IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-001808
[2012] NZHC 1074

BETWEEN	KORDA MENTHA (FORMERLY FERRIER HODGSON) First Plaintiff
AND	MICHAEL PETER STIASSNY Second Plaintiff
AND	VINCENT ROSS SIEMER Defendant

CIV 2012-404-001133

AND BETWEEN	VINCENT ROSS SIEMER Plaintiff
AND	MICHAEL PETER STIASSNY First Defendant
AND	KORDA MENTHA Second Defendant

Hearing: 19 March 2012

Appearances: P Hunt for Korda Mentha and M P Stiassny
F Deliu and M McFarland for V R Siemer in CIV-2012-404-001133
V R Siemer in person CIV-2005-404-001808

Judgment: 18 May 2012

(RESERVED) JUDGMENT OF ANDREWS J
[Application by defendants to strike out statement of claim in CIV-2012-404-001133]

This judgment is delivered by me on 18 May 2012 at 2:30pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

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Introduction

[1] There are two proceedings, and two applications, before the Court. They are related.

(a) On 21 November 2011 (amended on 28 February 2012) Mr Siemer applied for an order to recall or set aside the judgment given by Cooper J on 23 December 2008 in the proceeding CIV-2005-404-1808, in which Korda Mentha (formerly Ferrier Hodgson) and Mr Stiassny are plaintiffs and Mr Siemer is defendant.

(b) On 28 February 2012 Mr Siemer issued the proceeding CIV-2012-404-1133, in which he is plaintiff and Korda Mentha and Mr Stiassny are defendants. In his statement of claim Mr Siemer alleges that the judgment of Cooper J delivered on 23 December 2008 was obtained by fraud. He claims, by way of relief, an order setting Cooper J's judgment aside. The defendants in the 2012 proceeding have applied to strike out Mr Siemer's statement of claim in that proceeding, on the grounds that it is an abuse of process.

[2] In this judgment I shall refer to the proceeding brought by Korda Mentha and Mr Stiassny against Mr Siemer as "the 2005 proceeding", to the judgment delivered by Cooper J on 23 December 2008 as "the 2008 judgment", and to Mr Siemer's application for an order for recall or setting aside that judgment as "Mr Siemer's recall application". I shall refer to the proceeding brought by Mr Siemer against Korda Mentha and Mr Stiassny as "the 2012 proceeding", and to the application brought by Korda Mentha and Mr Stiassny to strike out Mr Siemer's statement of claim as "the strike-out application".

[3] Mr Siemer's recall application, and the strike-out application, were both set down for hearing on 19 March 2012. This was pursuant to a direction of Allan J, recorded in a Minute issued after the strike-out application had been listed for mention in the Duty Judge list on 14 March 2012. His Honour directed that the strike-out application and Mr Siemer's recall application were both to be before the

Judge at the hearing on 19 March 2012, so that the two applications could be considered at the same hearing.

[4] In a Minute issued after the hearing on 19 March 2012,[1] I recorded that, by consent, the strike-out application was heard first. I also recorded that at the stage that Mr Hunt had made submissions on behalf of Mr Stiassny and Korda Mentha, Mr Deliu had made submissions on behalf of Mr Siemer, and Mr Hunt had replied, the hearing had lasted almost a full day. I inquired of Mr Siemer as to how much time he required to present submissions on his recall application, and as to the extent to which those submissions might repeat or duplicate Mr Deliu's. Mr Siemer's response was that his submissions would take some two hours, and that he intended to cover different matters, and that it would be appropriate for judgment to be given on the strike-out application before the Court proceeded to consider Mr Siemer's recall application. Having heard further from counsel it was evident that, in any event, there was insufficient time to hear submissions in respect of Mr Siemer's recall application. Accordingly, that application was adjourned, to be considered after judgment is given on the application to strike out.

[5] Accordingly, this judgment is only concerned with the strike-out application.

Background

[6] A dispute arose between Mr Siemer and Mr Stiassny and the firm in which he is a principal, Korda Mentha, formerly Ferrier Hodgson, after Mr Stiassny was appointed receiver of a company, Paragon Oil Systems Ltd (Paragon). Mr Siemer was a shareholder of Paragon, and the appointment of a receiver was sought in proceedings in which he sought relief from oppression by the majority shareholders. That proceeding was resolved in favour of Mr Siemer in 2001, and the receivership of Paragon was terminated.

[7] A dispute had arisen between Mr Siemer and Korda Mentha (then called Ferrier Hodgson) as to costs charged during the receivership. The parties subsequently entered into a compromise agreement. The terms of the compromise

[1] The Minute, although issued on 19 March 2012, was incorrectly dated 19 February 2012.

agreement included that neither party would comment on any matter arising in or from the receivership.

[8] However, Mr Siemer made numerous complaints concerning Mr Stiassny and his firm, and their conduct of the receivership. In April 2005 Mr Siemer published a number of complaints concerning Mr Stiassny and his firm on a website www.stiassny.org, and advertised the existence of the website on a large billboard erected next to a billboard advertising Vector Ltd (of which Mr Stiassny was chairman). The billboard and website gave rise to the 2005 proceeding.

[9] In the 2005 proceeding Mr Stiassny and Korda Mentha alleged that the contents of the website were defamatory. An interim injunction was granted on 8 April 2005, directing that the billboard be removed, that all material relating to Mr Stiassny and Korda Mentha be removed from the website, and restraining publication of any further material.

[10] Mr Siemer applied to rescind the injunction. The application was granted, but a new interim injunction was granted which directed Mr Siemer and Paragon not to publish specified material. At that time, Mr Stiassny and Korda Mentha's claim had been amended to include a claim of breach of the compromise agreement. The second injunction was upheld on appeal.[2]

[11] In judgments of this Court dated 16 March 2006 and 9 July 2007, Mr Siemer was found to have breached the injunction order. In the latter judgment, the Judge made an order debarring Mr Siemer from defending the 2005 proceeding until further order of the Court (the debarring order). This was on the grounds that Mr Siemer had continued to breach the injunction and had refused to pay costs orders made against him. Mr Siemer did not appeal against the debarring order.

[12] The substantive 2005 proceeding was heard before Cooper J on 8 October 2008. As a consequence of the debarring order, Mr Siemer did not appear, and was not represented. In the 2008 judgment Cooper J held that the claims made by Mr Stiassny and Korda Mentha were made out. He awarded Korda Mentha damages

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2 *Siemer v Ferrier Hodgson* CA87/05, 13 December 2005.

totalling $95,000 for defamation and breach of the compromise agreement. His Honour awarded Mr Stiassny damages totalling $825,000 for defamation (including aggravated and exemplary damages). Cooper J also granted a permanent injunction prohibiting any further defamatory publication.

[13] Mr Siemer appealed to the Court of Appeal on the ground that the Judge erred in fact and law and that the Judge "engaged in what an impartial observer might likely consider an unprincipled and materially-deceptive summary of the facts, resulting in the evidence being materially and improperly changed, consummating in an unsafe Judgment of the Court." Mr Siemer set out ten particulars of the latter ground.

