IN THE COURT OF APPEAL OF NEW ZEALAND

CA262/2011
[2011] NZCA 466

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	MICHAEL PETER STIASSNY AND KORDA MENTHA Respondents

Hearing: 13 September 2011

Court: O'Regan, Glazebrook and Harrison JJ

Counsel: Appellant in person
P J L Hunt for the Respondents

Judgment: 16 September 2011 at 10:00 AM

JUDGMENT OF THE COURT

A The application to strike out the appeal is granted.

B The appellant is ordered to pay costs to the respondents on an indemnity basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The respondents, Michael Stiassny and Korda Mentha, apply to strike out a notice of appeal filed by the appellant, Vincent Siemer.

Background

[2] Mr Siemer has filed an appeal against a decision made in the High Court at Auckland. On 17 March 2011, Cooper J, of his own motion, struck out an application filed by Mr Siemer on 7 March.[1] Mr Siemer sought to "vary or set aside or rescind" a permanent injunction granted by Cooper J in the respondents' favour on 23 December 2008.[2] That reasoned decision followed trial of the respondents' claim against Mr Siemer and, in addition to the injunctive relief, Cooper J entered judgment for damages and costs. The injunction prohibited Mr Siemer from publishing specified defamatory material about the respondents.

[3] Mr Siemer appealed Cooper J's 23 December 2008 judgment. On 22 December 2009 this Court granted the respondents' application to strike out Mr Siemer's appeal except in relation to the quantum of the damages award.[3] On 20 May 2010 the Supreme Court dismissed Mr Siemer's application for leave to appeal that decision.[4]

[4] On 28 July 2010 Mr Siemer filed an application in the High Court to set aside the 23 December 2008 injunction. On 29 July 2010, without hearing from the parties, Cooper J made an order striking out Mr Siemer's application. He was satisfied that it was an attempt to re-litigate the issues which were decided by his substantive judgment; and that the application was vexatious and an abuse of process. On 14 December 2010 this Court dismissed Mr Siemer's application for an extension of time to appeal.[5] On 9 May 2011 the Supreme Court dismissed Mr Siemer's application for leave to appeal,[6] expressing its agreement with this Court that Mr Siemer's proposed appeal was an abuse of process.[7]

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1 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 17 March 2011.
2 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008.
3 *Siemer v Stiassny* [2009] NZCA 624.
4 *Siemer v Stiassny* [2010] NZSC 57.
5 *Siemer v Stiassny* [2010] NZCA 607.
6 *Siemer v Stiassny* [2011] NZSC 47.
7 At [2].

Decision

[5] In opposition to the respondents' application to strike out his latest appeal, Mr Siemer submitted that his 7 March 2011 application was not another attempt to re-litigate issues determined finally in the 23 December 2008 judgment. He emphasised that he applied to vary the injunction in the alternative to setting aside or rescinding the injunction. However, Mr Siemer declined our invitation to identify the nature and extent of the variation sought. An analysis of the application itself discloses that, while it purports to seek a variation in the alternative to setting aside or rescission, it is essentially based on a challenge to the merits of the 23 December 2008 judgment. It does not identify a proposed variation of the injunction or the grounds upon which a variation should properly be made.

[6] Alternatively, Mr Siemer submits that Cooper J had no jurisdiction to strike out his latest application without hearing from the parties. He relies on r 7.43 of the High Court Rules which materially provides that before making an interlocutory order on his or her own initiative the Judge must give the parties an opportunity to be heard. There are two answers to that submission: first, Cooper J's order was final, not interlocutory; and, second, in any event, the High Court has an inherent jurisdiction to prevent an abuse of its process.[8]

[7] We are satisfied that Cooper J was correct in dismissing Mr Siemer's second application as vexatious and an abuse of process. It was a further attempt to re-litigate issues which have been finally determined between these parties. As this Court observed in *Siemer v Stiassny*:[9]

> [65] Underlying all of these grounds of appeal is the reality that the appellant seeks to challenge the basis on which the injunction has been issued (his liability in defamation and breach of contract) and the granting of the injunction itself. What he seeks to challenge, therefore, is the injunction of which he is in contempt, and which mirrors the terms of the interim injunction of which he was in contempt from the time it was issued in 2005 until the time it was replaced by the permanent injunction issued by Cooper J. In other words, he seeks to challenge the order which he has continuously refused to comply with.

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8 See *McGechan on Procedure* (online looseleaf ed, Brookers) at [J16.07(2)(e)].

9 *Siemer v Stiassny* [2009] NZCA 624.

> [66] We see this as precisely the sort of situation envisaged by cases such as *Morgan Grampion* 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.

[8] The respondents' application is granted. Mr Siemer's appeal is struck out. He is also ordered to pay costs to be calculated on an indemnity basis and usual disbursements.

Recusal

[9] At the start of the hearing of the respondents' application on 13 September Mr Siemer filed a written application that Glazebrook J recuse herself. He appears to rely on two grounds. One is that a judgment delivered by Glazebrook J for this Court is the subject of an appeal to the Supreme Court to be heard this week.[10] The other is that Glazebrook J declined an application to release a transcript of a hearing in this Court said to disclose deception by counsel and that her application is the subject of a complaint to the Judicial Conduct Commissioner.

[10] We were not satisfied that either of these grounds justified Glazebrook J's recusal. Accordingly, we dismissed Mr Siemer's application.

Solicitors:
McElroys, Auckland, for the Respondents

[10] *Siemer v Heron* [2010] NZCA 610.