IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-5611
[2014] NZHC 2886

IN THE MATTER OF	an application under the New Zealand Bill of Rights Act 1990 for declaratory relief
BETWEEN	VINCENT ROSS SIEMER Plaintiff
AND	CLARE O'BRIEN First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing: 5 November 2014

Counsel: V R Siemer in person
D Harris for First and Second Defendants

Judgment: 20 November 2014

JUDGMENT OF WILLIAMS J

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[1] In this matter, Mr Siemer applies for the following orders:

(a) A declaration that the Registrar of the Court of Appeal (Clare O'Brien) acted unlawfully "in rejecting/dismissing the plaintiff's application, exercising judicial powers she did not by law have, abusing her administrative role in the New Zealand government, and consequently breaching the plaintiff's rights under s 61A(1) of the Judicature Act 1908 and s 27(1) of the NZBORA."

(b) A declaration that Ms O'Brien was "in breach of the Court of Appeal (Civil) Rules 2005 by rejecting/dismissing the plaintiff's application."

(c) A declaration that Ms O'Brien's "exercise of judicial powers to prevent court access constituted a fundamental breach of the rule of law".

(d) Such other relief as the Court deems fit.

[2] Before the substantive matter was argued, Mr Siemer raised a preliminary issue in relation to whether the Attorney-General had standing to be heard in this application. I will come back to that below.

Background

[3] Certain decisions of the Judicial Conduct Commissioner (rejecting Mr Siemer's complaints) were challenged by Mr Siemer by way of judicial review. Toogood J dismissed the application in a counter-application by the Commissioner for summary judgment.[1] Mr Siemer then appealed and the appeal became mired in the question of security for costs. The Registrar fixed standard security for costs in accordance with r 35 of the Court of Appeal (Civil) Rules 2005 (the Rules). Mr Siemer applied to review that decision and the application was dismissed by Wild J.[2] Mr Siemer then sought leave to appeal that decision to the Supreme Court but leave was denied.[3]

[4] Mr Siemer then brought fresh proceedings in judicial review against the same decision of the Judicial Conduct Commissioner (CIV-2012-485-2419 and CIV-2012-485-2546 – the earlier review).

[5] In a decision of 2 July 2013, I struck those proceedings out as an abuse of process.[4] That in turn was appealed in CA452/13. And then a further round of dispute over the fixing of security for costs began in respect of that appeal.

[6] On 15 July 2013, the Registrar of the Court of Appeal sent a letter acknowledging the appeal and fixing security at $5,880.

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1 *Siemer v Attorney-General* [2013] NZHC 1481.
2 *Siemer v Judicial Conduct Commissioner* CA442/2012, 5 September 2012.
3 *Siemer v Judicial Conduct Commissioner* [2012] NZSC 92.
4 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1655.

[7] On 23 July 2013, Mr Siemer then applied under s 61A(1) of the Judicature Act seeking a dispensation for security for costs directly from a judge. This application bypassed the Registrarial Review procedure contained in r 35(7) of the Rules. On 12 August 2013, the Registrar refused to accept the application and required an application for review to be made to the Registrar in accordance with the procedure in r 35. This appeal was deemed to be abandoned on 14 October 2013, due to the expiry of the appeal period pursuant to r 43. A notice of abandonment was issued by the Court of Appeal on 21 January 2014.

[8] It is in this context that Mr Siemer seeks declarations that the Registrar had no authority to set security for costs in his appeal.

[9] In the meantime, a full court of this Court (Ronald Young and Brown JJ) in *Attorney-General v Siemer* made orders under s 88B of the Judicature Act declaring Mr Siemer to be a vexatious litigant and requiring leave before he could institute civil proceedings against (relevantly) any Judge of the Supreme Court, the Attorney-General or the Judicial Conduct Commissioner.[5]

[10] That judgment is now appealed by Mr Siemer and there is a Crown cross-appeal.

[11] In the meantime, Mr Siemer accepts that he cannot proceed against the Attorney-General without leave. He does not seek leave. On the contrary, he argues that the Attorney-General's absence from this proceeding now operates to his advantage (as I will outline below).

[12] The order of this Court in *Attorney-General v Siemer* expressly prohibits Mr Siemer from bringing proceedings against judges of certain courts without leave. Officials within those courts are not so protected. On this basis, Mr Siemer argues that he is not prevented from bringing proceedings against the Registrar of the Court of Appeal – Ms O'Brien.

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5 *Attorney-General v Siemer* [2014] NZHC 859 at [204].

[13] Ms O'Brien confirms that she abides the decision of this Court. The absence of the Attorney-General, and the stance of Ms O'Brien in this proceeding mean there is no party contradicting the application for review of Ms O'Brien's decision under r 35. Mr Siemer submits that he is therefore entitled to proceed by way of formal proof.