[14] Mr Stiassny and Korda Mentha applied to strike out the appeal. In a judgment delivered on 22 December 2009 the Court of Appeal struck out his appeal, except to the extent that it related to a challenge to the quantum of the damages award made in the High Court. Further, that challenge was limited to an argument based on the facts as found in the High Court.[3] Mr Siemer then applied for leave to appeal to the Supreme Court. The Supreme Court dismissed the application in a judgment delivered on 20 May 2010.[4]

[15] On 28 July 2010 Mr Siemer applied to "[s]et aside or rescind" the permanent injunction ordered by Cooper J in the 2008 judgment. By a Minute dated 29 July 2010, Cooper J struck out Mr Siemer's application on the grounds that it was vexatious and an abuse of process. Mr Siemer applied on 13 October 2010 for an extension of time to appeal against Cooper J's decision to strike out his application to set aside or rescind the judgment. Mr Siemer's application was dismissed by the Court of Appeal in a judgment delivered on 14 December 2010.[5]

[16] On 15 December 2010 (and in an amended application dated 22 December 2010), Mr Siemer applied to the Court of Appeal to recall its judgment of 14 December 2010. In its judgment delivered on 17 February 2011 the Court of Appeal accepted the respondent's submission that the application for recall was plainly an

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3 *Siemer v Stiassny* [2009] NZCA 624 at [69].
4 *Siemer v Stiassny* [2010] NZSC 57.
5 *Siemer v Stiassny* [2010] NZCA 607.

attempt to have the Court reconsider matters it had already considered and dealt with, and declined the application.[6]

[17] Mr Siemer then applied for leave to appeal to the Supreme Court against the Court of Appeal's decision declining him an extension of time to appeal. The Supreme Court dismissed the application in a judgment delivered on 9 May 2011.[7] In doing so, the Court agreed with the view of the Court of Appeal that the proposed appeal was an abuse of process.[8]

[18] On 7 March 2011 Mr Siemer applied to the High Court to vary, set aside, or rescind the permanent injunction ordered by Cooper J. In a Minute dated 17 March 2011, Cooper J ordered that the application be struck out on the grounds that it was vexatious and an abuse of process.

[19] On 30 March 2011, the Court of Appeal delivered its judgment on Mr Siemer's appeal against the quantum of the damages award made in the 2008 judgment, having heard the appeal on 2 November 2010.[9] The appeal was dismissed. Mr Siemer applied for leave to appeal to the Supreme Court. That application was dismissed in a judgment delivered on 3 June 2011.[10]

[20] On 4 April 2011 Mr Siemer filed an appeal in the Court of Appeal against Cooper J's decision of 17 March 2011, striking out his application to vary, set aside, or rescind the permanent injunction. That appeal was struck out by the Court of Appeal in a judgment delivered on 16 September 2011.[11] The Court held that Cooper J was correct in dismissing Mr Siemer's application as vexatious and an abuse of process, and as being a further attempt to re-litigate issues which had been finally determined between the parties.[12] Mr Siemer applied on 22 September 2011 for leave to appeal to the Supreme Court. The Supreme Court dismissed the application in a judgment delivered on 3 October 2011.[13]

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6 *Siemer v Stiassny* [2011] NZCA 19 at [4].
7 *Siemer v Stiassny and Korda Mentha* [2011] NZSC 47.
8 At [2].
9 *Siemer v Stiassny* [2011] NZCA 106.
10 *Siemer v Stiassny* [2011] NZSC 63.
11 *Siemer v Stiassny* [2011] NZCA 466.
12 At [7].
13 *Siemer v Stiassny* [2011] NZSC 119.

[21] On 7 October 2011, Mr Siemer applied to the Supreme Court to recall its judgment of 3 June 2011 dismissing his application for leave to appeal against the Court of Appeal's decision dismissing his appeal against the quantum of the damages ordered in the 2008 judgment. That application was dismissed in a judgment delivered on 21 October 2011.[14] Mr Siemer further applied on 3 November 2011 for recall of the Supreme Court's judgments of 3 June 2011 and 21 October 2011. In a Minute dated 9 November 2011 the Supreme Court stated that the Court would take no action on that application.[15]

The application to strike out the statement of claim

[22] The defendants' application to strike out the statement of claim in the 2012 proceeding is brought on the ground that the 2012 proceeding is an abuse of process. It is brought pursuant to r 15.1 of the High Court Rules and the High Court's inherent jurisdiction.

[23] As relevant to the present application, r 15.1 provides:

> The court may strike out all or part of a pleading if it—
> ...
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.

[24] The criteria to be applied in considering an application to strike out a proceeding are well settled. They were summarised by the Court of Appeal in *Attorney-General v Prince and Gardner*,[16] and by the Supreme Court in *Couch v Attorney-General*.[17] The following principles apply:[18]

> (a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

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14 *Siemer v Stiassny* [2011] NZSC 128.
15 *Siemer v Stiassny*, SC20/2011, 9 November 2011.
16 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.
17 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
18 See *McGechan on Procedure* (on-line loose leaf ed, Brookers) at [HR15.1.02(1)].

(b) The cause of action must be clearly untenable. It is inappropriate to strike out a claim summarily if the Court cannot be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law, especially where the law is confused or developing.

[25] With respect to the principle that pleaded facts are assumed to be true, the Court of Appeal in *Attorney-General v McVeagh* acknowledged:[19]

> ... there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[26] It has been held that a proceeding is frivolous or vexatious, and therefore an abuse of process, if it is an attempt to re-litigate matters that have already been determined, or is a duplication of other proceedings. Attempts to re-litigate matters already determined are referred to as collateral attacks on judgments of another court of competent jurisdiction. In *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock said:[20]

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

[27] The inherent jurisdiction of the High Court was described by the Court of Appeal in its judgment in *Reid v New Zealand Trotting Conference* as follows:[21]

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19 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.
20 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541.
21 *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9.

> Misuse of the judicial process tends to produce unfairness and to undermine confidence in the administration of justice. In a number of cases in recent years this Court has had occasion to consider the inherent jurisdiction of the High Court, and on appeal this Court, to take such steps as are considered necessary in a particular case to protect the processes of the Court from abuse. ... In exercising that jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. The public interest in the due administration of justice necessarily extends to ensuring that the Courts' processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme step of staying a prosecution or striking out a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes.
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> (citations omitted.)

The allegations in the statement of claim

[28] Before setting out counsel's submissions on the strike-out application, I summarise the allegations in the statement of claim.

[29] In paragraph 1, Mr Siemer alleges, among other things, that in November 2008 he was ordered bankrupt on the defendant's petition, for costs awarded to them in a defamation claim which he was debarred by Court order from defending. He identifies that proceeding as *Stiassny v Siemer* CIV-2005-404-1808.

[30] At paragraphs 4 to 11, Mr Siemer refers to the appointment of Mr Stiassny as receiver of Paragon, of which company Mr Siemer was managing director. At paragraphs 6 and 7, Mr Siemer alleges that Mr Stiassny claimed to have incurred $51,709 in fees and related charges in the first two months of the receivership, and that Mr Siemer challenged the accuracy of those charges. He alleges that Mr Stiassny then admitted to an error and over-charge, and agreed to reduce his outstanding invoice by $10,283.07.

