

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

CIV 2009-404-001521

BETWEEN	RAJENDRA PRASAD Appellant
AND	INDIANA PUBLICATIONS (NZ) LIMITED First Respondent
AND	ARIN LAL Second Respondent
AND	INDIAN NEWSLINK Third Respondent
AND	VENKAT RAM Fourth Respondent
AND	MAHESH PARERA Fifth Respondent
AND	CHENCHU NAGULU Sixth Respondent

Hearing: 30 July 2009

Appearances: R Prasad in Person
G M Harrison for the Defendants

Judgment: 3 August 2009 at 4:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 3 August 2009 at 4.00pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
Parshotam & Co, P O Box 27 079, Mt Roskill, Auckland
G M Harrison, P O Box 4338, Auckland

Copy to:
R Prasad, P O Box 14 637, Panmure, Auckland

[1] Mr Prasad appeals against a decision given by Judge G A Andr e Wiltens in the District Court at Manukau on 20 February 2009. The point at issue is confined – namely whether Mr Prasad discontinued the proceedings prior to 20 February 2009. In order to understand what is in issue, some understanding of the dispute which culminated in the hearing before Judge Andr e Wiltens is necessary.

Background

[2] As long ago as May 2003 Mr Prasad commenced proceedings against a Mr Lal in the Manukau District Court. He alleged that Mr Lal had breached copyright in a publication known as “Indian Bizz”. Mr Prasad asserted that he owned the copyright in this publication.

[3] The proceedings were initially filed by Mr Prasad in his own name. Subsequently Mr Prasad sought to amend the proceedings. He swore an affidavit dated 19 July 2003 deposing that the correct plaintiff was an entity known as Sage Group Limited. The Court consented to this amendment, and an amended statement of claim was filed on 17 June 2004 in the name of Sage Group Limited asserting breach of its copyright by Mr Lal and Indiana Publications (NZ) Limited.

[4] The proceedings came before Judge C S Blackie in the District Court at Manukau in June 2005. The Judge issued a reserved judgment on 29 August 2005. Mr Prasad appeared on behalf of Sage Group Limited and it is referred to in the judgment as “his” company. The Judge found that Sage Group Limited held copyright in its directory. He noted:

Section 120 of the Copyright Act provides that any infringement is actionable by the copyright owner. It is not disputed in this case that the plaintiff is the owner of the directories and therefore has the right of action.

Judge Blackie then found that the defendants had not breached the plaintiff’s copyright. He also held that there was no objective similarity between the alleged infringing work and the copyright work or any substantial part of the copyright work. He held that the directory published by the respondents was not derivative of Sage Group Limited’s directory. The Judge concluded that the two directories were

in substance entirely different, and that the type of information contained in their advertisements was different, as was their editorial content, data, and details. The Judge held that there was no breach of the Fair Trading Act, and that there was no passing off by the respondents.

[5] Sage Group Limited appealed. The appeal was heard by Asher J in this Court on 12 April 2006. It was dismissed. His Honour concluded in a judgment issued on 13 April 2006 that there was an ample evidential basis for Judge Blackie's decision, and that there had been no copying at all on the part of the respondents of the appellant's publication. He noted that the two publications looked entirely different, that they had different names, and that they could not be confused. He observed that the lay out was different, as were the contents, the editorial content, and the advertising material. He concluded that the appellant – Sage Group Limited – had failed to establish any error of fact or law on the part of the District Court Judge.

[6] Sage Group Limited subsequently changed its name to World Commerce Limited, and the company was ultimately wound up on 2 November 2006 for failure to pay costs awarded against it in the District Court proceedings. The Official Assignee at Auckland was appointed as the liquidator.

[7] In October 2007 World Commerce Limited filed an application for leave to appeal Asher J's decision. The application was made without the consent of the Official Assignee. At the hearing it seems that Mr Prasad personally was seeking leave to appeal. He claimed that he was the "first copyright owner". The application was dismissed by Asher J in an oral judgment given on 6 November 2007.

[8] In December 2007, Mr Prasad applied to the Court of Appeal in his own name for special leave to appeal the substantive decision of Asher J. That application was dismissed on 19 March 2008. The Court expressly referred to Mr Prasad's affidavit of 19 July 2008 referred to in [3] above.

[9] Mr Prasad then applied to the Supreme Court for leave to appeal against the decision of the Court of Appeal. The Registrar declined to accept the application.

Mr Prasad challenged the Registrar's decision, but the same was confirmed by Blanchard J in a Minute issued on 16 April 2008.

[10] Mr Prasad was not to be deterred. On 17 June 2008 he issued proceedings in his own name against Indiana Publications (NZ) Limited, Mr Lal, and various other defendants who, as I understand it, are or were employees of Indiana Publications (NZ) Limited. In the pleadings, he alleged that he was the sole owner of copyright in the "Indian Bizz" directory, and that he has overall and exclusive rights in the creation and establishment of the copyright works in New Zealand. Otherwise the statement of claim largely mirrors that in the earlier proceedings. It alleged breach of copyright, breach of the Fair Trading Act, and passing off. In addition it asserts breach of the National Library Act 2003.

