IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-404-4750
[2014] NZHC 1179

BETWEEN	VINCENT ROSS SIEMER Plaintiff
AND	REGISTRAR, SUPREME COURT First Defendant
	MINISTRY OF JUSTICE Second Defendant

Hearing: 7 April 2014

Appearances: The plaintiff in person (by audio link)
B Keith for defendants

Judgment: 29 May 2014

JUDGMENT OF CLIFFORD J

Introduction

[1] The plaintiff, Mr Siemer, has commenced these proceedings to judicially review a decision of the Registrar of the Supreme Court declining him access to Court documents. The first and second defendants have applied on notice to strike out those proceedings. They do so on the basis that this Court has no jurisdiction to consider those proceedings.

Factual background

[2] In considering this strike-out application, I accept as true the factual claims made by Mr Siemer in his application for judicial review.

[3] On 2 October 2013 Mr Siemer emailed the Registrar. In that email he said:

> Hi Gordon,
>
> I am launching newzealandsupremecourt.co.nz, which is merely a website with links to the Supreme Court Judgments, transcripts and submissions. My question is how can I obtain copies of the legal submissions, including the applications for leave?

[4] The Registrar (Mr Gordon Thatcher) replied: "I will take advice on this and get back to you".

[5] Mr Siemer emailed again on 25 October 2013 asking for an update. The Registrar replied by letter dated 30 October 2013 in the following terms:

> Dear Mr Siemer,
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> I have now given full consideration to your email of 2 October 2013.
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> The courts judgments and the transcriptions of its hearings are in the public domain, so you are able to link to them from the Courtsofnz website.
>
> You also seek copies of applications for leave to appeal and any submissions filed.
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> There are no regulations which permit a search of this courts files. This is unlike the other Higher Courts which have a specific enabling regulation – see Court of Appeal (Access to Court Documents) Rules 2009, by way of example.
>
> Because of this I am unable to make available copies of applications for leave to appeal and the submissions lodged.
>
> Yours faithfully
>
> (Signed)
>
> Gordon Thatcher
> REGISTRAR

[6] That same day Mr Siemer made a request of the Registrar to access submissions filed in the proceedings *Harrison v Auckland District Health Board*.[1] The Registrar declined to provide that access to Mr Siemer, referring to his letter of that day.

Mr Siemer's judicial review application

[7] Mr Siemer challenges the Registrar's decision to decline him access to Court documents as requested on the following grounds:

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1 *Harrison v Auckland District Health Board* [2013] NZSC 98.

(a) The decision was based on an error in law. There was no lawful basis for a "blanket" prohibition against access to public court documents of the type effected by the Registrar's letter. Reliance upon there being an absence of regulations which permit a search of the Supreme Court's files was an error in law.

(b) The decision failed to take into account relevant considerations, namely the function of the Supreme Court as a repository of publicly filed documents at the highest level of New Zealand's judicial system and the need for it to provide public access to those documents through the application of open and transparent principles.

(c) The decision was based upon a procedural impropriety, namely the Registrar's reliance on the absence of search regulations applying to the Supreme Court.

(d) The decision was contrary to the intent of Parliament that there should be public access to Court records, as that intent was evidenced by the regulations applying to other Courts.

[8] By way of relief, Mr Siemer seeks:

(a) an order of this Court quashing the Registrar's decision;

(b) a Court direction advising the Government that New Zealand law as interpreted by the Registrar is defective and requires correction; and

(c) a judgment of this Court addressing whether the Registrar is lawfully capable of reconsidering Mr Siemer's application and, if not, making a determination regarding Mr Siemer's access to those documents.

Strike-out: the principles

[9] Rule 15.1(1)(a) of the High Court Rules provides that the Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading.

[10] The principles are well-established. As summarised by the Court of Appeal in *Attorney-General v Prince,* and endorsed by the Supreme Court in *Couch v Attorney-General*, they are:[2]

(i) Pleaded facts, whether or not admitted, are assumed to be true.

(ii) The cause of action must be clearly untenable.

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

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

(v) The Court should be particularly slow to strike out a claim in any developing area of the law.

[11] The same criteria apply where, as here, there is an application to strike out a judicial review proceeding.[3]

The defendants' application

[12] As summarised by Mr Keith in his written submissions, the defendants' application involved three short points:

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2 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA); *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

3 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).

