

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2003-404-005782

BETWEEN

VINCENT ROSS SIEMER AND
JANE CHAPMAN SIEMER
First Plaintiffs

PARAGON SERVICES LIMITED
Second Plaintiff

AND

KATHLEEN MARY FARDELL
Defendant

Hearing: 26 November 2009

Appearances: No Appearance of or for the First First-Named Plaintiff
G J Thwaite for the Second First-Named Plaintiff
No Appearance of or for the Second Plaintiff
M C Harris for the Defendant
Ms N R Hall for the Official Assignee

Judgment: 26 November 2009

(ORAL) JUDGMENT OF DUFFY J

Solicitors: G J Thwaite P O Box 6239 Wellesley Street Auckland 1141 for the Second
First Named Defendant
Gilbert Walker P O Box 1595 Shortland Street Auckland 1140 for the
Defendant
Simpson Grierson Private Bag 92518 Wellesley Street Auckland 1141 for the
Official Assignee

[1] This is application by the defendant to strike out the plaintiffs' statement of claim, as well as for other related orders. The application is based on the following grounds:

- a) The first plaintiff, Vincent Siemer, is an undischarged bankrupt;
- b) The second-named first plaintiff, Jane Siemer, has failed to comply with an order requiring her to pay security for costs; and
- c) The second plaintiff, Paragon Services Limited, is a liquidated company that has been struck off the Companies Register and, consequently, has no legal personality.

[2] The application to strike out is opposed by Mrs Siemer. She has filed a notice of opposition, and is represented today by Mr Thwaite. There are no notices of opposition filed and no appearances today from the other plaintiffs.

[3] The applicant/defendant seeks to have her application determined today and for the Court to make some or all of the orders she seeks. This, however, is not possible. Since one of the plaintiffs has taken proper steps to oppose the application, she is entitled to an opportunity to be heard, so that she can respond to an application that is adverse to her interests. The application will, therefore, have to be adjourned to a fixture date for hearing.

[4] Since the application has to be adjourned to a fixture date, I see no point today in dealing with that part of it that relates to the second plaintiff and to Mr Siemer. The application in relation to those persons can be dealt with when Mrs Siemer's opposition to the application is heard.

[5] Mr Siemer is an undischarged bankrupt. As such, under s 101 of the Insolvency Act 2006, all his property at the time of his adjudication will have vested in the Official Assignee. Part of that property may include the choses in action (as defined in *Jowitts Dictionary of English Law*) against the defendant as formulated in these proceedings. Whether the choses in action do form part of the property now

vested in the Official Assignee is an issue yet to be determined. It is not something that can be determined today in the Duty Judge List. If the choses in action do not form part of the property now vested in the Official Assignee, then Mr Siemer is free to pursue the claims he brings against the defendant, subject to any procedural requirements this Court may impose on him. But if the choses in action do form part of the property now vested in the Official Assignee, Mr Siemer cannot continue to prosecute the claims made in the proceedings without the Official Assignee assigning such rights to Mr Siemer.

[6] Ms Hall, for the Official Assignee, appears and has advised the Court that the Official Assignee will be taking no steps in the proceedings. There is also a memorandum from the Official Assignee on the Court file to that effect. I have been informed that the Official Assignee has also decided not to assign the choses in action to Mr Siemer, and has made this decision known to Mr Siemer. However, the Official Assignee has not as yet provided the Court with evidence to confirm that refusal or when it was made. This should be done. In any event, whether the choses in action constitute part of the property now vested in the Official Assignee is not yet clear to the Court. It follows that whether or not Mr Siemer is able to proceed to prosecute, the claims in the proceedings depends on the alternatives of:

- a) The choses in action in the proceedings not being property under s 101 of the Insolvency Act, in which case the rights to pursue them will remain with Mr Siemer and be unaffected by his bankruptcy; or
- b) The choses in action being property under s 101, in which case they will have vested in the Official Assignee and, unless he will assign them to Mr Siemer, only the Official Assignee can now prosecute the claims against the defendant.

[7] Given the indication from Ms Hall that the Official Assignee has informed Mr Siemer there will be no assignment of the choses in action, the Court also needs to know when any refusal to assign the proceedings to Mr Siemer may have occurred. Since such refusal is the exercise of a statutory power of decision, Mr Siemer would be entitled to challenge the decision by judicial review. However,

if he has known of the refusal for some time and sat on his rights, that would be relevant to any request he might subsequently make for time to pursue this remedy. Consequently, it is important that the Official Assignee provide the Court with a full account of what has occurred. This should be done by evidence. Accordingly, I direct the Official Assignee to file an affidavit confirming the advice I have been given in Court today: namely, that the Official Assignee has refused to assign the choses in action to Mr Siemer, and the date when written notice of that refusal was given to Mr Siemer.

[8] In terms of the hearing of the application to strike out, the parties have arranged a one day fixture on 23 March 2010. Because of the unusual nature of the arguments being raised by Mr Thwaite, it has been agreed between the parties that submissions for Mrs Siemer would be filed first, and no later than 26 February 2010. The applicant/defendant is to file submissions no later than 16 March 2010, and Mrs Siemer is to file any submissions in reply by no later than 19 March 2010.

[9] The applicant has requested the Court to amend the strike-out application in relation to Mrs Siemer to include an application for costs. As originally filed, no costs were sought. But since Mrs Siemer is to oppose the application, the applicant wants to protect her position regarding costs. I see no reason why the application should not be so amended and, accordingly, the application is granted.

[10] Mrs Siemer seeks to have the proceedings served on the Solicitor-General. She contends that the nature of the issues she will be raising in opposition to the strike-out application make it desirable for the Solicitor-General to have the opportunity to participate in the hearing. There is no opposition to this course of action. I direct that the application to strike out and the notice of opposition is to be served on the Solicitor-General, who, if he considers he has an interest in the matter, is at liberty to apply to intervene. So that the Solicitor-General has an understanding of why the strike-out application has been brought to his attention, a copy of this Judgment should also be served on him. Whether or not the Solicitor-General chooses to intervene in the strike out application is a matter for him to determine.

[11] Finally, I am advised by Mr Thwaite that Mrs Siemer is concerned that her ability to call on the assistance of the United Nations through the International Covenant on Civil and Political Rights is not prejudiced by her participation through resisting the strike-out application. She wishes to protect her right to seek the assistance and protection of the Covenant. Accordingly, out of an abundance of caution, she has requested the Court to record that she preserves her position as to whether the procedure set out in this Judgment of the Court, and in relation to the strike-out application, constitutes an effective remedy under the International Covenant on Civil and Political rights. Her opposition to the strike-out is without prejudice to any rights she may have under the Covenant, and her opposition is not to be taken as an acceptance on her part that the procedures being followed in this Court qualify as effective legal remedies under the Covenant.

[12] Leave is reserved to the parties to come back to me on any matter relating to these directions, should the need arise.

Duffy J