IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-5500

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

Hearing: 5 May 2010

Counsel: E Orlov for Applicants
ND Wright for Respondent

Judgment: 23 June 2010

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 23 June 2010 at 11.00 a.m., 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 applicants apply for leave to appeal against my judgment of 20 November 2009, in which I dismissed an appeal against the judgment of Judge Joyce QC in the Auckland District Court awarding the respondent damages totalling $57,500 for defamation.

[2] The respondent had alleged that the first applicant (Mrs Haden) and the second applicant (Verisure), a security company operated by Mrs Haden, had defamed him in a series of publications relating to the Animal Welfare Institute of New Zealand (AWINZ), a trust dedicated to animal welfare. In statements published on a website and by emails and a fax message, the applicants accused Mr Wells of fraudulent and corrupt behaviour in the conduct of the trust.

[3] The applicants had been debarred from defending the claim after failing to comply with an "unless" order to pay costs on an interlocutory procedure. The hearing proceeded by way of formal proof and for the purpose of quantifying damages. Judge Joyce ordered the applicants to pay general damages of $50,000 and ordered Mrs Haden to pay $7,500 in exemplary damages.

[4] Mrs Haden, who represented herself in the District Court and on appeal, challenged the interlocutory orders which had led to the applicants being debarred from defending the proceeding and relied on ten further errors alleged to have been made by Judge Joyce.

[5] As refined in the course of the hearing of the application for leave, Mr Orlov relied on three grounds:

a) I erred in finding that the applicants could not rely on s 76(5) of the District Courts Act 1947to challenge the "unless" order and associated interlocutory decisions.

b) The District Court hearing and the judgment were in breach of the applicants' right to freedom of expression.

c) Aspects of the conduct of the hearing and the judgment breached the applicants' rights to a fair hearing.

First ground – Section 76(5) District Courts Act

[6] Before the appeal against the substantive judgment was heard, the applicants had sought special leave to appeal out of time against the "unless" order, the costs orders leading up to it and Judge Joyce's refusal to review the orders. Their 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"[1] and found that the application must fail on the grounds of delay. He noted in passing, however, that s 76(5) of the District Courts Act appears to confer a power to review interlocutory decisions in the course of the determination of a substantive appeal.

[7] Mrs Haden duly pursued the issue at the hearing of the substantive appeal, arguing that s 76(5) should be invoked for the purpose of reviewing the interlocutory decisions.

[8] I held that the power could be used to set aside an interlocutory decision if required in order to give effect to the decision on appeal but not to expand the right of appeal to permit a party to alter the basis of the case they presented at trial. I also found that considerations of fairness and justice pointed strongly against bringing about that outcome in this case. I noted that no reasons had been given for the failure to appeal in time against the interlocutory decisions or to explain the lengthy delay. I held there was no basis on which I should go behind the judgment of John Hansen J and give the applicants a second bite of the cherry as an incident of the substantive appeal.

---

1 At [10]

[9] Mr Orlov submitted that in dealing with the s 76(5) issue, I had erred in failing to consider or give due weight to the principles in ss 14 and 27 of the New Zealand Bill of Rights Act 1990 (NZBORA). He submitted that it was inconsistent with these principles for the respondent to proceed by way of formal proof.

[10] This proposed ground of appeal runs into trouble at the first hurdle. The Courts frown on any attempt to use a second tier of appeal to introduce arguments which the Court had not been asked to address in the decision under appeal.[2] Yet, as Mr Wright pointed out, the NZBORA played no part in the argument before me as it related to s 76(5). I was simply required to interpret the subsection and apply it to the circumstances of the case.

[11] But even if Bill of Rights considerations might have affected the way in which I interpreted s 76(5), the factors which weighed against exercising the discretion to set aside the interlocutory decisions remain, in my view, compelling. I do not see the issue as raising a question of law or fact sufficient to justify the attention of the Court of Appeal.