(a) Following *Mafart v Television New Zealand Ltd*,[4] the control of Court records was a matter of the inherent power of each Court to control its processes and practices.

(b) As in *Mafart*, the exercise of that control by registrars was undertaken on behalf of the Court and under the supervision of the judges of that Court. Actions of the registrars of higher courts may only be challenged by way of review by one or more judges of the Court or, where – though not in this case – there is a relevant right of appeal, on appeal.

(c) It is in any case axiomatic that judicial review, whether at common law, pursuant to the Judicature Act 1972 or – as pleaded by Mr Siemer – s 27(2) of the New Zealand Bill of Rights Act 1990, does not lie against the actions of the higher courts.

[13] It followed, Mr Keith submitted, that Mr Siemer's proceedings did not disclose, and could not by amendment of pleadings disclose, any arguable cause of action and so should be dismissed under r 15.1(1)(a) of the High Court Rules.

Mr Siemer's response

[14] Mr Siemer's response was based on four key propositions:

(a) The Registrar, in sending the letter, was acting in an administrative capacity, unrelated to any proceeding before the Supreme Court. As such, his actions were inherently reviewable.

(b) *Mafart*, as is disclosed on the face of the judgment,[5] addressed the single question of whether the Court of Appeal had jurisdiction to hear an appeal from a High Court determination of an application under the Criminal Proceedings (Search of Court Records) Rules 1974. As the defendants here accept that the Registrar's decision is not appealable,

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4 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18.
5 *Mafart v Television New Zealand Ltd*, above n 4, at [1].

that distinguished Mr Siemer's application for judicial review from the matters being considered in *Mafart*.

(c) The alternative remedy of review by a Supreme Court judge was not available under either of rr 5 or 7 of the Supreme Court Rules 2004. Those rules concerned case management directions. The Registrar's decision did not fall into that category, but was of a general, administrative nature.

(d) Section 27(2) of the New Zealand Bill of Rights Act 1990 guaranteed a right of judicial review in the circumstances. Mr Siemer's rights have been affected by a determination of a public authority, namely the Registrar, and accordingly he had the right to apply, in accordance with law, for judicial review of that determination.

[15] More generally Mr Siemer argued the law here was confused. There was clearly tension, in Mr Siemer's submission, between the approach taken by the Registrar and more general moves, including relevant Court record search regulations, to clarify and make more transparent, public access to Court records. This was a further reason to decline to strike out applications. In support of that proposition, Mr Siemer pointed to the decision of the Court of Appeal in *Royal Australian College of Surgeons v Phipps*,[6] emphasising the willingness of the Court to review exercises of power which in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be categorised. That liberal approach to the availability of judicial review proceedings was also argued as a ground against this Court striking out Mr Siemer's proceedings.

Analysis

[16] The defendants base their application to strike out squarely on the Supreme Court's decision in *Mafart*.

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6 *Royal Australian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).

[17] Television New Zealand Ltd had, in 2005, been successful in an application made to the High Court under the Criminal Proceedings (Search of Court Records) Rules 1974 for authority to copy video tapes recording guilty pleas by Alain Mafart and Dominique Prieur to charges of manslaughter arising out of the 1985 sinking of the "*Rainbow Warrior*".[7] The High Court, after a defended hearing, authorised the searching and copying of the video tapes by TVNZ. Mafart and Prieur appealed to the Court of Appeal. The Court of Appeal directed argument on the preliminary question of whether it had jurisdiction to entertain an appeal from a decision to grant access to Court records in criminal proceedings. Finding that the order made in the High Court could not be considered an order made in civil proceedings, the Court of Appeal held it had no jurisdiction to hear Mafart and Prieur's appeal against the High Court decision, and accordingly dismissed that appeal.[8] Mafart and Prieur were granted leave to appeal to the Supreme Court.[9]

[18] Tipping J summarised the essential question for the Supreme Court in the following terms:[10]

> The essential question is therefore whether an application made under the Criminal Proceedings (Search of Court Records) Rules 1974 is criminal or civil in character. If it is civil, an appeal lies under s 66 [of the Judicature Act]. If it is criminal, s 66 does not apply and no other statutory right of appeal can be invoked. There is no right of appeal from the High Court to the Court of Appeal except pursuant to some statutory provision giving that right.

