IN THE COURT OF APPEAL OF NEW ZEALAND

CA692/2010
[2010] NZCA 607

BETWEEN	VINCENT ROSS SIEMER Applicant
AND	MICHAEL STIASSNY First Respondent
AND	KORDA MENTHA Second Respondent

Hearing: 30 November 2010

Court: Glazebrook, Arnold and Harrison JJ

Counsel: V R Siemer in person
P J Hunt for Respondents

Judgment: 14 December 2010 at 9.30am

JUDGMENT OF THE COURT

A The application is dismissed.

B Costs for a standard application are awarded to the respondents on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Glazebrook J)

Introduction

[1] Mr Siemer applies for an extension of time under r 29A of the Court of Appeal Civil Rules (2005) to file an appeal against an order made in a Minute of

Cooper J dated 29 July 2010 which struck out an application filed by Mr Siemer in the High Court to set aside a permanent injunction prohibiting Mr Siemer from publishing defamatory material about the respondents.

Procedural History

[2] On 23 December 2008 Cooper J found Mr Siemer liable for both defamation and breach of contract and ordered Mr Siemer to pay the respondents damages. Cooper J also granted a permanent injunction prohibiting Mr Siemer from publishing defamatory material about the respondents (the 23 December judgment).[1]

[3] Mr Siemer sought to appeal against the 23 December 2008 judgment and the respondents applied to strike out the appeal. On 22 December 2009, this Court granted the application to strike out except to the extent it related to the quantum of damages awarded in favour of the respondents in the High Court.[2]

[4] On 20 May 2010 the Supreme Court dismissed Mr Siemer's application for leave to appeal the Court of Appeal's strike out decision.[3]

[5] On 28 July 2010 Mr Siemer filed an application in the High Court to set aside the permanent injunction granted in the 23 December judgment. On 29 July 2010 Cooper J issued an order made in a Minute striking out this application. It was stated that it was apparent from the terms of the application that Mr Siemer was attempting to pursue the same arguments that he had earlier raised with this Court. This meant that the application was vexatious and an abuse of process.

Grounds of Mr Siemer's application

[6] Mr Siemer's grounds of application are:

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1 *Korda Mentha v Siemer* HC Auckland CIV 2005-404-1808, 23 December 2008.
2 *Siemer v Stiassny* [2009] NZCA 624.
3 *Siemer v Stiassny* [2010] NZSC 57. The remaining parts of the appeal have been heard by this Court but a judgment has not yet been released.

(a) the Minute was purportedly issued the day after he filed and served the application;

(b) the Judge acted of his own volition in ordering the strike out, without application, notice or hearing;

(c) Mr Siemer was not informed of the order until 21 September 2010;

(d) Mr Siemer did not receive a written copy of the order until 30 September 2010.

Our assessment

[7] Mr Siemer submitted in the hearing before us that his application to the High Court was made at the suggestion of this Court and the Supreme Court. At the Court's invitation, he filed a post-hearing memorandum setting out the passages he relied on for this assertion. His memorandum said:

> 1. This Memorandum is filed at the request of the Bench for reference as to where the Court of Appeal and Supreme Court previously suggested an application to vary or set aside the (now permanent) gag injunction was the appropriate legal mechanism.
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> 2. From recollection, the suggestion was by Justice Baragwanath at the 1 December 2009 hearing in CA453/2009, after Justice Robertson inquired of the appellant whether he had previously made application to do so. The appellant does not have a copy of the official transcript from that hearing, but it was duly recorded by the Court.
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> 3. Later, at the hearing SC48/2009 before the Supreme Court on 2 March 2010, Justice Blanchard stated:
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> *"If Mr Siemer feels that (the injunction) is too broad, or broader than he thought he was agreeing to in the, what you've called the contract litigation, then presumably he can apply for a variation but in the meantime, there is an injunction in these terms and it seems to me the only question is whether it's been breached. The only question we're talking about at the moment."*

[8] As was pointed out by the respondents, the comment by Blanchard J did not appear in the Supreme Court's judgment arising out of the hearing of 2 March 2010.

It was merely a tentative comment of one Judge in the course of a hearing. The same applies to the alleged suggestion by Baragwanath J.

[9] In any event, as noted by Mr Siemer in his memorandum, the alleged comments were made at a time when the injunction was based on the contractual settlement and there had been no final determination on the alleged defamation. That is no longer the case.[4] The injunction now arises out of Cooper J's judgment on defamation from which there is only a limited right of appeal.[5]

[10] This means that the proposed appeal is an abuse of process. Mr Siemer has exhausted all rights of appeal in relation to the injunction which he seeks to set aside.

[11] Under r 15.1(d) of the High Court Rules, the Court may strike out all or part of the proceedings if it is an abuse of the process of the Court. On its face, r 15.1 does not require the Court to be in receipt of an application to strike out all or part of the proceedings in order to make an order under r 15.1.

[12] In any event, the Court also has the ability under its inherent jurisdiction to strike out proceedings that amount to an abuse of process.

Result and costs

[13] The application is dismissed.

[14] Costs for a standard application are awarded to the respondents on a band A basis and usual disbursements.

Solicitors:
McElroys, Auckland for Respondents

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4 See at [2] above.
5 See at [3]–[4] above.