[31] At paragraphs 8 to 10, Mr Siemer refers to the Second Report to the High Court filed by Mr Stiassny as receiver of Paragon. He alleges that in that report Mr Stiassny said:

> We had begun dispersing moneys to unsecured creditors on the basis of our understanding that funds would be provided by shareholders to support ongoing trading costs as provided in our cash-flow forecasts. We now have no such assurance and accordingly no further funds will be released to pre-receivership creditors.

[32] Mr Siemer alleges that the inability to meet expenses as they fall due is one measure of insolvency, and that at all relevant times Paragon had no debt other than that owed to unsecured creditors.

[33] In paragraphs 11 to 17, Mr Siemer alleges that the receivership of Paragon was revoked in July 2001 by the High Court, on an application by Mr Siemer and his wife. He alleges that Mr Stiassny refused to release Paragon's assets after the receivership was revoked. He then alleges that he signed a compromise agreement in order to have Paragon's assets released.

[34] Mr Siemer alleges that this was on the advice of Mr Robert Fardell QC, and that neither Mr Fardell nor the defendants ever advised him that Mr Fardell was at the time advising the defendants on legal matters, including the compromise agreement, or that Mr Stiassny was trustee of Mr Fardell's family trust.

[35] Mr Siemer alleges that the defendants repeatedly breached the compromise agreement by failing to provide the promised consideration, and that he repudiated the agreement with cause, five months after it was signed.

[36] In paragraph 18, Mr Siemer alleges that some time after, he made formal complaints to the Institute of Chartered Accountants of New Zealand and the Serious Fraud Office regarding Mr Stiassny's actions and conduct.

[37] In paragraphs 19 to 28, Mr Siemer sets out allegations concerning the 2005 proceeding. He refers to the following:

(a) The injunction obtained in April 2005 in the 2005 proceeding (which alleged defamation on Mr Siemer's website and on the billboard);

(b) The judgment of Ellen France J maintaining the injunction;

(c) Mr Siemer's appeal to the Court of Appeal against the judgment of Ellen France J;

(d) Mr Siemer's being found by the Court to have breached the injunction on three occasions over three years;

(e) Amended statements of claim of claim being filed by the defendants over the period of three years, and the defendants' successful application to debar Mr Siemer from defending the proceeding;

(f) The trial before Cooper J, at which the defendants were given leave to file a fourth amended statement of claim, and the release of the 2008 judgment;

(g) Subsequent orders of the Court of Appeal and the Supreme Court by which, Mr Siemer alleges, he was prohibited from challenging the merits of Cooper J's defamation conclusions; and

(h) Mr Siemer alleges that notwithstanding the utter prohibition against his being heard in defence, or on the merits in appeals, the Court of Appeal in its judgment given on 30 March 2011[22] and the Supreme Court in its judgment given on 3 June 2011[23] concurred that the publications relied on by Cooper J to "convict" Mr Siemer of defamation were not accurate, and that the defendants were responsible for presenting the unrepresentative publications to the Judge in that manner.

[38] Mr Siemer sets out his allegations of fraud in paragraphs 29 to 37, as follows:

> **CAUSE OF ACTION – FRAUD**
>
> 29. The defendants obtained their defamation ruling on fraudulent evidence and are therefore guilty of committing a fraud upon the court.
>
> **PARTICULARS**
>
> 30. The defendants fraudulently misrepresented the plaintiff's publications to the Court and this misrepresentation was designed to lead the court into error and obtain an undue result. These

[22] *Siemer v Stiassny* [2010] NZCA 106.
[23] *Siemer v Stiassny* [2010] NZSC 63.

fraudulent misrepresentations are evidentially detailed in the supporting affidavit dated 28 February 2012.

31. Save for this fraudulent evidence, the defendants did not adduce evidence sufficient to find the plaintiff guilty of defamation. They merely claimed the material was defamatory and were not examined on this claim. Therefore, this is a case where not only the court was materially misled but the court was coerced into creating a miscarriage of justice by virtue of the fraudulent evidence placed before it.

32. The interlocutory orders obtained by the defendants in *Stiassny v Siemer* CIV2005 404 1808 were largely reliant, if not premised, on the fraud perpetrated upon the Court by them.

33. The injunction order was maintained by the defendants by a compromise agreement which was obtained by fraud and deception, with neither the defendants nor Mr Robert Fardell disclosing to the plaintiff that Mr Fardell was similarly advising the defendants, OR that the first defendant was trustee of Mr Fardell's family trust, at a time Mr Fardell was advising the plaintiff and Paragon to enter into this compromise agreement with the defendants.

34. At the time the compromise agreement was entered into, the defendants knew Mr Fardell was advising the plaintiff and Paragon in respect of the compromised agreement and understood they owed a duty to disclosure to the plaintiff and Paragon that Mr Fardell was also the defendants' lawyer and that their close relationship included the first defendant being a trustee of Fardell's trust. They failed to make such disclosure to Paragon or to the plaintiff, who was at all material times the Managing Director of Paragon.

35. At all relevant times the first defendant was a trained lawyer and was teaching classes relative to insolvency for the New Zealand Law Society or its local chapters.

36. Particulars as further provided in the affidavit of Vincent Ross Siemer dated 28 February 2012, filed in support of this claim.

37. As a significant number of the courts orders obtained by the defendants against the plaintiff in CIV 2005 404 1808 were obtained in ex parte proceedings, an amended statement of claim providing further particulars of the perpetrated fraud may be likely after discovery.

[39] In his prayer for relief, Mr Siemer seeks orders against the defendants jointly and severally, as follows:

(a) An order setting aside the judgment of Cooper J dated 23 December 2008 in the matter *Stiassny v Siemer* CIV-2005-404-1808.

(b) A declaration from the court that the judgment above was obtained by fraud.

(c) Costs related to these proceedings.

(d) Any other remedy the Court deems fit.

Submissions

Defendants

[40] On behalf of the defendants, Mr Hunt submitted that the statement of claim is a further attempt by Mr Siemer to attack the 2008 judgment. He submitted that it is an attempt to re-litigate issues that have already been considered and determined in the 2005 proceeding, and all rights of appeal exhausted. As such, he submitted, the statement of claim is an abuse of process.

[41] Mr Hunt referred to particular issues raised in the course of the 2005 proceeding, and submitted that they are identical to allegations made in the statement of claim. He further submitted that if there were any matters raised in the statement of claim that had not been considered and determined in the course of the 2005 proceeding, it is now well past the time when such matters should have been raised.

Mr Siemer

(a) Procedural challenges

[42] On behalf of Mr Siemer, Mr Deliu first submitted that, in the absence of an order to consolidate the 2005 proceeding and the 2012 proceeding, matters relating to the 2005 proceeding were not relevant to the 2012 proceeding. He further submitted that affidavit evidence filed in the 2005 proceeding (in particular, an affidavit sworn by Mr Andrew Colgan on 7 March 2012 and filed on behalf of the defendants in opposition to Mr Siemer's recall application) could not be referred to in relation to the defendants' strike-out application. Mr Deliu said that, for that reason, he had not read the affidavit filed in the 2005 proceeding.

[43] Mr Deliu also submitted that Mr Siemer had not been given proper notice of the strike-out application having been listed in the Duty Judge list on 14 March

2012,[24] and had been denied the right to be heard before any interlocutory order was made (such as that the strike-out application was to be heard on 19 March 2012). He also submitted that that Allan J's direction that the strike-out application was to be before the Judge on 19 March 2012 was contrary to a number of High Court rules.