[19] That question was, the Supreme Court found, to be determined by reference to the substance of the matter under consideration, and not by reference to the fact that what was sought was access to records of a criminal proceeding.

[20] In finding that Television New Zealand's application, as granted by Simon France J, was a decision in a civil proceeding, and therefore appealable in terms of s 66 of the Judicature Act, the Chief Justice, writing for herself and Blanchard and McGrath JJ, reviewed the nature, and the substance and procedure of, the rules

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7 *Television New Zealand Ltd v Mafart* (2005) 21 CRNZ 855 (HC).
8 *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 534 (CA).
9 *Mafart v Television New Zealand Ltd* [2005] NZSC 65.
10 *Mafart v Television New Zealand Ltd*, above n 4, at [42].

providing access to court records. The following passages are central to the defendants' application:[11]

> [18] A Court of record is under an obligation to maintain the record of its proceedings. The fact that the High Court is a Court of record, as s 3(1) of the Judicature Act recognises, means that the maintenance of the record is a significant ministerial obligation of the Court. The record is conclusive as to the matters formally entered and is notice to the world of them. While the maintenance of the record is as a matter of practice carried out by the Registrars of the Court, they are acting for the Court in this ministerial work and under the supervision of the Judges who comprise the Court.
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> [19] The records to be maintained may in part be prescribed by statute or rules. So, for example, s 353(1) of the Crimes Act requires the Registrar of the High Court in "the proceedings on a trial for a crime" to "cause to be preserved all indictments and all depositions transmitted to him" and to maintain the Crown Book, containing a record of the course of the trial, which is "the property of the Court and shall be deemed a record thereof". But to a substantial extent the content of the record is not prescribed by enactments and is a matter of the practice of the Court. There is, for example, no prescription in legislation or in rules of the record required to be maintained for civil proceedings. And the Crimes Act does not directly require maintenance of the register known as the "*Return of Prisoners Tried and Sentenced*", which is the formal record of a sentence, although the existence of the register is assumed in the Criminal Proceedings (Search of Court Records) Rules 1974.
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> [20] Once created, the records remain under the control of the Court by reason of its inherent power to control its processes and practices, until disposed of either according to the practice of the Court or under legislation. Where rules of Court provide for access to Court records, the inherent supervisory power is regulated by the rules. Following the enactment of the Public Records Act 2005, the records of Courts are ultimately transferred to the National Archives and may be disposed of under the Act.

[21] The Chief Justice went on to note the distinction between the formal record of a court (entries in the books and registers and documents maintained by a court which are formal steps in proceedings) and other material, received by a court during the course of proceedings which "constitute an archive generated by the proceeding, but which are not the formal record of the court".[12]

[22] In that context, the Chief Justice referred to the significance of formal civil and criminal search rules in the following terms:

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[11] *Mafart v Television New Zealand Ltd*, above n 4, at [18]-[20] (footnotes omitted).
[12] At [21].

> [24] Before the adoption of the Civil and Criminal Search Rules, in 1973 and 1974 respectively, no rules made under the Judicature Act or the Crimes Act regulated the inherent judicial control of access to Court records. Eichelbaum CJ in *R v Philpott*, in a passage approved by the Court of Appeal in *R v Mahanga*, expressed the view that the principal purpose of the rules was:[13]
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> > to confirm and enhance the Courts' supervisory powers over such material, and to rationalise the basis for dealing with the not infrequent requests for access to it.

[23] In their separate judgments, focussing particularly on the civil/criminal distinction, both Tipping J and Eichelbaum J referred to the general background to the appeal which had been set out in the Chief Justice's reasons.

[24] In light of that authority, and in terms more generally of the relationship between inferior and superior courts, the defendants' application for strike-out must succeed.

[25] The Chief Justice's discussion of the nature of the role of the Registrar was particularly directed to the obligation of the High Court, as a Court of record, to maintain the record of its proceedings. At the same time, and as is clear from the final paragraph of the extract from her reasons set out at [20] above, once created those records remain under the control of the Court by reason of its inherent power to control its processes and practices, as confirmed by Eichelbaum CJ in *R v Philpott.*

[26] Registrars act for the Court in maintaining the record of the Court's proceedings, and they do so as well when they respond to requests for access to that record.