Breach of right to freedom of expression

[12] Mr Orlov argued that, even if s 76(5) is not available as a basis on which to set aside the interlocutory decisions, the formal proof hearing they led to could be challenged on the basis that it offended the right to freedom of expression. This is because the applicants were denied the ability to advance the defence of truth. Mr Orlov submitted that, thus handicapped, they were found liable for publishing statements which, based on facts found or accepted by Judge Joyce, were true. Specifically, he said that the applicants were right to state that Mr Wells had solicited money from the public and asserted that the trust (AWINZ) existed when, to his knowledge, it did not.

---

[2] *P v P (No. 2)* [1958] NZLR 349; *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 2 NZLR 124 at [15]; *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* (2008) 591 at [38] – [44].

[13] As Mr Orlov acknowledged, this proposed ground of appeal also suffers from the deficiency of not having been raised before me. As he put it, "this Court was not quite properly seized" of the argument because Ms Haden was a lay litigant. He suggested that it may have been "implied in her extensive submission" and that this Court was "simply overwhelmed with the debris of detail". Whatever the reason, I was not aware that the argument was at any stage advanced.

[14] However, even if the applicants had been able to overcome this preliminary hurdle, they have not made out the factual basis for the argument. It relates to the formation of AWINZ and its being granted approved status under the Animal Welfare Act 1999. Judge Joyce found that when Mr Wells first applied for approval in late 1999, he conveyed the impression that a trust had already been established. In fact, it was not formed until 1 March 2000. As the Judge said,[3] Mr Wells got ahead of himself in his correspondence with officials and Ministers. But he held that no harm resulted as, by the time AWINZ achieved approved organisation status, a trust had been in existence for almost ten months.

[15] Mr Orlov submitted that Judge Joyce had criticised Mrs Haden for telling the truth when she accused Mr Wells of making false representations when he applied for AWINZ to become an approved organisation. However, the Judge's findings on that issue were firmly rooted in the evidence. What Mrs Haden said in 2006, which formed the basis for the Judge's adverse findings, were repeated statements that the trust was illegitimate and which conveyed that Mr Wells was dishonest, fraudulent and untruthful.

[16] In reply, Mr Orlov maintained that there was evidence which contradicted those findings. However, the evidence he relied on was not before Judge Joyce. It was in a 25-page affidavit sworn by Mrs Haden in support of the appeal. Her application to have the evidence admitted for the purpose of the appeal was rejected.[4]

---

3 At [241].

4 Judgment of Asher J, 13 February 2009.

Conduct of hearing

[17] Two issues which were addressed in my judgment are the subject of the third proposed ground of appeal. They are the Judge's use of the internet after the trial and the way in which he expressed his findings adverse to Mrs Haden.

[18] Judge Joyce recorded in his judgment that he had carried out an internet search to establish that the defamatory material was still on the website. He relied on this, in part, for the purpose of finding aggravated damages.

[19] Mrs Haden complained that the judgment was "defamatory" of her, referring to numerous passages which she saw as unfairly and gratuitously denigratory of her. I commented that Judge Joyce had expressed his decidedly unfavourable view of Mrs Haden and her conduct in trenchant and often colourful terms. I said that Judges who are obliged to express unfavourable opinions of the character and conduct of litigants should bear in mind the importance of moderation, referring to the cautionary words of the Court of Appeal in *Muir v Commissioner of Inland Revenue*.[5] I concluded, however, that Mrs Haden should not allow the critical terms in which the Judge expressed himself to obscure the realities which lay behind them. I said his findings were unassailable as a matter of fact and law.

[20] Mr Orlov submitted that these two matters indicate "a non-judicial approach" which should itself have provided a basis for a rehearing. He said that the judgment indicates apparent bias.

[21] My findings on the issues themselves did not attract a criticism. Rather they are used to introduce a new argument that was not canvassed at the hearing. That argument is neither available nor sustainable. In a very lengthy and comprehensive judgment, the Judge thoroughly explored every issue. He allowed the applicants to go a great deal further than was strictly permitted by the scope of the hearing. There can be no suggestion that he acted unfairly and his findings rest on a solid bed of evidence and legal principle.

---

5 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at [102].

[22] Like the other two, the third proposed ground of appeal does not raise any question of law or fact capable of bona fide and serious argument.

Result

[23] The application for leave to appeal is dismissed.

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