IN THE COURT OF APPEAL OF NEW ZEALAND

CA826/2009
[2011] NZCA 106

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	MICHAEL PETER STIASSNY First Respondent
AND	KORDA MENTHA FORMERLY FERRIER HODGSON Second Respondent

Hearing: 2 November 2010

Court: Glazebrook, Hammond and Arnold JJ

Counsel: Appellant in person
J G Miles QC and P J L Hunt for Respondents

Judgment: 30 March 2011 at 12 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondents (jointly and severally) on a standard basis, Band B, and usual disbursements. These disbursements are to include the actual costs of preparation and production of the case on appeal, if necessary as certified by the Registrar.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] In a judgment delivered on 23 December 2008, Cooper J found for the respondents that Mr Siemer had defamed them.[1] He awarded the first respondent, Mr Stiassny, damages totalling $825,000 and the second respondent, Korda Mentha (formerly Ferrier Hodgson) damages of $75,000. There was a further award to Korda Mentha of $20,000 for breach an agreement settling a dispute between the parties.

[2] In this appeal Mr Siemer challenges the quantum of the damages awards. But before considering the principles upon which this Court is required to review those damages and the awards themselves, it is necessary to briefly re-traverse briefly the facts giving rise to the claim and to explain the scope of this appeal, which has been significantly constrained by a partially successful strike-out application to this Court.

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1 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008.

Factual background

[3] The following summary of the factual background relies substantially on the judgment of Cooper J. As will be explained further below, the facts are unchallenged because of the way the appeal has come forward.

[4] The paths of the parties to this proceeding first crossed when Mr Stiassny was appointed as the receiver of Paragon Oil Systems Ltd (Paragon), a company in which Mr Siemer was a shareholder and Managing Director. The receivership was in the nature of a "caretaker administration" to keep the business on foot while an impasse between disputing shareholders, including Mr Siemer, was addressed. Proceedings in the High Court as to that dispute were resolved in Mr Siemer's favour.[2] The receivership was terminated. Solvency was not an issue in the receivership, though Mr Siemer maintains that Mr Stiassny filed an affidavit in Court which falsely described Paragon as insolvent.

[5] A dispute arose between Mr Stiassny and Paragon about the costs of the receivership. This continued after the receivership concluded. One of Mr Siemer's grievances related to an invoice for $10,000 sent to Paragon in error. The fees represented in the invoice had in fact been incurred by a client named Paramount. That error was rectified once it was identified and an apology was issued. A settlement agreement was reached to resolve that dispute. Mr Siemer personally, and for Paragon, executed the agreement on 9 August 2001. As a result of the agreement, Ferrier Hodgson, Mr Stiassny's firm, wrote off fees of $20,281. The settlement agreement required both parties to refrain from commenting to other parties on the receivership and the settlement.

[6] Unfortunately, that was not the end of things. Notwithstanding the settlement agreement, Mr Siemer made a number of complaints to third parties about Mr Stiassny's conduct of the receivership. These included complaints to the Institute of Chartered Accountants of New Zealand (ICANZ), the New Zealand Shareholders' Association, and Auckland Energy Consumer Trust, which held shares in Vector Ltd. Mr Stiassny was chairman of that company. There was also a complaint to the

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2 *Siemer v Paragon Oil Systems Ltd* (2001) 9 NZCLC 262,693 (HC).

Serious Fraud Office. Following the ICANZ complaint, its Professional Conduct Committee found there had been no breach of the ICANZ Code of Ethics. An independent review of that finding found further that there had been no procedural impropriety in the Committee's investigation of the complaint.

[7] Having failed to gain any real traction with these complaints, Mr Siemer resorted to a website, www.stiassny.org, on which he set out his many complaints about Mr Stiassny. He advertised the existence of this website on a billboard in Auckland. The billboard displayed a photograph of Mr Stiassny and was emblazoned with the words "Michael Stiassny A true story". Perhaps coincidentally, it was positioned next to another billboard displaying advertising for Vector.

[8] It was largely the content of that website that gave rise to the claims in defamation. The Judge had no difficulty in arriving at the conclusion that the material complained of was defamatory.[3] Cooper J accepted as accurate the following summary of the defamatory statements:[4]

> ... [That] Mr Stiassny had falsely labelled Paragon insolvent and lied to the Court about it; overcharged for accounting services; carried out dishonest and deceptive accounting practices; lied to the Professional Conduct Committee of the Institute of Chartered Accountants; amassed a huge fortune through acting dishonestly; stolen Paragon's technology; been guilty of serious criminal conduct; committed perjury; acted in a manner worse than the criminals of the Enron scandal; [and] was to be compared to Saddam Hussein.

[9] Moreover, this was deliberate defamation. Cooper J found that Mr Siemer "proudly owned the defamatory comments and openly persisted in them".[5] Furthermore, his Honour found:[6]

> It is apparent that Mr Siemer deliberately calculated that his defamatory statements would bring Mr Stiassny and his firm into disrepute and intended that to be the consequence of his defamatory statements.

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3 At [40].
4 At [38].
5 At [41].
6 At [42].

Procedural background prior to trial

[10] Before turning to the Judge's assessment of damages, it is necessary to understand some of the procedural history of this unfortunate litigation. That history had a significant bearing on the Judge's assessment of damages.

