IN THE COURT OF APPEAL OF NEW ZEALAND

CA480/2010
[2010] NZCA 591

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

Hearing: 16 November 2010

Court: O'Regan P, Hammond and Arnold JJ

Counsel: E Orlov and S Malaviya for First and Second Applicant
Respondent in person

Judgment: 6 December 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent usual disbursements.

REASONS OF THE COURT

(Given by Arnold J)

[1] This is an application for leave to bring a second appeal.

An escalating dispute

[2] The first applicant, Mrs Haden, and the respondent, Mr Wells, met through their involvement in the Auckland Air Cadet Trust (AACT), an incorporated charitable trust. Apparently they fell out, and Mrs Haden was removed as treasurer. Following this Mrs Haden began to make enquiries about the Animal Welfare Institute of New Zealand (AWINZ), an unincorporated charitable trust which Mr Wells was instrumental in establishing and running. Mrs Haden concluded that there were irregularities in the way that AWINZ had been established and was being operated.

[3] The background to this is that Mr Wells, who is a barrister, is an expert in animal welfare law. He was instrumental in the enactment of the Animal Welfare Act 1999 (the Act). The Act provides for "approved organisations". Once they have ministerial approval, such organisations are entitled to operate as prosecuting authorities under the Act. AWINZ is such an organisation.

[4] Before the Act was passed, Mr Wells took steps to establish AWINZ. He arranged for people to become trustees and they approved the wording of a draft trust deed. He also submitted a draft application for approved status to the Minister attaching the draft trust deed. The draft application stated that AWINZ had been formed as a trust and was in the process of being registered under the Charitable Trusts Act 1957. This was incorrect as AWINZ had not at that point been formally established by way of an executed deed, and when subsequently it was, the trust was not registered under the Charitable Trusts Act. This was because, following discussions with staff of the Ministry of Agriculture and Fisheries, registration was considered to be unnecessary. Around nine months after AWINZ was formally established it was confirmed by notice in the Gazette to be an approved organisation. It then undertook animal welfare work on behalf of several local authorities.

[5] In order to vent her concerns about Mr Wells and AWINZ, Mrs Haden formed a trust in the same name as AWINZ and established a website. Through the

website, correspondence and such like, and with the assistance of her company, the second applicant Verisure Investigations Ltd (Verisure), Mrs Haden waged a public campaign aimed at discrediting Mr Wells and AWINZ. The effect of her public statements was that Mr Wells was unethical and fraudulent and that AWINZ was a sham trust, no more than a front for Mr Wells' corrupt activities.

[6] The trustees of AWINZ and Mr Wells in his personal capacity issued proceedings against Mrs Haden and Verisure for damages for defamation.[1] Mrs Haden and Verisure responded by bringing a counterclaim against them. Included in this was a claim by Mrs Haden against AACT. Judge Sharp struck the counterclaim out.[2] In the course of her judgment, she urged Mrs Haden to obtain legal representation. Mrs Haden and Verisure then applied to have the statement of claim struck out, but Judge Sharp declined that application also, again urging the applicants to obtain legal advice.[3] Judge Sharp ordered Mrs Haden to pay indemnity costs to AACT, and ordered Mrs Haden and Verisure to pay costs to AWINZ and Mr Wells on both strike out applications.[4]

[7] These costs orders were not met. It appears that a telephone conference in relation to the defamation proceedings was scheduled for 28 June 2007 before Judge Sharp. At that, although there was no prior application for it, Judge Sharp made the following order (among others):

> Within 14 days [Mrs Haden and Verisure], or one of them shall pay in full all outstanding costs awards payable to [AWINZ and Mr Wells] failing which [Mrs Haden and Verisure] will be debarred from further defending the claims against them and the statement of defence will be struck out.

A Deputy Registrar wrote to Mrs Haden on 3 July 2007 confirming that this order had been made.

[8] Unfortunately, the costs were not paid. Accordingly, on 19 July 2007 Judge Sharp made an order striking out the statement of defence. The Court's minute read:

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1 The proceedings contained other claims as well, but they are not relevant for present purposes.
2 *Wells v Haden* DC Auckland CIV-2006-004-1784, 7 February 2007.
3 *Wells v Haden* DC Auckland CIV-2006-004-1784, 19 March 2007.
4 *Wells v Haden* DC Auckland CIV-2006-004-1784, 19 March 2007.

> The directions that I made on 29/06/07 were clear: By 13 June 2007 [Mrs Haden and Verisure] were to have paid in full the outstanding awards of costs against them in favour of [AWINZ and Mr Wells] or their statement of defence would be struck out. [Mrs Haden and Verisure] offer no adequate excuse for their failure to comply with that direction. [AWINZ and Mr Wells] now seek an order in terms of the direction made.
>
> I can see no reasonable ground not to make one as the ... failure to meet the costs awarded by the due date constitutes an abuse of process of the Courts.
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> Accordingly under Rule 209(c) I strike out the ... statement of defence.