[11] A statement of defence was filed on behalf of all defendants in July 2008. The statement of defence referred to the judgments given by Judge Blackie, by Asher J, and by the Court of Appeal and to the decision of the Registrar of the Supreme Court and the Minute of Blanchard J in the earlier proceedings. The statement of defence invoked the doctrine of "res judicata", and asserted that Mr Prasad was estopped by reason of the findings of Judge Blackie from continuing with the proceeding. At the same time the defendants filed an application for summary judgment. That application is dated 16 July 2008, and sought that judgment should be entered for the defendants against the plaintiff. A supporting affidavit was filed by Mr Lal which detailed the history of the matter and annexed copies of relevant documents.

[12] Mr Prasad filed a notice of opposition to the application for summary judgment. That notice of opposition is dated 25 August 2008. He also filed various memoranda.

[13] The proceedings were placed on the standard track.

[14] The first call of the summary judgment application took place on 17 September 2008. The application was then allocated another call on 19 November 2008. On that date a fixture was allocated for 19 January 2009. The application for

summary judgment came before Judge Blackie on 19 January 2009. Mr Prasad did not appear, although he had filed a comprehensive memorandum. In that memorandum he asserted that the Manukau District Court had no jurisdiction, and that there could not be a fair trial. He sought a transfer of all proceedings to the High Court. Mr Harrison appeared on behalf of the defendants, and he asked the Court to proceed with the summary judgment application. Judge Blackie declined to do so. In a memorandum dated 23 January 2009 the Judge noted that Mr Prasad had complained to the Judicial Conduct Commissioner about his involvement in the matter. He recused himself from any further involvement in the litigation.

[15] The summary judgment application was rescheduled, and in the event it came before Judge Andr e Wiltens on 20 February 2009.

District Court decision

[16] When the matter was called on 20 February 2009, there was no appearance by Mr Prasad.

[17] The Judge's decision is economical. It was given orally. It comprises only two paragraphs, each three lines long. The Judge entered summary judgment for the defendants. He dismissed Mr Prasad's claim. He also awarded costs to the defendants on an indemnity basis.

Submissions

[18] Mr Prasad appeared on his own behalf before me. His submission was essentially that he discontinued the proceedings on 17 February 2009, that he confirmed this in a memorandum dated 19 February 2009, that the discontinuance was served on the defendants. He submitted that it was therefore not open to Judge Andr e Wiltens to deal with the matter at all on 20 February 2009.

[19] Mr Harrison appearing for the defendants submitted that they were entitled to rely upon Judge Blackie's ruling, which was confirmed on appeal by Asher J, that

there was no breach of copyright. He referred to the affidavit sworn by Mr Prasad on 19 July 2003. He noted that Mr Prasad failed to appear before Judge Andr e Wiltens, but submitted that the papers he filed made it clear that he was aware of the hearing on 20 February 2009. He submitted that the proceedings had not been validly discontinued. He argued that no notice of discontinuance had been filed, because there was no document complying with r 479(2) of the Districts Court Rules. He also submitted that a plaintiff may only discontinue a claim if the defendant's costs are paid, and that that did not occur. He asserted that the proceedings were not removed into the High Court, and that there is no basis at law for a plaintiff, having commenced proceedings in the District Court, to apply for transfer of the proceedings to the High Court pursuant to the District Courts Act 1947. He submitted that only a defendant can make such an application.

Analysis

[20] I have every sympathy for the defendants. The materials which I have summarised detail the length and history of the dispute between the parties. It seems to me that Mr Prasad's latest proceedings in the District Court clearly faced very substantial difficulties given the fate of the early proceedings. Mr Prasad's assertion that he is the owner of the copyright is simply inconsistent with his own affidavit sworn on 19 July 2003.

[21] The defendants followed the procedure detailed in r 152(2) of the District Courts Rules and applied for summary judgment. The rule provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.

[22] The application was not made by way of counterclaim. Moreover the application for summary judgment was not treated as separate proceedings and it was not allocated a separate matter number by the District Court Registry. Had the application been made in the context of a counterclaim, then the counterclaim would have fallen to be treated as an independent action – see r 174(3) of the District Courts Rules – and it would have remained on foot and could have proceeded to trial

notwithstanding any discontinuance – see *McGowan v Middleton* (1883) 11 QBD 464 and *Campbell v New Zealand Timber Company Ltd* (1884) 3 NZLR 326.

[23] As the pleadings stand, the application for summary judgment is simply part of the pleadings in Mr Prasad's proceeding. It must follow that it rises or falls with that proceeding. So the question is, did Mr Prasad discontinue his proceedings?