[11] The respondents had sought injunctions forcing Mr Siemer to remove the billboard and the material on the website and restraining him from publishing further such information. Winkelmann J granted an ex parte application for an interim injunction in those terms.[7]

[12] On Mr Siemer's application, Ellen France J in a judgment delivered on 5 May 2005 rescinded that injunction but granted a new one in narrower terms.[8]

[13] Mr Siemer failed to comply with the terms of either injunction. The respondents then filed an ex parte application for Mr Siemer's committal. In determining that application on 16 March 2006 Potter J found that Mr Siemer had breached the injunctions and that he was in contempt of Court.[9] He and Paragon Services Ltd (the second defendant) were fined $15,000, on a joint and several basis, payable within 30 days of the judgment. That fine was subsequently paid. There was also an application by the respondents for writs of arrest and sequestration and for an order debarring Mr Siemer from defending the claim. Potter J left those applications to lie in Court with leave reserved to apply for relief in the event the injunction was again breached. That judgment was upheld by this Court on appeal[10] and the Supreme Court declined leave to appeal to it.[11]

[14] Still Mr Siemer failed to comply with the injunction. Indeed, he constructed a new website, www.kiwisfirst.com. The respondents made a further application for Mr Siemer's committal and other orders on the basis of his non-compliance. They also complained about his failure to pay costs orders of both the High Court and this Court. Mr Siemer took no steps to defend the application. Neither did he seek an

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7 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 8 April 2005.
8 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005.
9 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 16 March 2006.
10 *Siemer v Stiassny* [2007] NZCA 117, [2008] 1 NZLR 150.
11 *Siemer v Stiassny* [2007] NZSC 53.

adjournment. He had told the Registry he would be overseas at the time of the allocated fixture. Potter J proceeded in his absence, being satisfied that Mr Siemer had been properly served and that he had simply chosen to absent himself. Her Honour again held Mr Siemer in contempt. She found he had deliberately and wilfully breached the injunction. The Judge granted leave to issue a writ of arrest and made an order debarring Mr Siemer from defending the proceeding.[12]

[15] On 13 July 2007 Mr Siemer came before Potter J. She found that Mr Siemer "had flaunted his offending conduct to the plaintiffs and their advisers. He has challenged the plaintiffs and the Court in relation to the pursuit of the substantive proceeding."[13] Potter J imposed a term of imprisonment of six weeks.

[16] The Solicitor-General then commenced a proceeding against Mr Siemer alleging that Mr Siemer had continued to breach France J's interim injunction even after Potter J's judgment of 13 July 2007.

[17] A full Court of the High Court delivered judgment on 8 July 2008 to the effect that the Crown had proved beyond reasonable doubt that even since Mr Siemer had been sent to prison there had been new publications or republications of the offending material.[14] A further writ of arrest was issued to bring Mr Siemer before the Court, at which time he would be committed to prison for six months. He was given time to remedy his position but had failed to do so by the time the substantive proceeding, from which this appeal arises, was heard by Cooper J.

[18] Because of the debarment order, neither Mr Siemer nor any counsel for him made an appearance before Cooper J. Cooper J found for the plaintiffs, and awarded the damages referred to above.

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12 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 9 July 2007.
13 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 13 July 2007 at [8].
14 *Solicitor-General v Siemer* HC Auckland CIV-2008-404-472, 8 July 2008.

The scope of this appeal: the procedural history since trial

[19] Mr Siemer appealed Cooper J's decision to this Court. The notice of appeal was filed in time. But there were difficulties that had to be resolved before the appeal could come on for hearing. Those matters are set out in this Court's judgment of 22 December 2009.[15] The Court, having decided the appeal was to be kept on foot despite the various delays which would otherwise have seen it deemed abandoned, then had to consider applications to strike out the appeal and to increase security for costs. Only the Court's determination of the former is relevant here.

[20] It was argued for Mr Stiassny's interests that the appeal should be struck out, given the debarment order and Mr Siemer's continued contempt. However, this Court, in agreement with an earlier decision of the Court,[16] considered that the debarment order did not extend to proceedings in this Court.[17]

[21] As to contempt being a basis for a strike-out, the Court adopted the principles set out in *Arab Monetary Fund v Hashim*.[18] There Lord Bingham of Cornhill considered the issue is to be dealt with according to the interests of justice. That is, whether the interests of justice were best served by hearing a party in contempt or refusing to do so. Of paramount importance, in determining where those interests lie however is the "prompt and unquestioning observance of court orders".[19]

[22] Taking that approach, this Court considered that Mr Siemer's contempt constituted "a serious defiance of the Court's orders" and the denial of the respondents of the remedy owed them was a "telling factor" in favour of strike-out.[20] But against that was "the need to ensure that the Court does justice to [Mr Siemer]".[21]

[23] This Court concluded:

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15 *Siemer v Stiassny* [2009] NZCA 624.
16 *Siemer v Ferrier Hodgson* [2007] NZCA 581, [2008] 3 NZLR 22 at [27].
17 At [37].
18 *Arab Monetary Fund v Hashim* CA England and Wales, 21 March 1997.
19 *Arab Monetary Fund*, as quoted in Sir David Eady and A.T.H. Smith (eds) *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, 2005) at 915.
20 At [48].
21 At [49].