[9] There was a "formal proof" hearing before Judge Joyce QC on 13 March 2008. Mrs Haden represented herself, as she did at all but one of the hearings in the Courts below. Although the hearing was by way of formal proof, Judge Joyce gave Mrs Haden considerable latitude to raise matters by way of mitigation of damages.[5] In effect, the Judge allowed Mrs Haden to address the merits of the defamation claim.[6]

[10] Immediately before the hearing, Mrs Haden had filed applications seeking to review the costs and "unless" orders made by Judge Sharp and seeking a stay to allow that to occur. Judge Joyce heard argument on those matters along with the formal proof. In his judgment, Judge Joyce rejected those applications and dealt in detail with the substantive claim.[7] In addition to granting injunctive relief, Judge Joyce ordered that Mrs Haden and Verisure pay Mr Wells $50,000 by way of general damages and that Mrs Haden pay him $7,500 by way of exemplary damages.

[11] Mrs Haden filed an appeal against Judge Joyce's decision on the defamation claim within time. She later sought special leave to appeal out of time against the costs orders, the unless order and Judge Joyce's decision refusing to review them. John Hansen J refused Mrs Haden's application, on the basis that it was "hopelessly out of time".[8] However, the Judge also said that he considered that Mrs Haden did not need leave to appeal out of time as a result of s 76(5) of the District Courts Act 1947.

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5 Defamation Act 1992, s 29.
6 At [167].
7 *Wells v Haden* [2008] DCR 859.
8 *Haden v Wells* HC Auckland CIV-2008-404-5500, 4 December 2008 at [10]. Mrs Haden was represented by counsel at this hearing.

[12] Relevantly s 76 provides:

> (1) Having heard an appeal under section 72, the High Court, may–
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> (a) make any decision or decisions it thinks should have been made:
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> (b) direct the District Court in which the decision appealed against was made–
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> (i) to rehear the proceedings concerned; or
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> (ii) to consider or determine (whether for the first time or again) any matters the High Court directs; or
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> (iii) to enter judgment for any party to the proceedings concerned the High Court directs:
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> (c) make any further or other orders it thinks fit (including any orders as to costs).
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> ...
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> (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.
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> (5) Even if an interlocutory decision made in the proceedings concerned has not been appealed against, the High Court–
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> (a) may act under subsection (1); and
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> (b) may set the interlocutory decision aside; and
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> (c) if it sets the interlocutory decision aside, may make in its place any interlocutory decision or decisions the District Court could have made.

John Hansen J considered that by virtue of s 76(5) the Court considering the substantive appeal could also review the interlocutory decisions.[9]

[13] Rodney Hansen J heard the appeal against Judge Joyce's decision on the substantive claim. He dismissed it, for reasons which we will address later in this judgment.[10] Mrs Haden, by now represented by Mr Orlov, applied for leave to appeal against that judgment. Rodney Hansen J declined to grant leave.[11] Mrs Haden now seeks special leave from this Court.

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9 At [14].

10 *Haden v Wells* HC Auckland CIV-2008-404-5500, 20 November 2009.

11 *Haden v Wells* HC Auckland CIV-2008-404-5500, 23 June 2010.

Basis of present application

[14] Mr Orlov submitted that:

(a) Rodney Hansen J set too high a threshold when he declined leave. The issues were capable of bona fide and serious argument and were important to Mrs Haden, who had a realistic hope of benefit from the proposed appeal.

(b) The defamatory statements alleged could not be established because, on the facts found by Judge Joyce, Mrs Haden had a defence of truth or fair comment. Barring Mrs Haden's defence was contrary to ss 14 and 27 of the New Zealand Bill of Rights Act 1990 (NZBORA).

(c) Evidence of defamatory remarks made after the pleadings were filed could never be used to support formal proof. That would be contrary to natural justice and to s 27 of NZBORA.

(d) Statements made by Judge Joyce in his judgment about Mrs Haden evidenced bias, that is, they would indicate apparent bias to the reasonable observer.

(e) Rodney Hansen J gave too much weight to the principle of finality and too little weight to principles of natural justice and due process or to s 27 of NZBORA.

(f) Rodney Hansen J was wrong to uphold Judge Joyce's finding that there could have been an oral trust at the time that Mr Wells submitted the draft application to the Minister.

Test to be applied

[15] The test to be applied where leave is sought for a second appeal is set out in *Waller v Hider*.[12] There the Court said:[13]

> The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal ... ... in the end the guiding principle must be the requirements of justice ...

