IN THE COURT OF APPEAL OF NEW ZEALAND

CA718/2010
[2011] NZCA 1

BETWEEN	VINCENT ROSS SIEMER First Appellant
AND	JANE DINSDALE SIEMER Second Appellant
AND	MICHAEL PETER STIASSNY First Respondent
AND	FERRIER HODGSON AND CO LIMITED Second Respondent
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Third Respondent
AND	DAVID COLLINS Fourth Respondent
AND	JUDICIAL CONDUCT COMMISSIONER Fifth Respondent
AND	CHIEF JUSTICE OF NEW ZEALAND Sixth Respondent

Hearing: 27 October 2010

Court: O'Regan P, Hammond and Arnold JJ

Counsel: Appellant in person
A M Powell for Fourth Respondent

Judgment: 3 February 2010 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the fourth respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] The first appellant, Mr Siemer, is a frequent litigant in the New Zealand courts. Most of the various proceedings in which he is or has been a party stem from the conduct of the receivership of a company, Paragon Oil Ltd, in which Mr Siemer and his wife were significant shareholders and Mr Siemer was Managing Director. The receiver was Mr Michael Stiassny, of Korda Mentha (previously Ferrier Hodgson).

[2] A dispute arose because Mr Siemer was unhappy with the way the receivership was conducted and the fees charged. Although the parties settled the dispute and entered into a written settlement agreement, Mr Siemer embarked on a public campaign attacking Mr Stiassny's competence and integrity. Mr Stiassny and Korda Mentha sued Mr Siemer both for breach of the settlement agreement and in defamation and obtained an award of damages totalling $920,000.[1] That award is currently under appeal to this Court.

[3] In the course of the proceedings, Mr Stiassny obtained interim injunctions initially from Winkelmann J and later from Ellen France J[2] preventing Mr Siemer from continuing with certain conduct. Mr Siemer breached these injunctions and as a consequence was convicted of contempt of court in proceedings issued by the Solicitor-General.[3]

[4] On 9 January 2008 Mr Siemer issued proceedings against Mr Stiassny, Ferrier Hodgson and the Solicitor-General, alleging that they were parties to a

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1 *Korda Mentha formerly Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 at [90]–[91].

2 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005.

3 *Solicitor-General v Siemer* HC Auckland CIV-2005-404-472, 8 July 2008. This ultimately went to the Supreme Court – see *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

conspiracy to defeat the course of justice, deprive Mr Siemer of his legal rights and bring false allegations against him. Harrison J struck these proceedings out on the ground that the pleadings were irreparably defective, were designed to embarrass and were an abuse of process.[4] The Judge noted that Mr Siemer's pleadings contained personal attacks on the integrity, fitness for office and competence of Judges of the High Court, this Court and the Supreme Court arising out of their determinations in the various proceedings and sought to relitigate the issues dealt with in those proceedings.

[5] In October 2008, Mr Siemer, this time in conjunction with the second appellant, Mrs Siemer, filed fresh proceedings against the parties just mentioned, together with the Attorney-General, the Judicial Conduct Commissioner and the Chief Justice. Mr Siemer also filed an affidavit in support of the statement of claim. These proceedings covered much the same ground as those struck out by Harrison J, although there were arguably some new claims.

[6] The statement of claim was referred to Priestley J, who issued a minute dated 16 October 2008 in which he noted that the statement of claim as then drafted was unsatisfactory and would need to be re-pleaded. Among other things, he directed that the proceedings in their current form be served only on the Solicitor-General (service on the other named defendants was not to occur until further order) and that there be a judicial conference. The Siemers objected to these directions and filed an appeal against them.

[7] Before this appeal was determined, the Solicitor-General filed an application to strike the proceedings out or, in the alternative, for an order for security for costs. Winkelmann J granted the former application and struck the Siemers' proceedings out.[5] The Siemers then appealed against Winkelmann J's decision.

[8] The present appeal, then, deals with both the appeal against the directions made by Priestley J and the strike out order made by Winkelmann J. For obvious reasons, we address the latter first.

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4 *Siemer v Stiassny* HC Auckland CIV-2008-404-104, 20 March 2008 at [9]–[10].

5 *Siemer v Stiassny* HC Auckland CIV-2008-404-6822, 30 November 2009.

[9] We do not propose to describe the factual background in more detail. It is recorded in the judgments to which we have already referred. Rather, we will summarise the reasons that Winkelmann J gave for reaching her conclusion, outline the basis for the appeal and set out our reasoning and decision.

Winkelmann J's decision

[10] At the outset, Winkelmann J noted that the statement of claim pleaded five causes of action.[6] Two were pleaded against all the respondents: conspiracy to defeat or pervert the course of justice and conspiracy to injure by unlawful means. Two were pleaded against the third to sixth respondents: misfeasance in public office and violation of the appellants' human rights. And one was pleaded against the fourth respondent, the Solicitor-General: malicious prosecution. The Judge also noted that the pleading was similar to a draft pleading which Mr Siemer had prepared in the context of the strike out application granted by Harrison J.