> [66] We see this as precisely the sort of situation envisaged by cases such as [*X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL)] and *Arab Monetary Fund*. Much of what the appellant wishes to challenge on appeal is related to the limitations of the High Court hearing because of the debarment order, but he seeks to do this after the hearing to which the debarment order related, having passed up numerous opportunities to challenge it prior to, or at, the hearing. The Court would be doing an injustice to the respondents if it allowed its processes to be abused in that way. We are satisfied that the interests of justice in this case require that the Court refuse to give the appellant the opportunity to challenge on appeal the order which he has continuously defied.
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> [68] We do, however, consider that the position in relation to the award of damages made by Cooper J may give rise to different considerations. At the time the damages award was made, the appellant was bankrupt. The fact that he has not met the damages award cannot, therefore, be fairly described as an indication of contempt by him of that order. We are cognisant that by any standards the award is an extremely large one, and we have concerns that an award of that magnitude has arisen from a process in which the party against whom it is made has not participated. We propose, therefore, to allow a challenge to the quantum of the damages award to be mounted in this Court, so that that aspect of the proposed appeal by the appellant will be excluded from the ambit of the strike-out order.
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> [69] We order therefore that the appellant's appeal be struck out in all respects *except to the extent that it relates to a challenge to the quantum of the damages award made by the High Court*. That challenge is limited to an argument based on the facts as found by the High Court Judge, which are not susceptible to challenge in this Court. In essence, the argument which remains available to the appellant is that the award of damages for the defamation and breach of contract as found by the High Court Judge is excessive. (Emphasis added.)

[24] It is this history which has brought about the narrow scope of this appeal.

The case and submissions on this appeal

[25] Mr Siemer says he does not have his files or at least complete files; and that the Court has lost its file. So, he said, he could not prepare a case on appeal.

[26] Whatever the basis and extent of those difficulties, the respondents sensibly (but, of course, at real expense) took the initiative to get this case disposed of. They prepared the case on appeal themselves.

[27] The respondents filed submissions in proper form.

[28] Unfortunately, Mr Siemer's short written submissions dated 8 October are directed exclusively at matters that are outside the scope of this appeal as determined by this Court in its 22 December 2009 judgment. They restate the complaints arising from the fact that the trial proceeded in his absence. They also challenge findings of fact by the Judge. But this Court has determined that only the quantum of damages is to be open to challenge and that the appeal is to be conducted on the basis of the facts as found by the Judge. In other words, the issue in this appeal is whether the Judge's assessment of damages was excessive in light of the facts as he found them to be.

[29] For the respondent much the same arguments as were advanced to and largely adopted by the Judge at trial are again submitted to this Court.

The Judge's approach to quantum

[30] The Judge had no difficulty in finding that Mr Siemer had published defamatory material. In assessing the quantum of damages, Cooper J adopted a five-point analytical framework suggested by Mr Miles QC. He found:[22]

a) Regarding the nature of the defamatory statements, the defamatory words were "in the most serious category" alleging as they did the dishonesty of a professional kind and criminal conduct, and making comparisons to Saddam Hussein. The allegations "[struck] at the heart of Mr Stiassny's personal and professional reputation, and Ferrier Hodgson's business reputation". Some of the material contained "vile racist abuse".

b) Regarding the extent of publication, publication was on a "very wide basis" including the prominent billboard, the websites, sticker and poster campaigns and letters to various authorities and media. Publication increased over time and continued notwithstanding the

[22] At [54]–[60].

various orders of the Court. Mr Siemer's claims were repeated in mainstream print media.

c) Regarding the injury to plaintiffs, there was a severe effect on Mr Stiassny personally resulting from the attack on his integrity. There were also the costs involved. It was said legal costs had exceeded $1 million and the opportunity cost of time spent by people in Mr Stiassny's firm was more than $400,000. Mr Stiassny had felt it necessary to serve trespass notices on Mr Siemer to protect his home and family.

d) Regarding damage to reputation, there was the effect on Ferrier Hodgson and staff there, who "had to endure reactions from families and contacts".

e) Regarding the defendant's conduct, Mr Siemer had acted "deliberately" and "vindictively", courted publicity and disregarded Court orders. It was "difficult to imagine" what more he could have done "to ensure that his defamatory remarks hit home or were brought to the attention of a wider public".

[31] The Judge then considered the quantum of damages. He considered s 28 of the Defamation Act 1992, which provides for punitive awards in cases where the defendant has acted in flagrant disregard of the rights of the plaintiff. He further considered the comparability of two authorities, *Television New Zealand v Quinn*[23] and *Columbus v Independent News Auckland Ltd*.[24] His Honour thought the former was more useful in this instance but noted McKay J's caution in that case that detailed comparisons with other cases were unlikely to be fruitful undertakings in assessing the correct level of damages.

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23 *Television New Zealand v Quinn* [1996] 3 NZLR 24 (CA).

24 *Columbus v Independent News Auckland Ltd* HC Auckland CP600/98, 7 April 2000.