The Court went on:[14]

> Notwithstanding frequent reminders of the test, applications continue to be made which have little or no prospect of success. Counsel are of course to be commended for making all reasonable efforts to advance the cause of their clients but after a first appeal they must draw back and appraise the state of the case dispassionately, asking whether in truth the disputed matter contains the requisite element of sufficient importance. The scarce time and resources of the High Court and of this Court are not to be wasted, nor additional expense for an unsuccessful client incurred without realistic hope of benefit.
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> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

Discussion

[16] We agree with Rodney Hansen J that leave to appeal should not be granted in this case. In our view, the proposed appeal:

(a) does not raise any point capable of serious argument; and

(b) in any event, does not involve any interest of sufficient importance to outweigh the cost and delay of a further appeal.

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12 *Waller v Hider* [1998] 1 NZLR 412 (CA).
13 At 413.
14 At [413].

We now explain these conclusions under two headings: the striking out of the applicants' defence and the approach adopted by Judge Joyce.

Striking out of defence

[17] Before Rodney Hansen J, Mrs Haden sought to challenge Judge Sharp's unless order. Relying on *Hytec Information Systems Ltd v Coventry City Council*[15] she argued that the order was unfair. However, Rodney Hansen J noted that no reasons were put before John Hansen J to explain the lengthy delay in seeking to appeal the interlocutory orders. Further, Rodney Hansen J did not accept that the effect of s 76(5) was to provide Mrs Haden with a further opportunity to challenge the unless order. He said:[16]

> 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.

[18] The Judge concluded that s 76(5) was intended "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".[17] He noted that a successful challenge would mean that the proceeding would have to be re-litigated on a different basis than it in fact was, which would be unfair to Mr Wells.[18]

[19] Accordingly Rodney Hansen J refused to entertain a challenge to the unless order.

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15 *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 (CA).
16 At [21].
17 At [22].
18 At [23].

[20] Mr Orlov said that the effect of Rodney Hansen's judgment was to give primacy to achieving finality, at the expense of achieving justice. This, he said, was fundamentally wrong.

[21] John Hansen J held that Judge Sharp had the power to make the unless order under the District Court Rules 1992. That is clearly right. In *Ferrier Hodgson v Siemer*[19] Potter J debarred Mr Siemer from presenting a defence to a defamation claim brought against him by Mr Stiassny and Korda Mentha (formerly Ferrier Hodgson) until further order of the Court. The debarment order was made because Mr Siemer had continually breached interim injunctions granted in the proceedings (he was held to have been in contempt of court as a consequence) and had refused to pay costs orders made against him even though he had the means to do so. Mr Siemer did not rectify the position or attempt to appeal against Potter J's order decision. Accordingly, when Cooper J heard the substantive claim against Mr Siemer, the hearing proceeded by way of formal proof. Cooper J made substantial damages awards against Mr Siemer.[20]

[22] Mr Siemer applied to this Court for leave to appeal out of time against Cooper J's decision. Having considered the circumstances in which the debarment order was made, the Court concluded that Mr Siemer should not be entitled to pursue an appeal against liability but was entitled to pursue an appeal as to damages.[21]

[23] In the present case, Mrs Haden did not pay the costs that she was ordered to pay despite having, as Judge Joyce said, "ample opportunity to do so".[22] Mrs Haden let the period which Judge Sharp had fixed pass without doing anything to challenge or obtain a modification of the order. There has been no suggestion that she was unaware of the order or its implications, and no explanation has been offered for her failure either to pay the costs awards or to challenge Judge Sharp's order in a timely fashion. Moreover, according to Judge Joyce, Mrs Haden did not attempt to challenge the unless order until after the substantive hearing before him, although

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19 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 9 July 2007.
20 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008.
21 *Siemer v Stiassny* [2009] NZCA 624 at [66] and [68].
22 At [28].

she did so before he had given judgment.[23] As a consequence, as Rodney Hansen J noted, granting her an extension of time would have operated most unfairly in respect of Mr Wells and AWINZ, who had participated in the hearing before Judge Joyce on the understanding that Judge Sharp's order was not challenged.

[24] Debarring a defendant from presenting a defence is, as Mr Orlov submitted, a serious step. But so is defying or ignoring Court orders. In the circumstance of this case, and putting to one side the effect of s 76(5) for the moment, we consider that Rodney Hansen J was right to refuse to grant an extension.