[27] As a matter of principle, therefore, the exercise by the Registrar of such a power, being under the supervision of the Judges who comprise the Court, is to be reviewed by those Judges. In my view, that form of review is best understood as being part of the Supreme Court's inherent supervisory powers relating to matters, such as Mr Siemer's application for access to Court records, properly before it. The Registrar's decision to decline Mr Siemer's request will be reviewable by a Supreme

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[13] *R v Philpott* HC Wellington T74/90, 14 February 1991 at 3; *R v Mahanga* [2001] 1 NZLR 641 (CA) at 651.

Court Judge in like manner as, for example, the way in which decisions by the Registrar refusing to accept applications for leave to appeal are reviewed.[14]

[28] Furthermore, as Mr Keith submitted, it is clear that judicial review is not available to challenge the actions of the Higher Courts.

[29] That rr 5 and 7 of the Supreme Court Rules 2004 may not, as Mr Siemer submitted and as I think could be the case, be directly applicable here is, therefore, of no particular significance. Rule 5 provides for the Court to make directions in relation to any matter "that arises in a case". Rule 5 may not, therefore, apply here. Rule 7 provides for powers conferred on the Court by those rules to give directions or to decide a matter, other than the determination of an application for leave to appeal or an appeal, to be exercised by a permanent Judge of the Court. The rules do not themselves, however, address issues of access to Court records directly. Rule 7 also may not, therefore, be applicable. Having said that, cl 7(2) of the schedule to the Supreme Court Fees Regulations 2003 does reflect the fact that both parties and non-parties may apply to the Court for access to the Court's records by way of obtaining copies of documents from those records.

[30] I therefore grant the application by the defendants to strike out these proceedings.

[31] In doing so, I am mindful of the substantive concerns Mr Siemer has with the Registrar's decision in response to his application. It is sufficient to note that the observations of Eichelbaum CJ in *R v Philpott* that the rules "enhance the Court's supervisory powers" raise – for me at least – a real issue as to the reliance by the Registrar on the absence of any formal access rules as a basis for his decision. But that is a substantive matter for consideration in the appropriate venue for the review of that decision, that is by Mr Siemer applying to the Supreme Court to review the Registrar's decision.

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[14] *O'Neill v Accident Compensation Corporation* [2012] NZSC 53, (2012) 21 PRNZ 90 and *Koyama v New Zealand Law Society* [2014] NZSC 30.

[32] The defendants asked for indemnity costs on the basis that they had pointed out to Mr Siemer that judicial review by the High Court was clearly unavailable, and that an application for review by a Supreme Court Judge was Mr Siemer's proper remedy. I do not think an award of indemnity costs is appropriate. If nothing else, the principles emphasise that strike-out applications are to be considered carefully by the courts, with the jurisdiction to be exercised sparingly. Moreover, and as the Supreme Court itself recognised in *Mafart*, issues relating to public access to court files are important:[15]

> Public access to Court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information,[16] open justice,[17] access to official information,[18] protection of privacy interests[19] and the orderly and fair administration of justice. The basis upon which access is permitted can raise important points of principle, the application of which may be deserving of appellate scrutiny, as is indicated by a number of recent Court decisions.[20]

[33] In the circumstances, I consider that costs should lie where they fall.

"Clifford J"

Solicitors:
Crown Law Office, Wellington

Copy to: Mr V R Siemer, Gulf Harbour.

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15 *Mafart v Television New Zealand Ltd*, above n 4, at [7].

16 New Zealand Bill of Rights Act 1990, s 14.

17 As to which, see eg *Broadcasting Corporation of New Zealand Ltd v Attorney-General* [1982] 1 NZLR 120 (CA) at 122-124 per Woodhouse P, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

18 See s 5 Official Information Act 1982 and s 3 Public Records Act 2005.

19 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

20 See, for example *R v Wharewaka* (2005) 21 CRNZ 1008 (HC), *R v Mahanga*, above n 13, *Jackson v Canwest TV Works Ltd* [2005] NZAR 499 (CA).