[44] Mr Deliu then submitted that an affidavit sworn by Mr Colgan on 13 March 2012 and filed in support of the strike-out application should not be read. This was for the reasons which I summarise below.

[45] First, Mr Deliu submitted that r 7.20 of the High Court Rules requires evidence in support of an interlocutory application to be filed at the same time as the application. The defendants' application to strike out was filed on 9 March 2012,[25] and Mr Colgan's affidavit was filed on 13 March 2012. Accordingly, the affidavit did not comply with the rules and should not be read. Mr Deliu then submitted that one of the grounds of Mr Siemer's opposition to the strike-out application was that there was no evidence that Mr Siemer is attempting to re-litigate issues already considered and dealt with. If Mr Colgan's affidavit of 13 March were not read, there was then no evidence in support of the strike-out application.

[46] Mr Deliu submitted that the defendants had deliberately and knowingly decided that expediency outweighed any need to rely on evidence. They had made a tactical decision. It would be inappropriate, he submitted, to allow the defendants' procedural error to be sanctioned. The defendants should not be given the benefit of patching up their errors now.

[47] Mr Deliu submitted that everything in the High Court Rules had been turned on its head, as Mr Siemer had filed an affidavit in support of the statement of claim in the 2012 proceeding before the defendants filed theirs in support of the strike-out application. He submitted that the defendants expected a rubber stamp exercise in the Court, and should not be allowed to think that this would occur. They, like others, must follow the Court Rules.

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[24] The Notice of Opposition to the strike-out application incorrectly refers to the application having been listed in the Duty Judge list on 13 March 2012.

[25] The Notice of Application is dated 12 March 2012, but it was date stamped by the Registry on 9 March 2012.

[48] Secondly, Mr Deliu submitted that the defendants had failed to serve Mr Colgan's 13 March affidavit on him, as counsel for Mr Siemer. He had first seen it when he was given a copy during the course of the hearing. He submitted that he could not be expected to be able to consider the affidavit, in the circumstances. He further submitted that there was no proof of service of Mr Colgan's affidavit on Mr Siemer.

[49] Thirdly, Mr Deliu submitted that Mr Colgan's 13 March affidavit is in breach of r 13.5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Mr Deliu submitted that Mr Colgan "acts" for the defendants because he is a solicitor in the firm which acts for Mr Stiassny. He submitted that it is implicit that the statement of claim (in particular, paragraph 30 which alleges a fraudulent misrepresentation to the Court) is directed at the solicitors and counsel representing Mr Stiassny and Korda Mentha, as the fraud could only have been committed by way of submissions made by counsel.

[50] Mr Deliu submitted that if that is the case, there is a clear conflict between Mr Stiassny and Korda Mentha, and their solicitors and counsel. This is because if the case goes to trial, Mr Stiassny and Korda Mentha will say that they did not instruct their lawyers to defraud the Court. Mr Deliu submitted that the only way Mr Colgan's affidavit could be read is if the firm of solicitors which employs him is no longer acting in the proceeding. As they are still acting, he submitted, the affidavit should not be read, because of the wilful disregard of the professional rules.

(b) Opposition to strike-out application

[51] Turning to Mr Siemer's opposition to the strike-out application, Mr Deliu first submitted that the statement of claim alleges that the interim injunction orders and the 2008 judgment were obtained and maintained on fraudulent evidence that Mr Siemer had made racist comments. He submitted that all of the judgments on either Mr Siemer's appeals or his applications to set aside the 2008 judgment, whether in this Court, the Court of Appeal, or the Supreme Court, were irrelevant, because none of the Courts had the benefit of hearing evidence, and none of the judgments or orders were made after a proper process.

[52] Mr Deliu submitted that when the Courts rejected Mr Siemer's allegations that the 2008 judgment was obtained by fraud, they did so without any evidence or cross-examination. The previous judgments could not be relied on as being res judicata, as they were not decisions after trial.

[53] Mr Deliu further submitted that the whole manner in which the 2005 proceeding came before Cooper J was improper, and that the improperly obtained 2008 judgment could not be allowed to stand. He submitted that the defendants and their lawyers had acted improperly. He also submitted that at an ex parte trial the plaintiffs (Mr Stiassny and Korda Mentha), and their counsel, would have free reign to say what they wanted. In the circumstances, it was incumbent on them not to mislead the Judge.

[54] Finally, Mr Deliu submitted that when the alleged racist comments were looked at in their proper context, they either had not been made in the form which, he submitted, was the basis of the 2008 judgment, or were not defamatory.

[55] The second basis on which Mr Deliu submitted that the 2008 judgment was obtained by fraud was that Mr Stiassny and Korda Mentha had falsely labelled Paragon as being insolvent, but had then falsely given evidence before Cooper J that they had not described Paragon as insolvent. He submitted that Mr Stiassny's evidence was taken into account and relied on by Cooper J.

[56] Mr Deliu submitted that in considering the strike-out application the Court must consider the possibility that Mr Stiassny had been less than truthful in giving evidence before Cooper J. He submitted that this possibility demonstrated that the 2012 proceeding is not spurious, but is bona fide, and that at least part of the 2008 judgment may have been obtained by fraud.

Reply submissions

[57] I refer to Mr Hunt's submissions regarding Mr Deliu's submissions as to non-compliance with the rules, and conflict of interest, only.

[58] Regarding service, Mr Hunt submitted that it was made clear in the defendants' strike-out application that the defendants relied on the affidavit sworn by Mr Colgan on 7 March 2012 and filed in support of the defendants' opposition to Mr Siemer's recall application, and that a further affidavit was to be filed. He submitted that there was, clearly, no "tactical decision" by the defendants not to file evidence in support of the strike-out application. Mr Siemer and his counsel had the bulk of the evidence from the moment the strike-out application was filed.

[59] I gave leave for an affidavit of service to be filed after the hearing. An affidavit sworn by Mr Colgan was filed on 22 March 2012. Mr Colgan stated that a copy of his 13 March affidavit in support of the strike-out application was e-mailed to Mr Siemer on 14 March 2012, to two e-mail addresses, these being the e-mail address set out by Mr Siemer at the foot of the cover page of the statement of claim, and another e-mail address used by Mr Siemer in correspondence with the defendants' solicitors and the Court.

[60] I note at this point that in an affidavit filed on 23 March 2012, Mr Siemer denied receiving Mr Colgan's 13 March affidavit at either e-mail address, although he said it was possible that the affidavit was too large to be received by his e-mail provider, or to go through his filters. Mr Siemer also stated that he did not provide Mr Deliu with Mr Colgan's 7 March affidavit, as that was filed in support of the defendants' opposition to his recall application, and his instructions to Mr Deliu were only in respect of opposing the strike-out application.

[61] In response to Mr Deliu's submission that Mr Colgan's 13 March affidavit should not be read, because of a conflict of interest between Mr Stiassny and Korda Mentha, and their solicitors and counsel, Mr Hunt submitted that there is no specific allegation in the statement of claim of fraud on the part of the defendants' solicitors and counsel. He further submitted that the allegations as to "racist comments" had been considered by the Courts on several occasions, and dismissed. Therefore, he submitted, there was no conflict, no impediment to the solicitors and counsel continuing to act, and no impediment to Mr Colgan's affidavit being read.