[32] Cooper J arrived at a final award of $825,000 against Mr Siemer. The Judge specified the breakdown of the award: $650,000 in general damages, $150,000 in aggravated damages and $25,000 exemplary damages.

The correct approach to reviewing damages awards in defamation

[33] Section 33 of the Defamation Act 1992 allows for a review of an award of damages for defamation on the grounds that they "are excessive or are inadequate". There is no more statutory guidance than that.

[34] However, clearly an error of law will also attract appellate intervention. For instance, *McGregor on Damages*[25] cites the judgment of Greer LJ in *Flint v Lovell*[26] as "the classic statement" of the principles applying to appellate review of a judge's (as opposed to a jury's) award of damages in tort generally. There Greer LJ said:[27]

> [The Court of Appeal] will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

[35] It is uncontroversial that these principles apply as a matter of law in New Zealand to appeals such as this one. They have been applied in this Court. [28]

[36] The first ground of review, error of law, includes where the judge has misdirected himself or herself as to the law, given insufficient or undue weight to a particular matter,[29] or made an erroneous factual finding.[30]

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25 Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [46-025].

26 *Flint v Lovell* [1935] 1 KB 354 (CA). Confirmed in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 (HL).

27 At 360.

28 See for example *Donaldson v Waikohu County* [1952] NZLR 731 (CA) (albeit an appeal against a jury's award of damages); *Wellington Newspapers Ltd v Dealers Guide* [1984] 2 NZLR 66 (CA); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).

29 McGregor at [46-026]. See for example *Truth (NZ) Ltd v Bowles* [1966] NZLR 303 (CA).

[37] The second ground in *Flint v Lovell*, that of an "entirely erroneous estimate", poses greater difficulty in defamation cases. That is because the purpose of compensatory damages in defamation is primarily to remedy damage to reputation but also to recompense hurt feelings. As Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*:[31]

> It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation ... For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done.

[38] As such it might perhaps be said that awards for that kind of injury must by their nature be impressionistic and cannot be quantifiable in any truly objective way. And it may be thought that provides reason for additional caution in reviewing a trial judge's award for damages in defamation, since any interference with the judge's assessment risks the appearance of one subjective assessment simply being substituted by another.[32] But even so, it is possible – and the statute contemplates it to be so – to assess whether an award has "gone beyond reasonable bounds".[33]

[39] An entirely orthodox form of assistance to a reviewing Court is to have regard to the level of awards in other cases in this jurisdiction, and perhaps elsewhere. McKay J put it this way in *Television New Zealand Ltd v Quinn*:[34]

> I believe the best guide is to apply the experience of other verdicts in other defamation cases to arrive at what appears to be the appropriate level in the particular case, and to recognise that a reasonable jury may properly go some distance above or below that figure. I do not suggest any detailed comparison of one award with another, as I believe that would be unhelpful. What is called for is rather a judgment of the particular case in the light of the overall experience.

[40] Another way to put this is to ask whether an award is an "outlier": an entirely erroneous estimate in light of experience. It may be "startlingly high"[35] – or low.

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30 Patrick Milmo and WVH Rogers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at 1304.

31 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA) at 150. Lord Hailsham in *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) approved of that statement of principle at 1070-1071.

32 This view was expressed, obiter, by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616.

33 *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 38 per Lord Cooke.

34 *Quinn* at 45.

On such an approach, the Court should however be careful not to ossify levels of awards. If ever there was an area of the law which is anchored in a reflection of community views, this is it, and community views often change. For instance, to say of a woman that she was living out of wedlock with a man (when she was not) might not attract the same degree of concern today as it did forty years ago.

[41] There is the possibility of conventionalising awards. That is, by circumscribing the upper level of awards, as has been done in some jurisdictions, particularly in relation to awards for pain and suffering in personal injury damages cases.[36] The reasons for taking this course have, in the main, lain in the very real problems associated with the assessment of such damages, not just for the Courts, but for society as a whole. There is however room for argument whether such a course should only be taken by legislation.

[42] That said, damages for defamation are quite infrequent; special damages are not often claimed (and are very difficult to prove); the whole basis for recovery for loss of reputation lies overwhelmingly in the general damages award – and, at least by juries – is traditionally unparticularised. That is, the award is a lump sum. This approach requires the evaluation by the fact-finder of the reputation of a given plaintiff in a community. As Roscoe Pound once put it, an individual has a proper claim "to be secured in his or her dignity and honour as part of their personality in a world in which that person has to live in society amongst other people".[37]

[43] Another possibility is that in many cases where, as is the case here in respect of Korda Mentha, the plaintiff is a commercial entity, it might be possible to quantify damage in terms closer to actual pecuniary loss. In such cases of special damage the appellate court's role may well be simplified: the correct award is

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35 As Lord Cooke put it in *Quinn* at 38.

36 In the United Kingdom, the maximum set for non-pecuniary loss in personal injury cases effectively operates, not entirely unproblematically, as a (not unbreakable) ceiling for awards in defamation cases: see Patrick Milmo and WVH Rogers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [9.6]. In Australia the maximum award for non-pecuniary loss is set by the uniform Defamation Act 2005 (see, for example, s 35(1) of the Defamation Act 2005 (NSW)) at $250,000, but there is provision for that amount to be modified. In *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, (1995) 126 DLR (4th) 129 at [168] the Supreme Court of Canada declined to set a maximum award.