Arguments – the role of the Attorney-General

[14] As indicated, Mr Siemer challenges the Attorney-General's standing to appear through counsel in this application for review. He argues that his action is not against the Attorney-General (any more). Nor can the Crown be said to be representing Ms O'Brien since she formally abides. He submits that the Attorney-General's appearance through counsel in this case was no more than an attempt to intimidate the Court.

[15] For the Attorney-General, Ms Harris argues that the effect of the s 88B orders of Ronald Young and Brown JJ, mean that the Attorney-General cannot be sued, but they do not mean that he is prohibited from participating in proceedings where appropriate. In short, the order is against Mr Siemer, not against the Attorney-General. Ms Harris further argues that even though Ms O'Brien abides the decision of this Court on the present application, it is nonetheless appropriate for the Attorney-General to appear in his capacity as the State's principal law officer, in a case involving the exercise by the Registrar of a judicial discretion which would otherwise lack a contradictor.

Analysis – the role of the Attorney-General

[16] This is, in my view, an entirely appropriate case for the Attorney-General to appear to argue that the Registrar's exercise of power under r 35 was lawful.

[17] Indeed, it is quite wrong to conceive of the hearing before me as if (like a private law suit), the absence of formal contradictors meant Mr Siemer need only appear in support of his application in order for it to be automatically granted. This is a case in which the exercise of a public (and indeed judicial) power of decision is under challenge. Challenges to the exercise of public law powers involve wider

considerations in which it is very often appropriate for the Attorney-General to appear through counsel to support the legality of the decision and to ensure that all arguments are properly before the Court. This is one such case.

[18] I rule therefore that the Attorney-General is properly represented in this proceeding.

The substantive application – arguments

[19] On the substantive application for declarations, Mr Siemer argues that the broad discretion under s 61A(1) of the Judicature Act includes the power in a Court of Appeal judge to fix or dispense with security for costs. That discretion, he argued, is not impliedly removed by the Registrar's powers under r 35. He submits further that it is inappropriate under r 35 for a Registrar to consider dispensations from security for costs because such decisions required an assessment of the legal merits of the appeal and the Registrar is not legally trained. In this case, Mr Siemer also argues that the Registrar could not be objective in his application because collaterally, he (Mr Siemer) is pursuing a private prosecution against her in relation to an incident at the Court.

[20] In response, Ms Harris submits that the authorities were clear that r 35(6) and (7) contains the process by which security for costs is set. The authorities do not support any suggestion that the ancillary powers of a Court of Appeal judge under s 61A may be invoked in relation to the Registrar's powers covered by r 35.

[21] Further, Ms Harris submits that, it is not open to Mr Siemer to rely on allegations of apparent or actual bias against the Registrar in order to disqualify her, because that had not been pleaded, and it is appropriate in proceedings by Mr Siemer to require his pleadings to be technically correct.

[22] Ms Harris submits further that in any event this proceeding is no more than a derivative of the original proceeding in respect of which Toogood J granted the Judicial Conduct Commissioner summary judgment, and it is appropriate to read the orders of this Court in *Attorney-General v Siemer* as if they prohibited this proceeding against Ms O'Brien as well.

[23] Ms Harris finally argues that the Registrar of the Court of Appeal enjoyed judicial immunity from suit and that declaratory relief is not available against an individual exercising judicial powers.

Analysis – substantive application

[24] Rule 35(6) and (7) provide as follows:

> (6) However, the Registrar may, on application, if satisfied that the circumstances warrant it, make an order—
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> (a) increasing the amount of security:
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> (b) reducing the amount of security:
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> (c) dispensing with security:
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> (d) deferring the date by which security must be paid.
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> (7) An application under subclause (6)—
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> (a) must be made and served within 20 working days after the notice of appeal has been filed in the Registry; and
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> (b) may be made on an informal basis.

[25] Section 61A of the Judicature Act 1908 relevantly provides as follows:

> (1) In any civil appeal or in any civil proceeding before the Court of Appeal, any Judge of that court, sitting in chambers, may make such incidental orders and give such incidental directions as he thinks fit, not being an order or a direction that determines the appeal or disposes of any question or issue that is before the court in the appeal or proceeding.
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> …
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> (3) Any Judge of the Court of Appeal may review a decision of the Registrar made within the civil jurisdiction of the court under a power conferred on the Registrar by any rule of court, and may confirm, modify, or revoke that decision as he thinks fit.

[26] I do not agree with Ms Harris that the orders of the Court in *Attorney-General v Siemer* should be construed as if impliedly covering the Registrar of the Court of Appeal by a derivative means. The orders at [204] of that decision ought to be read literally, and not expanded by interpretative means by a later court. After all

the order takes away a right of recourse to the courts, a fundamental right in our system of law, even for a querulant.