[62] In any event, he submitted, even if there were a possibility of a conflict of interest arising (which he denied) that would not preclude him from appearing on the strike-out application, or prevent Mr Colgan's affidavit in support of the strike-out application being read.

The procedural issues

Notice that the strike-out application had been placed in the Duty Judge list

[63] I turn to consider, first, Mr Deliu's submission that Mr Siemer was not given proper notice that the strike-out application had been placed in the Duty Judge list on 14 March 2012, and of Allan J's direction that the strike-out application and Mr Siemer's application were both to be before the Judge on 19 March 2012.

[64] As to the first point, concerning notice, I am satisfied that Mr Siemer was given notice that the 2012 proceeding would be listed in the Duty Judge list on 14 March 2012. That is evidenced by an e-mail sent by the Registry to Mr Siemer and counsel for the defendants, sent at 2.25 pm on Tuesday 13 March 2012:

> Re CIV 2012 404 1133
> Dear Mr Hunt and Mr Siemer
> Please take note that above proceeding has been placed in the Duty Judge list on tomorrow 14 March 2012 at 10.00 am for mention.
> Please make sure that you attend the Court at the stipulated time.

[65] Mr Deliu submitted that this was not proper notice, as it was to Mr Siemer's e-mail address. Mr Siemer was not notified at his address for service. He also submitted that Mr Siemer had not been given notice in sufficient time before the application was listed.

[66] I reject this submission. Advice of a mention in a Duty Judge list is not "service", so did not have to be provided at Mr Siemer's nominated address for service. The e-mail address used by the Registry was, as Allan J noted in his Minute, that provided by Mr Siemer at the foot of the cover sheet of the statement of claim. As to the length of notice given, it was open to Mr Siemer, if he did not consider he had been given sufficient time, to appear in the Duty Judge list, and seek further time. He did not appear, and he did not request further time. I am satisfied that Mr

Siemer was given proper notice that the strike-out application was listed in the Duty Judge list on 14 March 2012.

[67] Nor is the second point, as to abridgement of time for hearing the strike-out application, of any merit. There was no opposition, either before or at the hearing on 19 March 2012, to the strike-out application proceeding. No adjournment was sought.

Should Mr Colgan's affidavit of 13 March 2012 be excluded for non-compliance with the High Court Rules?

[68] I turn now to Mr Deliu's submission that Mr Colgan's affidavit of 13 March 2012, in support of the strike-out application, should be excluded for non-compliance with the High Court Rules and that, without that affidavit, there is no evidence in support of the defendants' contention that the statement of claim raises issues that have been considered and dealt with previously, such that the 2012 proceeding is vexatious and an abuse of process of the Court.

[69] This submission is without merit. My reasons are set out below.

[70] As noted earlier, the strike-out application stated that the defendants relied on Mr Colgan's affidavit of 7 March 2012 (filed in opposition to Mr Siemer's recall application), and a further affidavit of Mr Colgan to be supplied. I consider, first, Mr Colgan's affidavit in the 2005 proceeding. I do not accept Mr Deliu's submission that, in the absence of an order for consolidation, the 2005 proceeding is irrelevant, and that the Court cannot refer to any document in that proceeding. The relevance of the 2005 proceeding is evident from the statement of claim in the 2012 proceeding, which seeks a declaration that the 2008 judgment (given on the 2005 proceeding) was obtained by fraud, and an order setting that judgment aside. The statement of claim focuses entirely on the 2005 proceeding, and what Mr Siemer alleges was wrong with the manner in which it proceeded, the evidence adduced at trial, and the 2008 judgment.

[71] I reject Mr Deliu's submission that Mr Colgan's affidavit of 7 March 2012 cannot also be read in support of the strike-out application. It was not submitted that

Mr Siemer did not have a copy of that affidavit. If Mr Siemer chose not to provide it to Mr Deliu, and if Mr Deliu chose not to read it, those are not grounds to exclude the affidavit from consideration in the present application.

[72] Turning, then, to Mr Colgan's affidavit of 13 March 2012, I note, first, that as well as referring to three proceedings brought by Mr Siemer against the defendants which had been struck out,[26] that affidavit contained as an exhibit a copy of Mr Colgan's affidavit of 7 March 2012, less the exhibits. There is nothing in Mr Colgan's affidavit of 13 March 2012 that would have been new to Mr Siemer, as it referred solely to proceedings in which he was a party.

[73] While Mr Colgan's affidavit of 13 March 2012 was not filed with the strike-out application, that is not fatal to its being read for the purposes of this application. This is, first, because his 7 March affidavit had already been filed, and could be referred to. Secondly, even if I am wrong in my conclusion that the 7 March affidavit could be referred to, r 1.5(1) provides that a failure to comply with the requirements of a rule is an irregularity, and does not nullify any step taken in the proceeding, or any document in the proceeding.

[74] Further, the Court has power under r 1.5(2)(b) to make an order dealing with the proceeding. While I am satisfied that it is not necessary in this case to do so, I would have been prepared to make an order extending time to file Mr Colgan's 13 March. I am satisfied that no prejudice to Mr Siemer has arisen as a result of the 13 March affidavit not being filed with the application. In that respect, it is relevant to note that no adjournment of the hearing of the strike-out application was sought.

[75] Mr Deliu also submitted that the 13 March affidavit was not served in compliance with the rules, as it was not served on Mr Siemer in person, or by delivery to his address for service. Rule 6.1(d) allows service by e-mail on a solicitor, where an e-mail address for service has been indicated. While in the present case, Mr Siemer gave such an indication by specifying an e-mail address at the foot of the cover page of the statement of claim, he is not a solicitor.

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[26] *Paragon Services Ltd v Stiassny* HC Auckland CIV-2006-404-593, 9 August 2006; *Siemer v Stiassny* HC Auckland CIV-2008-404-104, 20 March 2008; *Siemer v Stiassny* HC Auckland CIV-2008-404-6822, 30 November 2009.

[76] However, Mr Colgan's affidavits of 7 March 2012 and 13 March 2012 do nothing more than annex copies of judgments delivered and Minutes made in the 2005 proceeding. The judgments are matters of public record, and did not need to be exhibited to an affidavit in order to be referred to in the context of the strike-out application. That they were collected and exhibited to an affidavit is of convenience to the Court and the parties, but was not necessary before they could be referred to. The Minutes were already well known to Mr Siemer and were, in all but one instance (the Minute of the Supreme Court dated 9 November 2011) referred to in judgments. As such they, too, were available to be referred to.

[77] It is also the case that the defendants' notice of application set out, in some detail, particulars of their contention that the statement of claim raised issues already considered and dealt with, and that the 2012 proceeding is an abuse of process. Both Mr Siemer and his counsel were, therefore, well aware of the grounds on which the strike out was sought.

[78] In all the circumstances, any irregularity in regard to Mr Colgan's affidavit, or as to service of the affidavit of 13 March 2012, is not a reason to decline to consider and determine the strike-out application.

Conflict of interest

[79] Mr Deliu submitted that Mr Colgan, in swearing the affidavit of 13 March 2012, was acting in breach of r 13.5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Those rules were made pursuant to ss 94 and 95 of the Lawyers and Conveyancers Act 2006. I first set out r 13, which is headed "Independence in litigation":

> A lawyer engaged in litigation for a client must maintain his or her independence at all times.
>
> 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
>
> 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.

> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
> 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[80] In the statement of claim, Mr Siemer alleges that the defendants obtained judgment in the 2005 proceeding by fraud. This is apparent from paragraph 29 of the statement of claim:

> The defendants obtained their defamation ruling on fraudulent evidence and are therefore guilty of committing a fraud upon the court.

[81] In the present application the Court is not considering whether that particular allegation has been made out. The Court is considering the defendants' application to strike out. The defendants' application is on the grounds that any question that the judgment in the 2005 proceeding was fraudulently, or in any way improperly, obtained has already been addressed by the courts and determined in favour of the defendants. The issue for determination in the present application is whether the statement of claim in the 2012 proceeding should be struck out.

[82] I am satisfied that, as relevant to the strike-out application, no question of "the conduct or advice of the lawyer or of another member of the lawyer's practice" is in issue before the Court. Therefore, no conflict of interest arises as a result of the filing of Mr Colgan's affidavits.

The substantive issue: should the 2012 proceeding be struck out?

Allegation that the 2008 judgment was obtained on fraudulent evidence

[83] The principal allegation in the statement of claim is that the 2008 judgment was obtained on fraudulent evidence. In paragraph 30 of the statement of claim, under the heading "Particulars", it is alleged that the defendants "fraudulently misrepresented [Mr Siemer's] publications to the Court". Paragraph 30 goes on to

state that "[t]hese fraudulent misrepresentations are evidentially detailed in the supporting affidavit dated 28 February 2012".

[84] In that affidavit, at paragraphs 50 to 55, Mr Siemer sets out extracts from his publications, which he says were materially misrepresented to Cooper J. The same extracts were referred to (at paragraph 8) in Mr Siemer's notice of appeal against the 2008 judgment, and in his affidavit in support of the appeal at paragraphs 22 to 27. This was in the context of Mr Siemer's contention that Cooper J had "fabricated evidence" against him.

[85] This contention was addressed by the Court of Appeal in its judgment on Mr Siemer's appeal as to quantum, given on 30 March 2011, as follows:[27]

> 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 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.
>
> 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 has "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.

[86] Mr Siemer raised the issue of misrepresentation of his publications in his application for leave to appeal to the Supreme Court, dated 18 April 2011, at paragraphs 18 to 23, in which he set out [70] of the judgment of the Court of Appeal just quoted.

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[27] *Siemer v Stiassny* [2011] NZCA 106 at [69] and [70].

[87] The Supreme Court addressed this issue in its judgment given on 3 June 2011, as follows:[28]

> In the part of his judgment where he was reviewing the case for Mr Stiassny, Cooper J observed:
>
> > [48] [Mr Stiassny] complained also that some of the language used by Mr Siemer had apparently been calculated to be offensive to him and caused distress. Examples that he gave included ridicule of his name. Mr Siemer had distributed stickers saying "there is an 'ass' in our website www.stiassny.org". Also there had been references to his Jewish religion and to the persecution of the Jews. Thus, in his letter to the New Zealand Institute of Chartered Accountants on 14 February 2005 Mr Siemer had written:
> >
> > > News Flash! Michael Stiassny tells Professional Conduct Committee that sky is yellow ... again, the sky is yellow.
> >
> > [49] Further, on www.stiassny.org, on the "interviews page" Mr Siemer had referred to him as a man with "exceptional sway within the small Jewish community" and had commented that "*when the judiciary determines that a ruthless and powerful man's reputation is so priceless ... the Gestapo cannot be far behind ... people like Adolph (sic) Hitler ...* .
> >
> > [50] On a page headed "the Smartest Guy in the Room", Mr Siemer had stated:
> >
> > > Stiassny will likely have taken his family and ill-gotten gains to exile in Israel or Switzerland.
> >
> > [51] On the welcome page, Mr Siemer had referred to Mr Stiassny in the phrase
> >
> > > ... what a good Jew he is (no joke).
>
> Toward the end of his judgment, Cooper J, in what must have been a reference back [to] the paragraphs just set out, said that "the defamatory comments have been accompanied in some cases by clear instances of vile racist abuse".
>
> As we understand Mr Siemer's position, the words referred to by Cooper J at [49] which we have italicised appeared in a different "article" (if that is the right word) from the reference to Mr Stiassny's "exceptional sway within the small Jewish community". He claims that his references to Mr Stiassny being Jewish are innocuous and that there was thus no basis for the Judge to find that he had engaged in "vile racist abuse".
>
> (references omitted, emphasis as in Supreme Court judgment.)

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[28] *Siemer v Stiassny* [2011] NZSC 63 at [4] and [5].

[88] After setting out [69] and [70] of the judgment of the Court of Appeal, the Supreme Court went on to say:[29]

> It is not clear to us what Cooper J intended to convey in [49] by his references to "the Gestapo" and "people like Adolph [sic] Hitler. In the context of the "interview" provided to us by Mr Siemer, these expressions were used by way of criticism of the court's willingness to grant injunctive relief to protect the reputation of someone who was "powerful, ruthlessly aggressive and dodgy in his public dealings", as Mr Siemer characterised Mr Stiassny. They thus do not have any apparent anti-Semitic connotation. This point was recognised by the Court of Appeal. The Court was nonetheless of the view that it was open to the Judge to conclude on the basis of the material as a whole that Mr Siemer was "poking racial gibes" at Mr Stiassny. In light of this, and in the more general context of the way the Court described Mr Siemer's behaviour in the last two sentences of [70], we do not see anything of substantial moment in this proposed appeal point.

[89] Mr Siemer's allegation of fabricated or manufactured evidence was also raised by Mr Siemer in the context of his applications for an order setting aside or rescinding the permanent injunction order made in the 2008 judgment. In his application dated 7 March 2011, Mr Siemer referred to the same publications as are set out in his affidavit of 28 February 2012, filed in support of the 2012 proceeding.

[90] In its judgment given on 16 September 2011,[30] striking out Mr Siemer's appeal against the judgment of Cooper J striking out the application to rescind the injunction, the Court of Appeal held that Mr Siemer's application was "essentially based on a challenge to the merits of the 23 December 2008 judgment".[31] In dismissing Mr Siemer's application for leave to appeal to the Supreme Court, the Supreme Court held that the applications were "plainly an attempt to relitigate a matter already conclusively determined against Mr Siemer".[32]

[91] I am satisfied that Mr Siemer's allegation that the 2008 judgment was obtained by fraud, whether by evidence fabricated or manufactured by the Judge, or by the way in which extracts from his publications were put to Cooper J by the defendants, has been addressed and determined in judgments of the Court of Appeal and the Supreme Court. I reject Mr Deliu's submission that this Court cannot find that earlier judgments of the Court of Appeal and the Supreme Court have rejected

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29 At [7].
30 *Siemer v Stiassny* [2011] NZCA 466.
31 At [5].
32 *Siemer v Stiassny* [2011] NZSC 119 at [1].

Mr Siemer's allegations that the judgment against him was obtained by fraud, on the grounds that those Courts have done so without any evidence or cross-examination, and that they were not decisions after trial.