37 Roscoe Pound *Jurisprudence* (The Lawbook Exchange, New Jersey, 2000) at 49. See also Roscoe Pound "Interests of Personality" (1915) 28 Harv L Rev 343 at 347.

essentially a question of fact. But it is not necessary as a matter of law that special damage to a corporate plaintiff is proven before it can recover business losses,[38] and in this case the award for injury to Korda Mentha was on the basis that as a consequence of Mr Siemer's defamatory publications "the firm's business reputation must inevitably have suffered to some degree".[39]

[44] To summarise, this Court ought only to interfere in Cooper J's assessment of the quantum of damages if it is satisfied that the Judge proceeded on the basis of an error of law; or if, in the light of relevant precedent, the award was "entirely erroneous", in the sense of going beyond any figure which the judge could properly award.

Discussion

The remedial scheme adopted by the High Court

[45] When damages for defamation are awarded by a jury they are normally awarded in a lump sum and without any indication as to how the jury reached that sum.

[46] What the High Court Judge did in this case was to break out his final award of $825,000 under various remedial heads. There is nothing inappropriate about a trial judge taking that course. But of course if any error is made about the way damages are treated, then it will be apparent on the face of the judgment and reviewable accordingly.

[47] In this particular instance the Judge awarded damages under the heads of general damages, aggravated damages, and exemplary damages, as well as contractual damages for what amounts to a breach of a covenant for quietude in a settlement agreement. It is appropriate to say something about this approach.

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38 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC).
39 At [83].

General damages – principles

[48] First, in relation to general damages, in defamation actions that term is taken to refer to losses sustained which are normal and to be anticipated when a person's reputation is impaired. When that occurs, such an offence affects one's relations with others which could be in business, social, religious, familial or other contexts. The impairment of one's relations can interfere in quite unpredictable and unknowable ways with the enjoyment of life, and therefore the common law took the view that in such an action damages may be awarded by the judge or jury without proof by a plaintiff that there has been any impairment of reputation.[40] To put this another way, at common law general damages are an estimate, however rough, of the probable extent of actual loss a person has suffered, and will likely suffer in the future. That is so despite the fact that such loss cannot be identified in terms of, say, advantageous relationships lost, whether from a monetary or what might be termed an enjoyment of life standpoint. And, since the interests served by way of protecting a good reputation are of a dignitary and peace of mind character, it is relatively obvious that such damages are very difficult to measure in monetary terms.

[49] As noted, the defamation plaintiff is being compensated because of injury to reputation. Compensation vindicates and consoles the plaintiff. And, depending on the facts, damages for actual financial loss may be recoverable. Recovery for that type of loss may be characterised by special damages or general damages. It is of course subject to the burden and civil standard of proof. Examples of New Zealand cases where special damages were awarded for financial loss are given in *The Law of Torts in New Zealand*.[41] However, there does not have to be direct evidence of financial loss. As Tipping J put it in *Mount Cook Group Limited v Johnstone Motors Limited*:[42]

> There has been some suggestion that companies can only obtain damages by proving special damage, namely actual identifiable loss. … I do not accept that proposition. In my view the position is as stated above, on the basis that damages may be obtained by a company in respect of defamatory material

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40 See generally David Rolph's treatment of the subject of reputation in defamation law in *Reputation, Celebrity and Defamation Law* (Ashgate, Aldershot, 2008).

41 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2008) at 767.

42 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC).

> likely to cause commercial loss without any evidence being necessary of actual loss having been suffered. In any such case the appropriate assessment must be made upon all the material available to the court or the jury. Another way of putting the point is to say that a company may obtain damages for defamation but only in respect of financial loss, either shown to have been suffered or shown to have been probable.

We will return to this issue in the context of the facts of this particular case, later in the judgment.

Aggravated damages – principles

[50] A much more difficult point of general principle is raised by the Judge's division of general damages and aggravated damages.

[51] As a general proposition, aggravated damages are additional damages which are awarded to compensate for injury to the plaintiff's feelings or dignity where that sense of injury has been exacerbated by the manner in which, or the motive with which, the defendant committed the defamatory act, or by how the defamation defendant behaved towards the injured plaintiff, particularly after the tort had been committed.[43] In a classic statement of principle, Lord Devlin in *Rookes v Barnard* characterised aggravated damages in this way:[44]

> [i]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

[52] In recent years there has been some distinct criticism of this division of general and aggravated damages. In *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* Tipping J said:[45]

> In cases where the damage is mental, the degree of harm will be more or less according to the nature of the wrong and the way and circumstances in which it was

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43 Todd at 1128.

44 *Rookes v Barnard* [1964] 1 AC 1129 (HL) at 1221; followed in *Fogg v McKnight* [1968] NZLR 330 (HC). See also John Murphy "The nature and domain of aggravated damages" (2010) 69 CLJ 353.

45 *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at 303.