[27] I note that point is different to whether, in other cases, if s 88B does bite, leave should be granted for derivative proceedings. The two categories raise quite different considerations and it is important to keep them separate.

[28] In any event, the cases are clear that the procedure in r 35(6) and (7) is the means by which applications to dispense with security for costs will ordinarily be dealt with. Glazebrook J in her leave judgment in *Siemer v Stiassny* ruled:[6]

> Because the powers relating to security for costs are, under r 35(7), conferred on the Registrar, appellants cannot apply for an order directly to a judge of the Court of Appeal under s 61A(1) of the Judicature Act 1908. However, the Registrar's decision on security for costs (if adverse to an appellant) would be reviewable under s 61A(3) of the Judicature Act by a judge of the Court of Appeal.

[29] I note in a footnote to the above propositions, her Honour accepts:

> I acknowledge that a single judge of the Court may have the power under s 61A(1) of the Judicature Act 1908 to make an order relating to security for costs where no decision has been made by the Registrar. Even if that power exists, however, it does not mean that a judge must exercise it if an application is made. The Court of Appeal is entitled to require appellants to follow the procedures in the Court of Appeal (Civil) Rules and make application to the Registrar under r 35(7).

[30] A further leave ruling in *Siemer v Stiassny*, McGrath, William Young and Glazebrook JJ then confirmed:[7]

> The proper procedure for applying to dispense with or vary security for costs is, as occurred in this case, for Mr Siemer to apply to the Registrar under r 35(7) of the Court of Appeal (Civil) Rules. …
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> Once that occurred, the only avenue for review of that decision is by a single judge under s 61A(3) of the Judicature Act. This means that Harrison J was not able to consider Mr Siemer's application for an order under s 61A(1) of the Judicature Act.

[31] And again in a footnote, the Court recorded:

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6 *Siemer v Stiassny* [2013] NZSC 110 at [10].
7 *Siemer v Stiassny* [2013] NZSC 115 at [8] and [9].

> We acknowledge that there may be jurisdiction for a single judge to vary a security for costs order under s 61A(1) of the Judicature Act 1908 in circumstances where there has been no application to or decision by the Registrar. Even if there is jurisdiction under s 61A(1), however, this does not give an appellant the right to apply for an order under s 61A(1). The Court of Appeal is entitled to require that applications relating to security for costs be made to the Registrar in accordance with r 35(7) of the Court of Appeal (Civil) Rules 2005.

[32] Then finally in *Siemer v Official Assignee*, William Young, Glazebrook and Arnold JJ addressed the position in this way:[8]

> … the applicant wishes to argue that a judge of the Court of Appeal, acting under s 61A of the Judicature Act 1908, may dispense with security for costs and that an appellant who seeks such dispensation is not required to apply, in the first instance, to the Registrar of the Court of Appeal and then to a judge only by review. Given that the Court of Appeal (Civil) Rules 2005 provide specifically for applications to dispense with security to be dealt with by the Registrar but with a right to seek review, a judge of the Court of Appeal is most unlikely to assume or exercise jurisdiction to do so under s 61A. For this reason, the argument of the applicant does not raise an issue of public or general importance and we also see no appearance of a miscarriage of justice.

[33] These authorities suggest that there may be a residual power to apply directly under s 61A(1) – where the Registrar has not fixed security for costs or where for some other reason the matter should be dealt with directly by a judge. But the authorities are clear that the Registrar of the Court of Appeal is entitled to require the r 35 procedure to be followed and for any review to be under s 61A(3).

[34] Proceedings claiming actual bias against the Registrar herself may be an example of proceedings that might best be dealt with as to security for costs, by a judge directly. But even if that is true, I agree with Ms Harris, that while Mr Siemer raised the matter in argument, it was not pleaded. I decline to consider such a serious matter as that without proper pleadings that would have properly warned the Registrar of the nature of that allegation. Such warning would likely have led her to reconsider whether she should continue to abide the Court's decision.

[35] Mr Siemer's pleaded argument is more general. He argues that the Registrar, not being legally trained, is in no position to consider the merits of his case when dealing with an application to dispense with security for costs. Such an argument, if

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8 *Siemer v Official Assignee* [2014] NZSC 42 at [5].

accepted, would mean the Registrar could never deal with an application under r 35(6) in any appeal. Such a result would render the registrarial dispensation procedure redundant, and would be the opposite of the drafter's intention.

[36] It follows that Mr Siemer's application must fail.

[37] In light of my conclusion in this regard, I see no need to address the other arguments raised by the Attorney-General. Nor do I need to address the question of whether, his substantive appeal now abandoned, it is appropriate for this Court to consider an application for declarations in relation to pre-hearing decisions in a non-appeal. The application is dismissed accordingly.

Williams J

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