[92] Plainly, the proceeding brought by Korda Mentha and Mr Stiassny was heard and determined. Evidence was given before Cooper J. Mr Siemer has, on many occasions, contended that the evidence was manufactured, or fabricated, or led in a misleading manner. That does not alter the fact that there was a hearing, at which evidence was given, and that Mr Siemer's allegations as to fabrication, manufacture, or misleading representations, have been rejected by the Court of Appeal and the Supreme Court.

The debarring order

[93] That there was no cross-examination of the evidence adduced before Cooper J was as a result of the debarring order, and that has also been addressed and determined both in the Court of Appeal and the Supreme Court, both of which have recorded that there was no appeal against that order.[33]

[94] In its judgment given on 22 December 2009, the Court of Appeal said:[34]

> Potter J found [Mr Siemer] in contempt of court and granted leave to the respondents to issue a writ of arrest to bring him before the Court. ... The Judge also made an order debarring [Mr Siemer] from defending the proceeding until further order of the Court. She did so on the basis that [Mr Siemer] had continued deliberately breaching the injunction and was refusing to pay the numerous costs awards against him, despite having the means to do so. [Mr Siemer] did not appeal against this judgment.
>
> ...
>
> At the hearing [Mr Stiassny and Korda Mentha] sought, in addition to a writ of arrest and an order for costs, an order that [Mr Siemer] (and Paragon) "be debarred from defending the substantive proceedings". Potter J observed at [22] Mr Miles' concession that an order debarring [Mr Siemer] was more appropriate than an order striking out his defence, because it was the "'more flexible' alternative".

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33 See *Siemer v Stiassny* [2009] NZCA 624 at [11] and [55] – [63]; and *Siemer v Stiassny* [2010] NZSC 57 AT [3].

34 *Siemer v Stiassny* [2009] NZCA 624 at [11] and [55] – [63].

After setting out the evidence, the Judge found [Mr Siemer] in contempt of court. She granted leave to [Korda Mentha and Mr Stiassny] to issue a writ of arrest to bring him before the High Court so that the consequences of his contempt could be determined: at [58]. The Judge then considered the application for an order debarring [Mr Siemer] from defending the proceeding. [Korda Mentha and Mr Stiassny] relied on [Mr Siemer's] breaches of the injunction as well as his failure to pay numerous costs awards against him. The Judge then concluded in the following terms:

> [68] The plaintiffs do not seek an order that the defence be struck out. They seek that the appellants be debarred from defending the proceeding until outstanding costs are paid. The circumstances of this case are undoubtedly extreme. Having already been found in contempt of Court, the appellant continues to deliberately breach the injunction, and now refuses to pay the costs awarded against him despite having effectively admitted that he is financially able to do so. It is appropriate that I make such an order in the exercise of the Court's discretion.

Although to some extent this part of the Judge's discussion centred on [Mr Siemer's] obligation to pay the costs awards against him and his failure to do so, the Judge had already recorded her finding that [Mr Siemer] was in contempt of court due to his breaches of the injunction. The Judge's "summary of orders" at [72] simply recorded that the appellant "is debarred from defending this proceeding until further order of the Court".

[Mr Siemer] did not appeal against the order. He suggested to us that he could not do so because he was in prison after it was made and the appeal period lapsed. Whether that is so or not, there is nothing to indicate any attempt to seek an extension of time for appealing despite a number of references to that possibility by this Court.

After the earlier strike-out application, this Court issued a minute dated 27 February 2008. In that minute the Court dealt with a number of procedural points relating to the upcoming appeal. It concluded, however, with the following observations:

> [12] Recognising, as we do, that this Court, in the judgment of 14 December 2007, refused to strike out the present appeal, there can be little or no point in determining the appeal if the debarring order is to remain in place. The point becomes apparent when one considers what would happen after we allowed or dismissed the appeal against the directions of 19 April. Unless the debarring order were set aside, the appellant could play no part in the trial. Whatever success he had gained in placing additional material in this Court pursuant to the present Minute, and even if he succeeded in whole or in part in challenging Rodney Hansen J's judgment striking out various parts of the second amended statement of defence, he would still have to sit mute and play no part in the trial.
>
> [13] The appellant may apply to the High Court to set aside the debarring order (something which presumably at the least would require him to meet the cost orders against him) or he could apply to this Court for leave to appeal out of time against the debarring order. If he takes the second course, that application and (should leave be

> granted) the appeal could be addressed at the same hearing as the appeal from the decision of Rodney Hansen J.
>
> [Mr Siemer] did not take up either of the suggestions made at [13] of the minute. Instead, he responded by way of a memorandum dated 3 March 2008:
>
> > [12] By the same token, there is no need to separately appeal the 'debarring order' of Potter J (as suggested in the Minute) when Certiorari will force the Court into a review which the appellant respectively submits will expose the entire case of the respondents as a fraudulent abuse of process, as well as a contravention of the appellant's guaranteed legal rights.
>
> On 24 July 2008, this Court issued judgment in relation to the appellant's appeal against Rodney Hansen J's interlocutory orders ... The Court dismissed the appeal on its merits. It concluded with the following observations:
>
> > [62] We note that the advancement of the merits of this dispute have been distinctly delayed by the difficulties which have been created by and associated with this appeal. Amongst other things, a February 2008 fixture was lost. We would urge that there be an early fixture, on the merits. In that respect, we note that the debarment order of Potter J made on 9 July 2007 is still on foot.
>
> Finally, in its judgment in the 2009 appeal, this Court again referred to the debarring order and the fact there had been no appeal against it: at [17].
>
> We are satisfied that [Mr Siemer] has chosen not to appeal against the debarring order or to seek to have it set aside. He has had the opportunity to do either. He had proper notice of the hearing before Cooper J. He chose not to attend. He did not try to have the debarring order set aside so he could participate in that hearing. He has similarly chosen to continue to defy the injunction when compliance with it would have removed the basis for the debarring order.
>
> (citations omitted.)

[95] In its judgment given on 20 May 2010 dismissing Mr Siemer's application for leave to appeal against the Court of Appeal's judgment, the Supreme Court said:[35]

> There was then an allegation of further breach of the injunction and an application for committal. That matter came again before Potter J who made an order debarring Mr Siemer from defending the proceeding. That order was, as the Court of Appeal says in [11] of its present judgment, made on the basis that Mr Siemer had continued deliberately breaching the injunction, as well as on the basis of his refusal to pay the costs award against him. There was no appeal against Potter J's judgment.
>
> (footnotes omitted.)

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35 *Siemer v Stiassny* [2010] NZSC 57 at 3.

[96] Again, the absence of any cross-examination does not alter the fact that there was a trial, evidence was given, and Mr Siemer's allegations have been addressed and determined against him.

Alleged fraud in relation to compromise agreement

[97] Mr Siemer also alleges in the statement of claim that the compromise agreement between himself and Paragon, and Korda Mentha and Mr Stiassny, was obtained by fraud. In the particulars to this allegation Mr Siemer states that the defendants knew that Mr Fardell QC was advising Mr Siemer and Paragon, when he was also acting for the defendants, and had a close relationship with Mr Stiassny.