> inflicted. … [It is] quite unnecessary to speak of aggravated damages. It is sufficient and indeed more helpful and accurate to speak, if necessary, of damages, the amount of which has been increased (or aggravated, if you like) by reason of certain features of the case. Even in cases of so-called aggravation, no attempt can or should be made to fix a base figure and then add what is seen as necessary to the aggravation. Only one composite exercise and ultimate figure is involved.

[53] In *Manga v Attorney-General* Hammond J said:[46]

> To say damages are "aggravated" adds nothing. Rather, compensatory damages may appropriately be enlarged to reflect the greater damage for which actual compensation is required. Exemplary damages may be awarded in an appropriate case.

[54] This issue has created some difficulties for High Court judges. As Professor Todd notes,[47] there are instances in which claims for aggravated damages have been struck out;[48] and others in which High Court judges have taken a more cautious line and said that without appellate authority, claims for aggravated damages should be allowed.[49]

[55] In this instance we have the difficulty that this issue has simply not been raised before us. For obvious reasons Mr Stiassny's interests were content to take all the relief they could get. Mr Siemer is not legally aided, and this conceptual issue in the law of remedies – which also has practical implications – was not referred to by him.

[56] In the absence of full argument from both sides, it is inappropriate to make a final pronouncement on this issue. That said, this case is a very good illustration of the dangers which can arise under this bifurcated approach: if general damages are awarded which somehow shade into aggravated damages which in turn somehow shade into exemplary damages, there is a distinct possibility that there will be double or even triple compensation. The problem is not unlike the conceptual problems in the criminal law in sentencing: it is the *totality* of the award which matters at the end of the day, not how the individual component parts are made up.[50]

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46 *Manga v Attorney-General* [2000] 2 NZLR 65 (HC).

47 Todd at 1129.

48 See, for example, *Gerdelan v The Problem Gambling Foundation Inc* HC Auckland CIV-2003-404-3497, 5 June 2005.

49 See, for example, *Tairawhiti District Health Board v Perks* [2002] NZAR 23 (HC) at 30.

50 See to this effect *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1072–1074 per Lord Hailsham.

Exemplary damages – principles

[57] The next conceptual problem with respect to damages in this case relates to exemplary damages. In *Couch v The Attorney-General (No 2)*[51] the Supreme Court of New Zealand adopted a restrictive view of the availability of exemplary damages. That view, at least in what might be termed common law actions, now requires that plaintiffs prove the defendant deliberately ran a consciously appreciated risk of injuring the plaintiff.[52] That is, the defendant must have been subjectively aware of the risk; exemplary damages at common law can no longer be awarded where the defendant's conduct was inadvertent, no matter how outrageous.

[58] While the Supreme Court was considering the issue in the context of claims for personal injury, the majority expressed the view that the test was applicable to all claims for exemplary damages.[53] There was however no mention in that judgment of statutorily authorised exemplary damages.

[59] Section 28 of the Defamation Act 1992 provides that "in any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff."

[60] There are other like provisions in New Zealand statutes, for example the Health and Disability Commissioner Act 1994 contemplates that "punitive damages" may be awarded where "[a]ny action of the defendant ... was in flagrant disregard of the rights of the aggrieved person".[54]

[61] Other statutes provide that exemplary damages are available for breach of certain statutory obligations without specifying the nature and degree of conduct in respect of which exemplary damages are available.[55]

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51 *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149.

52 At [178]–[179] per Tipping J.

53 See at [178] per Tipping J; at [246] per McGrath J; at [259] per Wilson J and at [45] per Blanchard J concurring with the conclusions reached by Tipping and McGrath JJ.

54 See Health and Disability Commissioner Act 1994, ss 52(2) and 57(1)(d).

55 Examples include Credit Contracts and Consumer Finance Act 2003, s 94(1)(c); Commerce Act 1986, s 82A; and Plant Variety Rights Act 1987, s 17(4).

[62] In construing one such provision in the Crown Pastoral Land Act 1998,[56] the High Court held, referring to the Supreme Court's decision in *Couch (No 2)*, that Parliament had intended to depart from the common law meaning of exemplary damages and thus the availability of exemplary damages under that Act was not restricted to the extent in *Couch (No 2)*.[57] To hold otherwise would have run contrary to the scheme of the Act and defeated its purpose in expressly contemplating awards of exemplary damages.[58]

[63] In at least one other enactment it is expressly stated that the general law applying to exemplary damages applies.[59]

[64] Finally, this Court has itself held in respect of one statute not specifying the criteria for an exemplary award that the common law test applied (although at that time the prevailing standard was that overruled in *Couch (No 2)*).[60]

[65] As can be seen, there is a range of possible relationships between the common law and legislation in this area. However, in this instance the express statutory test must prevail. That is, the question is simply "[did] the defendant act in flagrant disregard of the rights of the plaintiff"? Of course, if one acts in flagrant disregard the defendant will routinely have a mental intent or motive which would, in any event, satisfy the now New Zealand common law test, but the two tests should not necessarily be conflated.