[11] Winkelmann J determined that the proceedings should be struck out for three reasons:

(a) She accepted the Solicitor-General's submission that the proceedings were a collateral attack on the outcomes and processes of earlier proceedings. The Judge said that if Mr Siemer had concerns about the earlier proceedings, the proper way for him to address those was through appellate or complaint processes. Mr Siemer had pursued these processes without success. It was not now open to him to seek to re-litigate the issues.[7]

(b) Winkelmann J said that another fundamental problem with the proceedings was that they could not succeed. There were various reasons for this.[8] For example, judicial officers exercising judicial

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[6] At [5].
[7] At [18].
[8] At [19]–[22].

functions in Court are exempt from civil liability for anything said or done by them in a judicial capacity.[9]

(c) Finally, the Judge noted that the pleadings had manifest deficiencies, largely taking the form of "rambling invective".[10] The Judge considered the factual allegations (including Mr Siemer's affidavit) to be without foundation and so insubstantial that Mr Siemer should not have the benefit of the usual assumption on a strike out application that factual assertions are capable of proof.[11]

Basis of appeal

[12] Before us Mr Siemer argued that he is being denied access to the courts. Such access is, he said, the most fundamental right of a just court system. Citing *Couch v Attorney-General*[12] and *Attorney-General v Prince*[13] he submitted that Winkelmann J should not have struck out the proceedings at such an early stage. Moreover, Mr Siemer complained that Winkelmann J had struck out the proceedings in their entirety even though some of the parties had not sought to have them struck out. He argued that Winkelmann J's decision was not sufficiently supported by reasons and that it was inconsistent with the evidentiary material before her, in particular, his affidavit. Finally, Mr Siemer argued that Winkelmann J had a conflict of interest. This arose because, after the hearing but before judgment, the Judge varied an order which she had made in other proceedings involving Mr Siemer and the Solicitor-General.

Evaluation

[13] We consider that Winkelmann J was right to strike the proceedings out in their entirety.

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9 *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 682 and 685.
10 At [25].
11 At [21].
12 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
13 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

[14] First, the power to strike out a proceeding under r 15.1 of the High Court Rules (the Rules) does not depend upon an application having been made. By contrast, r 15.2 expressly contemplates applications. In any event, in the present case an application was made, but not by all the defendants. This was because Priestley J directed that the proceedings be served only on the Solicitor-General. But that does not prevent the Court from exercising its powers under r 15 in respect of all defendants.

[15] Moreover, the fact that there is a strike out power in r 15 does not affect the inherent jurisdiction of the Court.[14] Under that jurisdiction, Winkelmann J had the power to strike out the proceedings irrespective of any application, providing she concluded that they were an abuse of process, as she did.[15]

[16] Second, we consider that the causes of action in the statement of claim are unarguable, except in one respect, as we now explain.

[17] Courts hearing strike out applications generally proceed on the basis that the factual allegations in the statement of claim can be proved.[16] Affidavit evidence has a limited role in such applications, although Mr Siemer has filed several affidavits in support of his various sets of pleadings. The statement of claim under consideration is prolix and unfocussed. It is expressed at points in extreme and insulting language and the causes of action are inadequately supported by relevant allegations. We consider each cause of action in turn.

(i) First cause of action, against all respondents - conspiracy to pervert the course of justice

[18] The basis for this claim lies in the decisions that the Courts have made in the litigation in which one or both of the Siemers have been involved. The Siemers allege that the respondents have conspired through the proceedings to deny them their rights.

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[14] Rule 15.1(4).
[15] At [26].
[16] *Prince and Gardner* at 267.

[19] However, rights of appeal have been available in respect of the proceedings, which have generally been exercised. These provided the means by which the Siemers could pursue their concerns. The real difficulty is that the Siemers have been unwilling to accept outcomes adverse to them. In reality, then, this claim seeks to re-litigate matters that have already been dealt with by the courts and is accordingly an abuse of process.

(ii) Second cause of action, against third to sixth respondents – misfeasance in public office

[20] With two exceptions, the allegations in this cause of action constitute collateral attacks on previous judicial decisions and accordingly are unarguable. Moreover, the claim in respect of the Chief Justice is defeated by judicial immunity.[17]

[21] The two exceptions relate to the Solicitor-General and the allegations first, that he misled Parliament and second, that he wrongfully caused the Police to execute a search warrant at the appellants' home. As to the former, as Winkelmann J said, that is a matter for Parliament, not the courts.[18] As to the second, the suggestion appears to be that the Solicitor-General directed the police to obtain a search warrant in respect of the Siemers' home for an improper purpose. The police would then, of course, have had to persuade a District Court Judge or a Registrar to issue the warrant.

