siemer has been involved, or had an interest. He does so because the proceedings have been largely determined against him, or against his interests as he perceives them. As should be clear from the description of this proceeding, the vast bulk of the allegations contained in the statement of claim concern actions taken by the first, second and fourth defendants and various judicial officers in the course of the previous proceedings. As the Solicitor-General says:

> The plaintiff's assertion is that the judgments in those cases, including the injunctions and subsequent contempt proceedings were procured and maintained by the mendacity of the first and second defendants, and persistent dereliction of duty by the Judges involved in them, the Solicitor-General and the Judicial Conduct Commissioner.

[18] These proceedings are, on any view, a collateral attack on the outcome and processes involved in those proceedings. If Mr Siemer had concerns about the actions of the litigants and decisions of the judicial officers, then the appropriate course was for him to pursue those through the appeal processes. To the extent that Mr Siemer believed there had been judicial misconduct, then the appropriate forum for those concerns was through the Judicial Conduct Commissioner. Mr Siemer describes in his pleading occasions where he has pursued those avenues of redress, and his displeasure with the outcome. It may be that he has not obtained the outcome he was hoping for, but even if that is so, it is not open to him to commence further proceedings to relitigate the issues. Once all avenues of appeal or judicial review are exhausted, then there must be an end to proceedings.

[19] Another fundamental obstacle to this proceeding is that it is certain that it cannot succeed. As noted by Harrison J in his decision striking out the earlier pleading, persons exercising judicial functions in a Court are exempt from civil

liability for anything said or done by them in a judicial capacity: *Gainsley v Lord Cooke of Thorndon* [1999] 2 NZLR 668.

[20] As to the malicious prosecution cause of action, Mr Siemer would need to prove that criminal proceedings under which he was prosecuted were terminated in a way that was not incriminating of him: *Van Heeren v Cooper* [1999] 1 NZLR 731. He cannot do this for the reasons the Solicitor-General submits. In *Siemer v Solicitor-General* [2009] 2 NZLR 556, the Court of Appeal concluded that the proceedings were civil in nature and not criminal. They upheld the finding of the lower Court that Mr Siemer had been in contempt.

[21] There are some allegations Mr Siemer levels against the Solicitor-General that cannot be categorised as relating to the conduct of now determined legal proceedings. In relation to the alleged misfeasance by the Solicitor-General in respect of the search warrant, Mr Siemer has set out in affidavit form the basis for his allegations. The affidavit is so insubstantial that it is clear that this is a case where Mr Siemer should not have the benefit of the assumption normally applying in such applications - that is, that the factual assertions are capable of proof. As the Court of Appeal said in *Collier v Panckhurst* CA136/97, 6 September 2006 at [4]:

> The Court is not required to assume the correctness of factual allegations obviously put forward without any foundation.

I accept the applicant's submission that these allegations have no foundation. The misfeasance cause of action has no prospect of success.

[22] In relation to the allegation that the Solicitor-General misled Parliament, that is a matter for Parliament, and not this Court. As Professor Joseph points out in *Constitutional & Administrative Law in New Zealand* (3ed 2007) Article 9 of the Bill of Rights 1688 (Eng) applies as law in New Zealand and is the foundation of freedom of speech in Parliament. It provides:

> That the freedom of speech, and debates, or proceedings ought not to be impeached or questioned in any Court or place out of Parliament.

[23] As to the position of Mrs Siemer, she has not been party to the defamation, contempt of Court, perjury or judicial review proceedings. Nor was she party to the

earlier proceedings struck out by Harrison J. But in these proceedings the only allegations directly concerning her relate to the execution of a search warrant at her home. As I have already held, those allegations should be struck out.

[24] I note Mr Siemer's submission that the Solicitor-General has not yet pleaded in response to the allegations. He is not required to respond to allegations made in abuse of process.

[25] There are many defects in this present pleading which I have not traversed in detail. Although the causes of action have recognisable labels, the pleadings pay scant regard to the critical legal elements of those causes of action. Much of the pleading simply takes the form of rambling invective.

[26] To conclude, I am satisfied that all of the causes of action in the present proceeding should be struck out on the grounds that the claim cannot succeed. Moreover, the proceedings are an abuse of process because they attempt to relitigate existing proceedings.

[27] For these reasons, I do not need to consider the alternative ground, that it was an abuse of process to commence proceedings in essentially the same form to those struck out by Harrison J.

[28] The proceeding is struck out.

Winkelmann J

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