General damages – analysis

[66] As explained above, Cooper J adopted a five point framework for his analysis. He considered the nature of the defamatory statements; the extent of publication; the kind of injuries suffered by Mr Stiassny in particular and collaterally his firm; damage to reputation; and Mr Siemer's conduct. There can be no issue that

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56 Crown Pastoral Land Act 1998, s 19(2)(b).
57 *Attorney-General v Little Bo Peep Sheep Company Ltd* [2010] NZAR 756 (HC) at [36].
58 At [37]–[38].
59 Prisoners' and Victims' Claims Act 2005, s 47.
60 *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* CA226/04, 5 December 2005.

the general character of those five heads is relevant and of proper concern in a defamation case.

[67] In relation to Mr Stiassny personally, there are three matters, however, we should comment upon. The first relates to costs. Undoubtedly there must have been very substantial legal and related business costs to Mr Stiassny, and for that matter his interests, in these proceedings. As noted in [30]c) above, the Judge thought they had perhaps exceeded $1.4 million. However, under our system of party and party costs, the fact that a party chooses to pursue a proceeding and incurs expense is of no weight in the fixing of general damages. This is because a party is entitled to those costs which are awarded under our rules of court, unless of course an application is made for indemnity costs, which are governed by particular principles. That has not occurred in this particular instance.

[68] If we thought that the Judge had inflated the damages simply because of the large costs the litigation had attracted, we would have been bound to interfere, even although this was not a point Mr Siemer had raised. However, these large legal and business costs were never pleaded as a distinct head of claim in the fourth amended statement of claim and do not appear to have been relied upon in submissions. The context of the Judge's remarks appears to have been the impact on the firm's activities, rather than a distinct element of the damages. And the Judge's remarks emphasised the continuing nature of the defamation – indeed through the extensive Court process itself.

[69] A second matter is that Mr Siemer takes strong exception to the way in which he was characterised by the Judge as having made "vile racial attacks" on Mr Siemer. In his brief written submissions he said, "It is evidence Cooper J fabricated vile racist evidence because the anti-Semitic quote he created is a combination of words he took from different articles and juxtaposed into an unrepresentative quote". Before us, he enlarged on this: he suggested that the Judge had taken "Hitler", "Gestapo" and "Jew" out of discrete publications and rolled them all up, out of context, into a "quote" that he attributed to the appellant. In fairness to the Judge, the "quote" had been put in that manner by the plaintiffs in their submissions.

[70] We accept that the words Cooper J set out were taken from different articles and that intervening passages were omitted. However, we understand that the articles in question ran continuously on, one from another article on the website. It must also be said that Mr Siemer was, at the very least, sailing very close indeed to the wind. It was hardly unreasonable for the Judge to reach the view that, however expressed, Mr Siemer was poking racial gibes at Mr Stiassny. And, as the trier of fact, that inference was a matter for the Judge. Certainly it was a matter that he was entitled to take into account, although the precise weight to be given to it has to be seen – as indeed the Judge did – in the larger context. Mr Siemer's problem was that he had "personalised" the attacks he was making in the basest kind of way, quite deliberately, and on an ongoing basis. That was what the Judge appears to have been concerned about.

[71] Thirdly, we should remark also that in relation to Mr Siemer there is no direct reference in the Judge's analysis to pecuniary loss suffered by Mr Stiassny. However the Judge held that there was likely some spill-over in lost work to the firm:[61]

> No doubt Korda Mentha will have suffered some financial loss as a result of instructions not being given to the firm that might have been given to it had the defamation not occurred. The statements were directly relevant to the company's core business activities, and to the ethics with which principals of the firm approached their work. Consequently, the firm's [and we would add Mr Stiassny's] business reputation must have inevitably suffered to some degree.

[72] Turning to the firm, the damages award of $75,000 to it proceeded along the same sort of line. The statements made were directly relevant to the company's core business activities. The Judge found it "difficult" to estimate the extent of damage. At the same time the Judge did fairly acknowledge that the company had continued to operate successfully. The award of $75,000 to the firm was modest in relation to the award to Mr Siemer.

Aggravated damages – analysis

[73] It is at this point that the awkwardness of dealing with aggravated damages as a separate head becomes manifest. What seems to have carried aggravated damages

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61 At [82].

in this case, in the Judge's view, was the persistence of the attacks, the broadening of them, the racial overtones, and Mr Siemer's general conduct throughout the proceedings. Because the Judge quantified the sum, we know that to his mind those elements gave rise to an award of $150,000 in aggravated damages, standing alone. As we have indicated, we consider the better approach would have been simply to award a lump sum for general damages, without particularising the portion of that sum accruing as a consequence of Mr Siemer's aggravating conduct. If our preferred approach had been taken that would have meant an award of general damages of $800,000. But this does not mean that we think that the Judge erred in his approach in dealing with the aggravating features of Mr Siemer's defamatory actions. We do not. Those features were relevant considerations properly taken into account.

Exemplary damages – analysis

[74] This was a case where a punitive award was open to the Judge. As the Judge said, it would be difficult to imagine a defendant more determined to persist in his defamation.[62] And Mr Siemer's persistence went to the extent of ignoring injunctions and going to jail when found to be in contempt, and yet still carrying on. We think an exemplary award was warranted.

[75] The Judge reduced the punitive element of the award on the basis that Mr Siemer had already been punished to an extent for his conduct in the proceeding. With respect to the Judge, in the context of the award as a whole, $25,000 demonstrated significant restraint.

[76] We do not think this is an instance for intervention by this Court under this head.