[22] In relation to this latter claim, we consider that Winkelmann J was right to find that the allegations in the statement of claim and the supporting affidavit were so insubstantial that the Siemers should not have the benefit of the normal assumption on strike out applications that factual allegations are capable of being proved. This is amply illustrated by the following extract from Mr Siemer's affidavit of 28 May 2009:

> 5. In a phone call I placed to Police Deputy Superintendent Andrew Lovelock of Auckland after the raid, he admitted he had directed the

[17] *Gazley v Lord Cooke of Thorndon* at 682.
[18] At [22].

> raid against my house be carried out. When I asked why he – the top cop in Auckland – was so interested in raiding my house in Rodney, particularly with such a large contingent of Police detectives, Lovelock seemed clueless to give me an answer and, indeed, failed to. I then asked him whether David Collins had ordered the raid. He responded that he was refusing to answer this question. This minimally suggested someone superior to Lovelock ordered it.
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> 6. A source in New Zealand Government has since affirmed to me my suspicions that David Collins ordered the raid on my house as a likely result of my writing about his (Collins) illegal activities on my legal news website ... The reasonable inference was, and remains, that Collins covertly engaged in this heavy handed action in his official capacity as New Zealand Solicitor General – at taxpayer expense – to unlawfully attack me and seize my confidential personal and business records.
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> 7. This view is further supported by what the Twelve Police Detectives actually took from my home. The search warrant gave the raiders authority to target my library card and correspondence alleged to have occurred with the lawyers of the so-called "Terrorists". What Police targeted and took suggested this was a ruse. The 72 man-hour search extended from the attic, through my wife's underwear drawers, through the kitchen and bath cupboards, to under the house. The extensive seizure included spiral bound notebooks of business data, my and my wife's business records, files of 2006 & 2007 personal tax information, all my computer storage data systems (including those thoroughly searched by two Police IT experts during the raid and found not to be relevant to the search warrant) and even my photo copier, camera and laser printer.

[23] The allegations against the Solicitor-General are said to be based on "reasonable" inferences. In fact they fall far short of providing any real basis for a claim against the Solicitor-General. As has been recognised in other contexts (such as applications for summary judgment), the courts are not obliged to accept statements in affidavits that lack precision, plausibility or substantiation.[19]

(iii) Third cause of action, against the third to sixth respondents – breach of appellants' rights

[24] Again, the majority of matters raised in this cause of action go to issues addressed in earlier proceedings. Consequently the claim constitutes an attempt to re-litigate issues that have already been judicially determined.

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[19] *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock.

[25] There is one new element, however. Paragraphs 187 and 188 of the statement of claim allege breaches of the New Zealand Bill of Rights Act 1990 (NZBORA) by police officers in their search of the appellants' home and of Mr Siemer personally. Some particulars are provided at paragraphs 122 to 135. Mr Powell properly drew attention to the fact that there has been no previous adjudication of any claim that the Siemers may have arising out of the search. We return to this point below.[20]

(iv) Fourth cause of action, against all respondents – conspiracy to injure by unlawful means

[26] Again in this claim the Siemers attempt to challenge the correctness of various rulings made by the courts in the course of the litigation in which they have been involved, albeit by an indirect route. The claim is clearly an abuse of process.

(v) Fifth cause of action, against the Solicitor-General – malicious prosecution

[27] This claim is based on the proceedings brought by the Solicitor-General for contempt arising out of Mr Siemer's breaches of court orders. Assuming that they can be characterised as criminal proceedings for this purpose, this claim cannot possibly succeed as the Solicitor-General's proceedings were successful, being upheld by the Supreme Court. One of the elements for a successful action for malicious prosecution is that the criminal proceedings were terminated without the plaintiff being incriminated.[21]

Conclusion

[28] We have concluded that the allegations in the statement of claim are unsustainable, with one exception. That is the Siemers' claim against the Attorney-General arising out of the alleged breach of their rights by the police in the course of the search of their home. Clearly the Siemers are entitled to pursue that claim.

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[20] At [28].
[21] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [18.2.02].

[29] However, the Siemers have issued proceedings in the District Court in relation to the search.[22] The defendants are individual officers involved in the search rather than the Attorney-General. While it is unclear whether those proceedings are being actively pursued, the fact that there are concurrent proceedings in two different courts arising out of the search is unsatisfactory. Moreover, this is the only aspect of the High Court proceedings that is arguable, so that the statement of claim would have to be radically redrawn to remove the objectionable elements. With a properly drawn statement of claim, the proceedings would bear little resemblance to those currently before the Court.

[30] In these circumstances, we consider that the proceedings should be struck out in their entirety, but without prejudice to the Siemers' right to pursue their claims arising out of the search of their home in either the District Court or the High Court. For the sake of completeness, we note that we see nothing in Mr Siemer's conflict point.

Decision

[31] The appeal is dismissed. The appellants must pay the fourth respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondents

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22 *Siemer v Brown* DC North Shore CIV-2008-044-517.