[25] This brings us to s 76(5). As we have said, John Hansen J considered that this provision enabled Mrs Haden to challenge the unless order in her appeal against Judge Joyce's substantive judgment which was, as we have said, brought in time. Rodney Hansen J disagreed, saying that in circumstances such as the present, this interpretation would operate most unfairly to AWINZ and Mr Wells. He considered that s 76(5) had a much narrower scope.

[26] There is no need for us to reach a final view as to the precise scope of s 76(5). The case has not been argued in a way that would enable us to do so. We do, however, agree with Rodney Hansen J that Mrs Haden could not utilise s 76(5) to pursue her challenge to Judge Sharp's order. That would have given her a "second bite" at the issue in circumstances where she had been denied leave as a result of delay, and would have been unfairly prejudicial to AWINZ and Mr Wells.

[27] In the result, then, we consider that the proposed appeal has little or no prospect of success on this ground.

Approach adopted by Judge Joyce

[28] Mr Orlov raised a number of criticisms concerning Judge Joyce's approach to the substantive case. He submitted that the Judge:

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[23] At [1].

(a) Ought not to have found that Mrs Haden's statements were defamatory given his finding that AWINZ was not established when Mr Wells said it was.

(b) Erroneously took into account allegedly defamatory statements made by Mrs Haden after the pleadings were filed.

(c) Demonstrated (apparent) bias towards Mrs Haden.

[29] As to the first of these points, Judge Joyce gave Mrs Haden considerable latitude in respect of the scope and nature of her evidence and submissions. He found that Mr Wells had got ahead of himself in his dealings with officials when he said in the draft application that AWINZ had been formally established and was seeking registration under the Charitable Trusts Act. However, Judge Joyce considered that no harm was done: the preparatory work was well in hand and AWINZ was established many months before it obtained ministerial approval.

[30] Moreover, Judge Joyce found that what Mrs Haden alleged against Mr Wells went far beyond anything that his overstatement of the position in relation to AWINZ could possibly justify, describing her claims that Mr Wells was dishonest and a serious fraudster as "entirely unsubstantiated and utterly irresponsible".[24] He said that looking at the totality of her conduct and her own admissions, Mrs Haden had acted in such a way as would "surely have denied her any efficacious defence ... of honest opinion had the case remained entirely contestable".[25]

[31] Mr Orlov's contention that, on the Judge's findings, there was no defamation is plainly wrong.

[32] Turning to Mr Orlov's second point, when addressing the question of damages, Judge Joyce noted that Mrs Haden had persisted in her endeavours to paint Mr Wells as a fraudster throughout the hearing. He noted that a Google search revealed that the links remained to material sourced from Mrs Haden and Verisure

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[24] At [199].
[25] At [230].

which was defamatory of Mr Wells. Citing *Praed v Graham*[26] the Judge said that he was entitled to look at Mrs Haden's conduct down to the time of judgment,[27] and did so in fixing damages.

[33] Mr Orlov submitted that the Judge was wrong in this respect. While we agree that it was unwise for the Judge to have conducted his own researches on the internet, at least without informing counsel, he was entitled to consider Mrs Haden's conduct up until the time of judgment.[28] It is clear from his judgment that Mrs Haden vigorously pursued her campaign against Mr Wells through the vehicle of the court proceedings, and the Judge was entitled to take account of that. Quite apart from the internet searches, there was ample material to justify the Judge's view.

[34] Finally there is Mr Orlov's argument about bias. It is true that Judge Joyce expressed himself in trenchant terms at some points when discussing Mrs Haden's conduct. While it is preferable that Judges express themselves in moderate terms, even when a litigant is unreasonable and provocative as Mrs Haden undoubtedly was, we are satisfied that what the Judge said in his judgment did not indicate bias. As we have mentioned, Judge Joyce gave Mrs Haden considerable latitude in the way she presented her case, in recognition of the fact that she was representing herself, and heard her with considerable patience. Despite Judge Sharp's order, Judge Joyce gave Mrs Haden every opportunity to justify her claims. He considered that she had failed to do so, by a wide margin. That is an assessment with which Rodney Hansen J agreed,[29] as do we.

[35] In the result, then, we think none of these points about Judge Joyce's approach has any substance.

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26 *Praed v Graham* (1889) 24 QBD 53.
27 At [316].
28 *McDermott v Wallace* [2005] 3 NZLR 661 (CA) at [102].
29 At [71].

Conclusion

[36] We consider that the appeal has no realistic prospect of success. Further, even if we felt that it did raise an arguable point, we would be unlikely to have granted leave. It is difficult to see that this case raises any significant issue of principle, or has an impact beyond the parties involved, sufficient to justify a second appeal.

Decision

[37] The application for leave to appeal is declined. As a litigant in person, Mr Wells is not entitled to an award of costs. However the applicants are to pay him usual disbursements.

Solicitors:
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