Totality of the award – analysis

[77] Having determined that there was no error in the Judge's approach to damages, we turn to consider whether the totality of the compensatory awards is excessive. That is the central issue on this appeal.

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[62] At [63].

[78] We were told from the Bar that compendiously this judgment is the largest award made for defamation in New Zealand. Certainly it was higher than that in both of the two cases used as comparators by the Judge, *Quinn* and *Columbus*.

[79] In inflation adjusted terms (as calculated by the Judge, and not challenged by Mr Siemer), the eventual overall award in *Quinn* (after this court had reduced the award in respect of one publication and remitted to the High Court the question of damages for the second publication) was approximately $775,000 at the time that Cooper J delivered judgment. In *Columbus* the award of $500,000 was equivalent to $625,000 in 2008 terms. The Judge thought *Quinn* the better comparator.

[80] In *Quinn* the subjects of the claims were two episodes of the Holmes television programme containing allegations that the plaintiff, who carried on the business of supplying animal food supplements, had supplied and illegally sold drugs for doping racehorses, and was involved in financial irregularities concerning the Auckland Trotting Club. No defence of truth was offered in the case of either programme. The audience for the programmes was in the region of 700,000 persons. Mr Holmes, the presenter and Mr Vaughan, the reporter gave evidence to the effect that they stood by the facts, and that the stories were good journalistic stories. It was Lord Cooke's opinion, however, that "[t]he jury were entitled to think that the hair-splitting distinctions drawn by these witnesses showed at least a lack of candour".[63]

[81] The jury initially awarded $400,000 in respect of the first programme, and $1,000,000 in respect of the second. The Judge dismissed the defendants' application to set aside the first award but granted it in respect of the second, directing a new trial limited to the question of damages. The award on the retrial, in the end, was $250,000.

[82] Cooper J appears to have accepted that Mr Siemer's defamatory allegations were more serious than in *Quinn*, although he did not accept that the difference was as significant as Mr Miles had put it. While acknowledging the greater reach and impact of television, the Judge considered that was counter-balanced by the permanence of material published on the internet.

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[63] At 32.

[83] The starting point for the award of damages, seen in the round, must be the characteristics of the defamatory conduct of Mr Siemer, and the consequences – both in human and pecuniary terms – of that conduct.

[84] The Court found – and this is not in dispute before us – that Mr Siemer had falsely claimed that Mr Stiassny:

a) was a liar, who had also lied to the Court and committed perjury;

b) carried out dishonest and deceptive accounting practices;

c) deceived his professional body;

d) amassed a huge fortune by his deceptive practices;

e) stole Paragon's technology;

f) committed various crimes;

g) acted in a worse manner than those involved in the Enron scandal;

h) is to be compared to Saddam Hussein;

and further, that Mr Siemer:

i) had poked racist jibes at Mr Stiassny;

j) had done all of the above knowingly, and persistently, and with the intent of bringing Mr Stiassny and his firm into professional disrepute;

k) maintains his position to this day, despite a range of Court orders and even imprisonment.

[85] We have not had our attention drawn to any worse case of defamation in the British Commonwealth, and our own researches have not disclosed one.

[86] By way of comparison, Mr Quinn was awarded by a Full Court of this Court, presided over by Lord Cooke of Thorndon, a sum (in current dollars) of $775,000 for defamation which did not reach the extent, or the vituperativeness, or the persistence of the defamation perpetuated by Mr Siemer. The Judge's award cannot therefore be said to be "out of range", or unreasonable. Neither is there anything about any "pattern" of awards in recent years which might require appellate intervention. Things have been relatively quiet in New Zealand on the defamation award front.

[87] That said, we do not altogether accept the Judge's internal breakdown of his final figure. The Judge gave a heavier weighting to the "business" impact aspect on Mr Stiassny, and less than we would have done to what might be termed the dignitary and human elements. Professional persons rightly take pride in their very professionalism and integrity. The allegations – grossly, deliberately, and persistently thrown around by Mr Siemer – that Mr Stiassny is totally dishonourable, are what is sometimes referred to as the real "sting" of the defamation in this case. However, as we have said, at the end of the day, it is the totality of the award which matters.

[88] In the result, we do not consider this award went beyond any figure which a Judge could properly award.

Breach of contract

[89] In assessing the extent of liability for breach of the settlement agreement, Cooper J adopted Bingham LJ's reasoning in *Watts v Morrow*:[64]

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party ... . But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.

[90] Here the Judge awarded a sum of $20,000 in damages. That was on the basis that Mr Siemer had "caused exactly the sort of adverse publicity and embarrassment

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[64] *Watts v Morrow* [1991] 1 WLR 1421 (CA) at 1445; adopted in *Bloxham v Robinson* CA198/94, 18 June 1996 (noted at [1996] 2 NZLR 664).

the agreement was supposed to prevent". We do not consider there is any principled basis on which this Court can intervene in this award.

Conclusion

[91] For the reasons we have given, the appeal is dismissed.

[92] The appellant must pay costs to the respondents (jointly and severally) on a standard basis, Band B, and usual disbursements. These disbursements are to include the actual costs of preparation and production of the case on appeal, if necessary as certified by the Registrar.

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