[98] The compromise agreement was referred to in the 2008 judgment, in which it was noted that Paragon (which included its directors, employees, servants and/or agents) was not to comment on any matter arising in or from the receivership.[36] Cooper J later said in relation to the breach of contract claim:[37]

> It is not possible for me to take into account any defence that Mr Siemer might have raised in relation to this aspect of the claim, since he has been debarred from defending it. In the circumstances, being satisfied that there has been a breach of the contract, it merely remains to consider what damages should flow for the breach. I am satisfied on the evidence that the settlement agreement was entered into by Ferrier Hodgson on the basis that the relationship with Mr Siemer had proved difficult, there had been ongoing arguments about fees and the quality of work performed and the commercial decision was taken to waive the firm's entitlement to any further fees on the basis of the settlement in the terms agreed. The object was plainly to put an end to Mr Siemer's ongoing complaints so as to enable the firm to move on and no longer be troubled by its dealings with Mr Siemer.

[99] In Mr Siemer's notice of appeal against the 2008 judgment the stated grounds of appeal included:

> On the "breach of contract" issue His Honour Justice Cooper minimally failed to account for the extensive and uncontested evidence before the Court showing a certain conflict of interest between Stiassny and [Mr Siemer's] former counsel (Robert Fardell QC) who advised [Mr Siemer] to sign this agreement AND WHOM Stiassny ... claimed to obtain his "legal advice" from before releasing the premises key.

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[36] *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 at [8].
[37] At [86].

...

> On the "breach of contract" claim, His Honour Justice Cooper overlooked the fact that both Fardell and Stiassny failed their legal obligation to inform [Mr Siemer] that the lawyer advising him to sign this agreement was actually in Stiassny's pocket. Specifically, Stiassny was the trustee of Fardell's family trust. Further, Stiassny and Fardell were close personal mates and Stiassny was Fardell's top client. Each of these incontrovertible facts – if cited by the Judge – would have legally undermined, if not prevented, Cooper J's ruling in favour of Stiassny on the contract issue.

[100] Pursuant to the judgment of the Court of Appeal given on 22 December 2009, Mr Siemer's appeal was struck out except to the extent that it related to the quantum of damages.[38] The Supreme Court dismissed Mr Siemer's application for leave to appeal.[39] Accordingly, as this allegation has been raised and determined, and appeal rights exhausted, this allegation cannot now be re-litigated.

[101] In any event, I accept Mr Hunt's submission that Mr Siemer's allegation of fraud by Korda Mentha and Mr Stiassny in relation to the compromise agreement does not give rise to any reasonably arguable cause of action.

Alleged falsely labelling Paragon insolvent

[102] Mr Siemer alleges in the statement of claim that Mr Siemer falsely labelled Paragon as insolvent, in his second report to the High Court as receiver of Paragon, and then lied to the Court about the matter.

[103] I accept Mr Hunt's submission that this allegation has been addressed and determined by the courts on numerous occasions. In particular, it was raised before Ellen France J when Mr Siemer sought an order rescinding the interim injunction ordered on 8 April 2005. In her judgment given on 5 May 2005 her Honour said of the allegation that Mr Stiassny falsely labelled Paragon as insolvent, and other similar allegations made by Mr Siemer:[40]

> [Ferrier Hodgson and Mr Stiassny] are correct that one of the underpinnings of Mr Siemer's grievance is the claim that Mr Stiassny said Paragon was insolvent and that this claim was based on the March 2001 report to the

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38 *Siemer v Stiassny* [2009] NZCA 624.
39 *Siemer v Stiassny* [2010] NZSC 57.
40 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005 at [52] – [55].

> Court. However, Mr Siemer's complaint about this has, as Mr Miles put it, now "morphed" into a claim about what he says Mr Stiassny said at a meeting in February 2001. One can be justifiably sceptical about the lateness at which this has emerged, appearing in Mr Siemer's affidavit of 26 April 2005. However, I am not convinced it is appropriate for me to take the mettle as Mr Miles urged me to do and effectively decide this issue now.
>
> Further, while the issue about solvency is a key one there are other issues which emerge in the voluminous documentation, such as Mr Stiassny's approach to the injection of capital. It is clear there was no deliberate over-charging in respect of the $10,000 but Mr Siemer does appear to raise other issues of claimed over-charging independent of that. Also, there may well be a legitimate issue about the return of the documents Ferrier Hodgson says are receivership documents.
>
> One of the difficulties for the Court in assessing whether the threshold is met is that the language used by Mr Siemer is a mixture of the extreme, the vituperative, and the rather more anodyne. Further, his complaints have become more extreme over time. However, some of the documents on the website in fact put Mr Stiassny's side of events, as the material includes letters from Ferrier Hodgson.
>
> Having assessed the evidence, I conclude this is one of those exceptional cases where the Court can say that there is no reasonable possibility of a defence of truth succeeding in relation to any allegations of criminal or unethical conduct or as to improper personal enrichment. ...

[104] The Court of Appeal dismissed Mr Siemer's appeal against the judgment of Ellen France J.[41]

[105] In the 2008 judgment, Cooper J found that Mr Siemer's statement that Mr Stiassny had falsely labelled Paragon as insolvent, and then lied to the Court, was defamatory.[42]

[106] Mr Siemer set out as one of the grounds of his appeal to the Court of Appeal against the 2008 judgment that Cooper J had "failed to address the extensive evidence before him which proved ... [Mr] Stiassny attempted to label Paragon Oil Systems Limited insolvent". As has already been noted, Mr Siemer's appeal was struck out by the Court of Appeal, except to the extent that it related to the quantum of damages, and the Supreme Court refused leave to appeal.

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41 *Siemer v Ferrier Hodgson* CA87/05, 13 December 2005.

42 See *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 at [38] – [42].

[107] The allegation that Mr Stiassny falsely labelled Paragon insolvent was also raised by Mr Siemer as a ground of his application on 28 July 2010 to set aside the permanent injunction ordered in the 2008 judgment, and in his further application on 7 March 2011 to vary or set aside the permanent injunction. Both applications were struck out by Cooper J as being attempts by Mr Siemer to re-litigate issues already addressed and determined, and Mr Siemer's attempts to appeal against those decisions to the Court of Appeal and the Supreme Court failed.[43]

[108] I am satisfied that this allegation has been raised and determined, and all appeal rights have been exhausted. It cannot now be re-litigated.

Overall assessment

[109] I am satisfied that each of the issues raised in the statement of claim has already been addressed and determined in earlier judgments of this Court, the Court of Appeal, and the Supreme Court. I am also satisfied that the statement of claim is an attempt to re-litigate matters that have already been determined, and is a collateral attack on those determinations. It is, therefore, an abuse of process.

[110] Accordingly, I am satisfied that the statement of claim should be struck out as an abuse of process.

Result

[111] Mr Siemer's statement of claim in the 2012 proceeding is struck out. The defendants are entitled to costs on a 2B basis.

[112] Mr Siemer's recall application in the 2005 proceeding is to be called before the Duty Judge on Wednesday 24 October 2012, for the Court to be advised whether that application is to be pursued.

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Andrews J

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[43] See *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 29 July 2010, and *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 17 March 2011; *Siemer v Stiassny* [2010] NZCA 607; *Siemer v Stiassny* [2011] NZSC 47; *Siemer v Stiassny* [2011] NZCA 466; *Siemer v Stiassny* [2011] NZSC 119.