IN THE SUPREME COURT OF NEW ZEALAND

SC 116/2010
[2011] NZSC 32

BETWEEN	VINCENT ROSS SIEMER Applicant
AND	THE SOLICITOR-GENERAL Respondent

Court: Elias CJ, Blanchard and McGrath JJ

Counsel: T Ellis for Applicant
F Sinclair for Respondent

Judgment: 1 April 2011

JUDGMENT OF THE COURT

The application for recall of the Court's dismissal of the applicant's leave application is dismissed.

REASONS

[1] In its decision denying Mr Siemer leave to appeal[1] this Court said:

> [1] The proposed appeal is against an award of indemnity costs in favour of the Solicitor-General. Mr Siemer published on two websites extracts from a pre-trial ruling in a criminal matter in breach of a suppression order, as the High Court found. That finding has not been the subject of any appeal.
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> [2] Because the material remained on the websites the Solicitor-General brought contempt proceedings and sought costs. After several weeks Mr Siemer removed several passages from the websites and, as a result, the Solicitor-General concluded that there was no longer any current breach. Mr Siemer also signed an undertaking not to breach the suppression order in the future.
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> [3] In those circumstances the Solicitor-General obtained leave to discontinue but indicated he wished to apply for costs. The High Court

[1] *Siemer v Solicitor-General* [2011] NZSC 4.

> made an order for indemnity costs which the Court of Appeal has now upheld, relying on r 14.6(4)(a), (b) and (f) of the High Court Rules.
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> [4] The proposed appeal is unarguable. Mr Siemer was held to be in breach of the High Court's order for suppression and seems to have acted with deliberation in publishing the material. The costs order was permissible in terms of the High Court Rules. Although Mr Siemer has not been held to be in contempt on this occasion, he has been held to be in breach of a court order and, if he had not removed the particular portions of the websites, he would surely have been found to be in contempt. Mr Siemer elected to sign an undertaking which implicitly admitted the weakness of his position. The Solicitor-General then took the sensible course of discontinuing the contempt application as his objective had been achieved but signalled at the time that costs would still be pursued.

This Court considered that the award of indemnity costs was well open to the High Court.

[2] In an application now made through counsel, Mr Siemer applies for re-call of that judgment, asserting that costs could not be awarded against him because the contempt proceeding was a criminal proceeding and that the Costs in Criminal Cases Act 1967 did not permit any award in circumstances where the charge was withdrawn.

[3] That submission misconceives what this Court said in an earlier decision involving Mr Siemer, relating to a different matter also involving breach of a Court order.[2] This Court did not classify contempt proceedings as either criminal or civil but saw them as a unique summary process with protective features which the Court identified. Mr Siemer had to be treated as having been "charged with an offence" in terms of s 24 of the New Zealand Bill of Rights Act 1990 because of the penal consequences if he were found to have committed a contempt.

[4] But it certainly does not follow that costs are then to be determined under the Costs in Criminal Cases Act rather than in the manner appropriate for a process governed by the High Court Rules. There is no applicable Bill of Rights Act guarantee which requires that "charged with an offence" in the definition of "defendant" in the Costs and Criminal Cases Act has to be read as extending that statute beyond orthodox criminal proceedings. Furthermore, any such extension

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2 *Siemer v Solicitor-General* [2010] 3 NZLR 767.

might be very disadvantageous to a defendant to a contempt proceeding who was successful, because it would likely limit the costs that could otherwise be properly awarded against the Solicitor-General or other applicant in that event.

[5] The suggestion that this Court has failed to be cognisant of the presumption of innocence in its leave judgment is likewise bereft of any substance. When fixing costs after a proceeding has come to an end because of a discontinuance a Court is entitled in coming to its award to consider the merits of the parties but in making its award it is not determining the proceeding. For this reason also the allegation of apparent bias is untenable.

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