[24] Mr Prasad wrote to the Court on 17 February 2009. His letter stated as follows:

This matter is now discontinued in this Court and removed into the High Court.

[25] A memorandum was filed with the letter. That memorandum is also dated 17 February 2009. *Inter alia* it noted as follows:

5. Manukau District Court not having commenced my proceedings for now in excess of nine months, the matter is being discontinued in Manukau District Court and removed into the High Court.
6. Copy of statement of claim filed before the High Court is served on this proceedings and Manukau District Court and Crown is first defendant.

[26] Mr Prasad accepted, and Mr Harrison accepted, that these documents were served on the defendants.

[27] Relevantly r 479 of the District Courts Rules provides as follows:

- (1) A plaintiff may, at any time before the giving of judgment or a verdict, discontinue a proceeding by—
 - (a) filing a notice of discontinuance and serving a copy of the notice on every other party to the proceeding; or
 - (b) ...
- (2) A notice of discontinuance under subclause (1)(a) must be in form 40AA.

[28] Mr Prasad's letter and accompanying memorandum do not follow the form for notices of discontinuance set out in form 40AA contained in the first schedule to the District Courts Rules. However r 5 of the District Courts Rules provides that

where there has been a failure to comply with the requirements of the rules, whether in respect of time, place, manner, form or content, or in any other respect, the failure is to be treated as an irregularity, and it is not to nullify the step taken in the proceeding.

[29] In my judgment it is clear enough that Mr Prasad's letter, and his memorandum, did or were intended to discontinue the proceedings. Indeed his letter and memorandum could not have been clearer. His intention was to discontinue his case against the defendants in the District Court. It seems to me that effectively Mr Prasad did discontinue the proceedings and notwithstanding the failure to utilise form 40AA. I refer to *Wire Supplies Limited v Commissioner of Inland Revenue* [2007] 3 NZLR 458 at para 167-170.

[30] Further, I do not accept Mr Harrison's argument that a discontinuance is only effective if a plaintiff who discontinues pays the defendant's costs. He referred to r 480C of the District Courts Rules. That rule provides as follows:

Unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[31] The rule simply raises a presumption as costs – *Davies v Caughey and Grayson* HC AK CIV 2004-404-3056, 15 September 2004, Rodney Hansen J. It details what generally happens consequent upon a notice of discontinuance being filed. In its terms the rule deals with the imposition of costs when a plaintiff has discontinued proceedings. When proceedings are discontinued, they come to an end against the defendant or defendants – see r 480A(1). However the discontinuance does not affect the determination of costs – r 480A(2).

[32] The defendants could have sought an order setting aside the discontinuance – r 480B(1). However they did not do so.

[33] In the circumstances, it seems to me that Mr Prasad did discontinue the proceedings. As a consequence, he brought the defendants' application for summary

judgment to an end because it was an integral part of the proceedings. It had not been brought by way of counterclaim.

[34] It is not apparent from Judge Andr e Wiltens' decision that he gave any consideration to the discontinuance. In my judgment it was not open to the Judge either to dismiss Mr Prasad's claim, or to give judgment in favour of the defendants on the summary judgment application. The proceedings were at an end. It follows that the appeal is allowed, and that Judge Andr e Wiltens' decision is set aside.

[35] There is no point in remitting the matter to the District Court. Mr Prasad has discontinued the District Court proceedings and commenced separate proceedings – making the same allegations – against the defendants in this Court. Those proceedings are set down for hearing later this year. Mr Prasad remains liable to pay the defendants' costs in relation to the proceedings which have been discontinued under rr 480C and 480A(2). I have the power to make a decision as to those costs – s 76, District Courts Act 1947 – but I do not have sufficient detail to enable me to do so.

[36] It is manifestly clear to me that the defendants should be awarded costs consequent on the discontinuance. I direct as follows:

- a) the defendants are to file and serve a memorandum detailing the costs they seek consequent upon the discontinuance of the proceedings in the District Court within 10 working days of the date of this judgment;
- b) Mr Prasad is to file and serve a response to the defendants' memorandum within a further 10 working days; and
- c) the defendants are to have a right of reply to Mr Prasad's response within a period of a further 5 working days.

I will then deal with the costs application on the papers unless I require the assistance of the parties.

Costs of this appeal

[37] My preliminary view is that the costs of this appeal should be where they fall. Mr Prasad sought costs of some \$8,500 in the event that he was successful. This included legal costs. Mr Prasad has appeared on his own behalf. He is not entitled to legal costs. Moreover it is hard to escape the conclusion that Mr Prasad's proceedings in the District Court were misconceived from the outset. If, notwithstanding this indication, Mr Prasad wishes to persist with a costs application, then he should file and serve a memorandum in that regard within the same 10 working day period, the defendants should file and serve their response within 10 working days thereafter, and Mr Prasad may reply within a further 5 working days. Again I will deal with any application made on the papers unless I require the assistance of the parties.

Wylie J